SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JEFFREY E. EPSTEIN,

Defendant-Appellant.

AFFIRMATION IN RESPONSE TO NON-PARTY MOTION

N.Y. County Ind. No. 30129/10

Cal. Date: December 31, 2018

CYRUS R. VANCE, JR.
District Attorney
New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

Karen Friedman Agnifilo
Assistant District Attorney
Of Counsel

EXHIBIT F

Browning, Jack

From: Martin G. Weinberg <owlmgw@att.net>
Sent: Thursday, January 03, 2019 8:14 AM
To: Browning, Jack; 'Maksim Nemtsev'
Cc: Balin, Robert; owlmgw@att.net
Subject: RE: Motion to Unseal Epstein Appeal Briefs

[EXTERNAL]

Jack, after consideration of your request for the unsealing of the appellate briefs with redactions of certain identities, we take no position on behalf of Mr Epstein. I appreciate your courtesy in providing me with more time to respond given the holidays. Let me know if this email suffices. Thanks, Marty

Martin G. Weinberg, Esq.
20 Park Plaza, Suite 1000
Boston, MA 02116
off - 617 227 3700
fax - 617 338 9538
cell - 617 901 3472

==========
This Electronic Message contains information from the Law Office of Martin G. Weinberg, P.C., and may be privileged. The information is intended for the use of the addressee only. If you are not the addressee, please note that any disclosure, copying, distribution, or use of the contents of this message is prohibited.

From: Browning, Jack [mailto:JackBrowning@dwt.com]
Sent: Thursday, December 27, 2018 10:13 AM
To: Martin G. Weinberg <owlmgw@att.net>; 'Maksim Nemtsev' <menemtsev@gmail.com>
Cc: Balin, Robert <robertbalin@dwt.com>
Subject: RE: Motion to Unseal Epstein Appeal Briefs

Marty,

Please find attached a scan of the signed signature page.

Best regards,

Jack

HOUSE_OVERSIGHT_016479

From: Martin G. Weinberg <owlmgw@att.net>
Sent: Thursday, December 27, 2018 8:55 AM
To: Browning, Jack <JackBrowning@dwt.com>; 'Maksim Nemtsev' <menemtsev@gmail.com>
Cc: Balin, Robert <robertbalin@dwt.com>; owlmgw@att.net
Subject: RE: Motion to Unseal Epstein Appeal Briefs

[EXTERNAL]

Jack, my local counsel in NY (we are filing for pro hac vice) has advised that the Court Clerk may require a signature on the Stipulaion. Out of an abundance of caution, can you sign and return and we will file today. Thanks, Marty

From: Browning, Jack [mailto:JackBrowning@dwt.com]
Sent: Wednesday, December 26, 2018 12:19 PM
To: Maksim Nemtsev <menemtsev@gmail.com>
Cc: Martin G. Weinberg <owlmgw@att.net>; Balin, Robert <robertbalin@dwt.com>
Subject: RE: Motion to Unseal Epstein Appeal Briefs

Maksim,

Please find attached a copy of the stipulation with some minor edits, which you can go ahead and file/serve. If you do ultimately file an opposition, please serve us with copies via email.

Best regards and happy holidays,

Jack

From: Maksim Nemtsev <menemtsev@gmail.com>
Sent: Wednesday, December 26, 2018 10:33 AM
To: Browning, Jack <JackBrowning@dwt.com>
Cc: Martin G. Weinberg <owlmgw@att.net>
Subject: Motion to Unseal Epstein Appeal Briefs

[EXTERNAL]

Hi Jack,

Attached is a draft Stipulation to adjourn the return date to January 7, 2019. Answering papers will be due January 4 and reply papers will be due January 6.

We are also enlisting the assistance of local counsel to sponsor Marty's pro hac vice petition. We will provide you with copies of the motion papers once they are prepared.

Let me know if you have any questions. Happy Holidays.

Thank you,
Max Nemtsev
20 Park Plaza, Suite 1000
Boston, MA 02116
(617) 227-3700
(347) 251-4800 (cell)

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EXHIBIT G

Davis Wright Tremaine LLP

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1251 Avenue of the Americas
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January 4, 2019

VIA HAND DELIVERY

FILED
JAN 4 2019
SUP COURT APP. DIV.
FIRST DEPT.

Clerk of Court
Supreme Court of the State of New York
Appellate Division, First Department
27 Madison Avenue
New York, NY 10010

Re: Motion to Unseal Briefs (with Names of Victims Redacted) in *People v. Epstein*, N.Y. Co. Index No. 30129/10 (Appellate Division No. 6081)

Dear Sir or Madam:

We write on behalf of non-party movant NYP Holdings, Inc., publisher of the New York Post (the "Post"), to withdraw the motion filed by the Post on December 21, 2018 seeking an order to unseal the briefs submitted by the parties in the above-captioned appeal (with the names of victims redacted). Pursuant to NYCRR § 1250.2, we write to inform the Court that the Post hereby withdraws its pending motion without prejudice and expressly reserves the right to refile the motion. *See* NYCRR § 1250.2(a) ("Withdrawal of Motion. A moving party may file a written request to withdraw a motion at any time prior to its determination").

The Post intends to refile its motion for an order unsealing the briefs (with appropriate redactions), but has withdrawn its pending motion in response to an affidavit submitted by the office of the Manhattan District Attorney on December 28, 2018. That affidavit asserts that the Post was required, but failed, to provide notice of the unsealing motion to "prosecutor's offices in Florida" before proceeding with its motion. While the Post firmly believes that it satisfied its obligations by serving the Manhattan District Attorney's office with a copy of its unsealing motion, it wishes to avoid and moot any dispute with the District Attorney's office over whether the notice requirements of the relevant statute were met. Accordingly, the Post will refile its motion to unseal next week and, at that time, will serve its motion papers on the relevant Florida prosecutors, as well as on the parties to the appeal.

Respectfully yours,

Davis Wright Tremaine LLP

Robert D. Balin

cc: Assistant District Attorney Karen Friedman Agnifino (by email)
Martin G. Weinberg, Esq. (by email)

4844-9920-0645v.1 3930033-000135

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - JEFFREY E. EPSTEIN, Defendant-Appellant.	App. Div. No. 6081 On Appeal from New York Supreme Court, New York County, Index No. 30129/10 (Pickholz, J.)

MEMORANDUM OF LAW IN SUPPORT
OF MOTION BY NYP HOLDINGS, INC TO UNSEAL APPELLATE BRIEFS

DAVIS WRIGHT TREMAINE LLP

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John M. Browning
1251 Avenue of the Americas, 21st Floor
New York, New York 10020-1104
Telephone: (212) 603-6410
Counsel for Non-Party Movant NYP Holdings, Inc.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 3

A. Epstein's Conviction for Sex Crimes and Designation as a Level Three Sex Offender 3

B. The Appeal 4

C. Media Interest in New York and Florida Prosecutors' Lenient Handling of Epstein's Case 5

D. The Post's Efforts to Obtain the Appellate Briefing Filed with the First Department 8

ARGUMENT 11

I. THE POST HAS THE RIGHT TO MOVE THIS COURT FOR AN ORDER UNSEALING THE APPELLATE BRIEFING 11

II. GOOD CAUSE EXISTS TO UNSEAL THE APPELLATE BRIEFS 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Brown & Williamson Tobacco Corp. v. FTC,
710 F.2d 1165 (6th Cir. 1983) 14

Daily News, L.P. v. Wiley,
126 A.D.3d 511, 6 N.Y.S.3d 19 (1st Dep't 2015) 11

Danco Labs., Ltd. v. Chem. Works of Gideon Richter, Ltd.,
274 A.D.2d 1, 711 N.Y.S.2d 419 (1st Dep't 2000) 13, 15

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982) 13, 14

In re Application of National Broad. Co.,
635 F.2d 945 (2d Cir. 1980) 13, 15

In re Associated Press v. Bell,
70 N.Y.2d 32, 517 N.Y.S.2d 444 (1987) 13

In re Capital Newspapers Div. of Hearst Corp. v. Moynihan,
125 A.D.2d 34, 512 N.Y.S.2d 266 (3d Dep't 1987), *aff'd on other grounds*,
71 N.Y.2d 263, 525 N.Y.S.2d 24 (1988) 11

In re Herald Co. v. Weisenberg,
59 N.Y.2d 378, 465 N.Y.S.2d 862 (1983) 11

Mancheski v. Gabelli Grp. Capital Partners,
39 A.D.3d 499, 835 N.Y.S.2d 595 (2d Dep't 2007) 11

Maxim, Inc. v. Feifer,
145 A.D.3d 516, 43 N.Y.S.3d 313 (1st Dep't 2016) 11, 16

N.Y. Times Co. v. United States,
403 U.S. 713 (1971) 13

Nixon v. Warner Commc'ns, Inc.,
435 U.S. 589 (1978) 13

People v. Burton,
189 A.D.2d 532, 597 N.Y.S.2d 488 (3d Dep't 1993) 13, 16

People v. Epstein,
89 A.D.3d 570, 933 N.Y.S.2d 239 (1st Dep't 2011) ..... *passim*

HOUSE_OVERSIGHT_016486

Press-Enterprise Co. v. Superior Court,
464 U.S. 501 (1984) 14

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986) 13

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 13, 14

Constitutions

U.S. Const. amend. I 13

N.Y. State Const. art. I, § 8 13

Statutes

N.Y. Civ. Rights Law § 50-b ..... *passim*

N.Y. Civ. Rights Law § 50-b(1) 4

N.Y. Civ. Rights Law § 50-b(2) 1, 4, 11

Other Authorities

22 NYCRR § 1250.1(e)(3) 1, 11, 12

Samuel Goldsmith, Jeffrey Epstein Pleads Guilty to Prostitution Charges, N.Y. POST (June 30, 2008), *available at* https://nypost.com/2008/06/30/jeffrey-epstein-pleads-guilty-to-prostitution-charges/ 6

Jennie Suk Gersen, *Why Didn't the Manhattan DA Prosecute the Trumps or Harvey Weinstein*, NEW YORKER (Oct. 13, 2017) *available at* https://www.newyorker.com/news/news-desk/why-didnt-manhattan-da-cyrus-vance-prosecute-the-trumps-or-harvey-weinstein 13

HOUSE_OVERSIGHT_016487

Non-party movant NYP Holdings, Inc., publisher of the *New York Post* (the "Post"), respectfully submits this memorandum of law in support of its motion, filed pursuant to 22 NYCRR § 1250.1(e)(3) and N.Y. Civil Rights Law § 50-b(2)(b), for an order unsealing the briefs filed by the parties in the above-captioned appeal (the "Appeal") with the names of victims of sex crimes redacted.

PRELIMINARY STATEMENT

The Post seeks to unseal court documents that will shed light on why the Manhattan District Attorney's Office initially sought lenient treatment of billionaire financier and convicted pedophile Jeffrey Epstein. In 2008, Epstein pled guilty to soliciting prostitution from a minor, but there has been suspicion since that time – voiced by members of the judiciary and the press alike – that prosecutors gave Epstein preferential treatment because of his wealth and his political connections to powerful men like Donald Trump, Bill Clinton, and Prince Andrew. The handling of criminal proceedings against Epstein by federal prosecutors in Florida and thereafter by the Manhattan District Attorney's office has come under renewed scrutiny after the *Miami Herald* published a series of investigative articles beginning November 28, 2018, including an article reporting recently that "prosecutors worked to cut him a break" despite strong evidence that he had abused 80 girls and young women.

As part of its own news reporting on the New York proceedings against Epstein, the Post seeks to unseal the briefs filed in this Appeal, in which this Court held that Epstein had to register as a level three sex offender in New York, which is the category reserved for highest-risk offenders. *See People v. Epstein*, 89 A.D.3d 570, 570, 933 N.Y.S.2d 239, 240 (1st Dep't 2011). During the Appeal, Epstein argued that his sex offender status should be downgraded to a lower level while the District Attorney's Office argued that the level-three designation was appropriate.

The District Attorney's position on appeal, however, was in stark contrast to what it argued in proceedings before the lower court, which was that Epstein "should be adjudicated a level one offender" (*i.e.*, lowest risk) in spite of the damning evidence establishing that "defendant committed multiple offenses against a series of underage girls." *Id.* at 570-71, 933 N.Y.S.2d at 240. The public has the right to know why the Manhattan District Attorney's Office switched its legal position on appeal and what justifications it advanced in its brief to explain its initial request for lenient treatment of Epstein. Similarly, the briefing submitted by Epstein, which confronted the District Attorney's arguments on appeal, may shed additional light on why the District Attorney changed course on appeal. Despite the obvious public interest in knowing this information, the briefs were filed wholly under seal pursuant to New York Civil Rights Law section 50-b – which protects the anonymity of sex abuse victims – and not a single word of either party's briefs is available to the public.

Since the District Attorney's Office has made it clear that it will not release any portion of any of the appellate briefs filed in this action without clear instructions from this Court, the Post respectfully requests an order unsealing the briefs and directing the District Attorney to provide the Post with copies redacted only to the extent necessary to preserve the anonymity of victims. As a threshold matter, the Rules of this Court and the common law both guarantee the Post's right to move this Court for an order unsealing court documents (POINT I, *supra*). And the Post easily demonstrates the "good cause" required to overcome sealing of documents under section 50-b. Simply put, the presumption of openness that governs judicial proceedings in this State is at its zenith because the documents sought by the Post are highly relevant to allegations of prosecutorial missteps and favoritism by the office of the District Attorney in a case involving a powerful sex offender (POINT II, *supra*). The Post is mindful, however, of the importance of

HOUSE_OVERSIGHT_016489

maintaining anonymity for the victims of sexual assault and respectfully requests that this Court also direct the District Attorney's Office to redact the names of any victims before serving the Post with copies of the redacted appellate briefs. The Post further requests that this Court order the District Attorney's Office to provide the Post with copies of the redacted briefs within seven days of entry of its order granting this motion.

FACTUAL BACKGROUND

A. Epstein's Conviction for Sex Crimes and Designation as a Level Three Sex Offender

In June 2008, a Florida Court sentenced Jeffrey Epstein to eighteen months in prison after he pleaded guilty to soliciting prostitution from a fourteen-year-old girl. Affirmation of John M. Browning dated December 21, 2018 ("Browning Aff."), Ex. A.

After serving thirteen months of his sentence, Epstein was released and required to register as a sex offender in New York, where he owned property and sought to reside. *Id.* Ex. B. The New York State Board of Examiners of Sex Offenders ("NYBSO") recommended that Epstein be designated a level three sex offender – which is the level reserved for the most dangerous sexual predators – because investigators in Florida had found compelling evidence that Epstein had abused scores of underage girls, despite only pleading guilty to solicitation of a single minor. *Epstein*, 89 A.D.3d at 570, 933 N.Y.S.2d at 240.

Remarkably, New York Assistant District Attorney Jennifer Gaffney ignored the NYBSO recommendation and asked the trial court tasked with deciding Epstein's sex-offender status to designate him as a level one offender only, which is the least-restrictive category possible and is typically applied to offenders who pose the lowest risk of committing further crimes. *Id.* ADA Gaffney argued that, since "there was only an indictment for one victim," Epstein should not be placed under the heavy scrutiny required for the most dangerous class of abusers. *Id.* Ex. B. For

HOUSE_OVERSIGHT_016490

their part, Epstein's lawyers argued that the lowest designation should be applied because "there are no real victims here." *Id.* Ex. C.

In January 2011, the judge presiding over the sex-offender registration proceedings, Justice Ruth Pickholz, rejected ADA Gaffney's arguments and designated Epstein as a level three sex offender. *Epstein*, 89 A.D.3d at 570, 933 N.Y.S.2d at 240. At a hearing preceding her ruling, Justice Pickholz told the Assistant District Attorney that she had "never seen the prosecutor's office do anything like this" and further stated that she had "done many [cases] much less troubling than this one where [prosecutors] would never make a downward argument like this." *Id.* Ex. B. When ADA Gaffney was questioned about whether she knew Epstein had sexually abused other minors, Gaffney admitted that she had never spoken to the federal investigators in Florida who had reached the conclusion that Epstein was a serial abuser of underage girls. *Id.* Ex. C.

B. The Appeal

Epstein subsequently commenced this Appeal, seeking to overturn the trial court's ruling that he is a level three sex offender. The appellate briefs submitted by Epstein and the Manhattan District Attorney were filed under seal, pursuant to New York Civil Rights Law section 50-b. *Id.* ¶ 7. That statute protects the anonymity "of any victim of a sex offense" by requiring any "court file . . . which tends to identify such a victim" to be filed under seal. N.Y. Civ. Rights Law § 50-b(1). The statute further provides, however, that court documents filed under seal shall be disclosed if a movant "demonstrates to the satisfaction of the court that good cause exists for disclosure to that person." *Id.* § 50-b(2)(b).

In a decision filed on the public docket (the "Decision"), this Court affirmed Epstein's level three offender status because the lower "court properly relied on highly reliable proof of criminal conduct for which defendant was neither indicted nor convicted." *Epstein*, 89 A.D.3d at

HOUSE_OVERSIGHT_016491

570, 933 N.Y.S.2d at 240. Specifically, the "evidence . . . established that [Epstein] committed multiple offenses against a series of underage girls," who "were brought to [Epstein's] home to provide 'massages' that led to very serious sex crimes." *Id.* at 570-71, 933 N.Y.S.2d at 240.

Although the Manhattan District Attorney's briefing remains under seal, the Decision indicates that "the People [took] a different position on appeal from the position they took before the hearing court." *Id.* at 571, 933 N.Y.S.2d at 241. This Court did not, however, unseal any of the appeal briefs or provide a detailed summary of the parties' respective arguments. The public and the press are thus left in the dark as to what exactly the District Attorney's Office and Epstein wrote in their respective appeal briefs. It appears that the District Attorney's Office may have taken the position that ADA Gaffney had "mistakenly conceded [before the lower court] that the conduct for which defendant was not indicted should not be considered, and that defendant should be adjudicated a level one offender." *Id.* at 572, 933 N.Y.S.2d at 241. The Decision also states that this Court rejected Epstein's argument that the District Attorney "should be estopped" from changing position on appeal and also rejected Epstein's "remaining claims" as being "improperly raised for the first time on appeal." *Id.* The public has the right to know more than these sketchy details, however, particularly when the arguments advanced by the parties on appeal clearly discuss the decision taken by the Manhattan District Attorney's Office to abruptly change its earlier position that Epstein was deserving of lenient treatment.

C. Media Interest in New York and Florida Prosecutors' Lenient Handling of Epstein's Case

The handling of Epstein's prosecution in Florida and the subsequent sex offender registration proceeding against in him New York have both been the subject of legitimate public interest and intense controversy. In the Florida proceedings, the prosecutors were criticized for allowing Epstein to enter into a seemingly favorable plea deal. For instance, as the Post reported

HOUSE_OVERSIGHT_016492

at the time, the Florida judge sentencing Epstein "was critical of two of the deal's conditions, indicating she thought he was getting special treatment by being allowed private counselling for his sex offender treatment and to serve time in county jail instead of state prison." Samuel Goldsmith, *Jeffrey Epstein Pleads Guilty to Prostitution Charges*, N.Y. POST (June 30, 2008), *available at* https://nypost.com/2008/06/30/jeffrey-epstein-pleads-guilty-to-prostitution-charges/. Another serious concern was that Epstein's status as a billionaire investor with powerful connections – including close relationships with Bill Clinton, Donald Trump, and Prince Andrew – may have influenced prosecutors to give Epstein unduly favorable treatment and to turn a blind eye to the extent of his sexual abuse of minors. *Id.*

There has also been critical reporting on how the Manhattan District Attorney's Office handled Epstein's sex offender registration hearings in New York. After the Post obtained copies of the transcript of the status hearing before Justice Pickholz, it published an article on January 7, 2015, entitled "DA's office 'went easy' on sex offender Epstein." *Id.* Ex. B. In that article, the Post reported that "Prosecutors went to bat for the billionaire pervert at a 2011 legal hearing, asking a judge to cut the filthy-rich felon a break on the severity of his sex-offender status . . . ." *Id.* In addition to reporting the contents of the hearing transcript, Post reporters also sought to discover why the District Attorney initially sought lenient treatment for Epstein and, as part of its investigation, reached out for comment from the District Attorney's Office. As the article reported, the spokesman for the District Attorney did not give a detailed response on the record but referred the Post instead to the portion of the Decision stating "that the prosecution's position was based 'largely on the mistaken notion' that only the formal charges against Epstein could be factors in the decision." *Id.* The Post was unable to obtain copies of the briefs filed

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with the First Department – which would provide a more fulsome explanation of the District Attorney's position – because those documents remained under seal.

The prosecution of Epstein has remained in the news and was recently the subject of a wide-ranging investigation by the *Miami Herald*, which was published on November 28, 2018. *Id.* Ex. A. One of several in-depth feature articles published by the *Miami Herald* was entitled "Cops worked to put serial sex abuser in prison. Prosecutors worked to cut him a break." *Id.* In that article, the *Miami Herald* reported that investigators uncovered evidence that Epstein had abused "over 100 middle school and high school aged girls," but "despite ample physical evidence and multiple witnesses corroborating the girls' stories, federal prosecutors and Epstein's lawyers quietly put together a remarkable deal for Epstein." *Id.* Epstein agreed to plead guilty to soliciting an underage prostitute "in state court, and in exchange, he and his accomplices received immunity from federal sex-trafficking charges that could have sent him to prison for life. *Id.* More troubling still, Epstein's case file was sealed – including a detailed criminal complaint – so that "no one . . . could know the full scope of Epstein's crimes and who else was involved." *Id.*

The *Miami Herald*'s reporting has also had serious political ramifications. As the *Miami Herald* has reported, "[t]he U.S. attorney in Miami, Alexander Acosta, was personally involved in the negotiations" back in and around 2008. *Id.* Ex. C. Acosta subsequently became "a member of President Donald Trump's cabinet" and currently serves as the Secretary of Labor. *Id.* Since the *Miami Herald* published its expose, some members of Congress have demanded an investigation into what led to the slap-on-the-wrist punishment for Jeffrey Epstein. *See, e.g.*, Anthony Man, *Florida Democrats want investigation into Trump cabinet member's role in handling Epstein case*, SOUTH FLORIDA SUN SENTINEL (Dec. 4, 2018) *available at*

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https://www.sun-sentinel.com/news/politics/fl-ne-jeffrey-epstein-alex-acosta-investigation-20181204-story.html.

The Post has also persisted with its own investigation into whether the Manhattan District Attorney's Office was unduly lenient when it advocated in favor of registering Epstein as a level one sex offender. On December 1, 2018, the Post published an article entitled "Manhattan DA sided with pedophile billionaire after botching investigation." *Id.* Ex. C. Following up on its prior reporting, the Post reported Justice Pickholz's denial of ADA Gaffney's efforts to register Epstein as a level one offender and then asked the District Attorney's Office to account for the "mishandling of the Epstein hearing." *Id.* In response to questions from the Post, the District Attorney's Office insisted that ADA Gaffney simply "made a mistake." *Id.* A spokesman also claimed that Manhattan District Attorney Cyrus Vance "'was not aware' of the hearing until years later and had nothing to do with it." *Id.* But, as the Post also reported, "[s]ome law enforcement sources don't believe Vance had no clue that his office had a sex-offender case involving a Manhattan mogul with close ties to Democrats." *Id.*

Unsealing of the First Department appeal briefs in this case is crucial so that the public and the press may more fully understand why Epstein was initially offered level one offender status despite the overwhelming evidence that he was a serial sexual abuser of children.

D. The Post's Efforts to Obtain the Appellate Briefing Filed with the First Department

On December 4, 2018, Post reporter Sue Edelman contacted the Director of Communications for District Attorney Cyrus Vance, Jr. and requested a copy of the appellate brief filed by the District Attorney's Office. *Id.* ¶¶ 6-8. In making this request, Edelman specifically stated that the District Attorney's Office could redact the names of any victims of sexual abuse before forwarding the brief. *Id.* Edelman's request was denied, however, because the District Attorney's Office has taken the position that the brief was filed under seal in its

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entirety pursuant to N.Y. Civil Rights Law section 50-b and could not be released – even with the names of victims redacted – without an order from this Court. *Id.* Nonetheless, the District Attorney's Office stated in an email that it would "*not* oppose" the Post's motion requesting that a redacted brief be produced. *Id.* Ex. D.

Counsel for the Post also contacted counsel for Epstein to ascertain his position on the disclosure of the appellate briefs. *Id.* On December 20, 2018, Mr. Epstein's lawyer stated that he would not take a position until he had an opportunity to review the brief and reserved his right to oppose. Counsel for Epstein later informed counsel for the Post that "after consideration of your request for the unsealing of the appellate briefs with redactions of certain identities, we take no position on behalf of Mr. Epstein." *Id.* Ex. F.

On December 21, 2019, the Post moved this Court for an order unsealing the appellate briefs and directing the Manhattan District Attorney's Office to produce copies of the briefs with the names of victims redacted (the "December 21 Motion"). On January 2, 2019, counsel for the Post received an affirmation signed by Assistant District Attorney Karen Friedman Agnifilo, dated December 28, 2018, which opposed the December 21 Motion. After telling the Post that it "will *not* oppose the petition for a redacted brief," the District Attorney's Office argued that the December 21 Motion should be denied on two grounds. First, the District Attorney's office faulted the Post for supposedly failing to "furnish the requisite notice" to "the prosecuting agencies for defendant's underlying sex crimes," as required by section 50-b of the New York Civil Rights Act. *Id.* Ex. E ¶ 2. According to the Manhattan District Attorney, the Post should have notified "the federal and local prosecutor's offices in Florida, where defendant was charged" (and presumably not the Manhattan District Attorney's Office).[1]

[1] The Post firmly disputes the District Attorney's contention – which is not supported by any authority – that section 50-b requires the Post to serve any prosecutor who touched Epstein's case in Florida in order to unseal documents

Second, Assistant District Attorney Friedman Agnifilo objected to unsealing any portion of the appellate briefs and wrote that "we cannot agree ... even to a production of the people's brief with redactions of the names or initials of Epstein's victims." *Id.* ¶ 3. She further noted, however, that "if this Court is inclined to grant the Post's motion, we would not oppose producing a copy of the People's brief, with substantial redactions necessary to protect the identities of the victims but keeping intact those portions of the brief that recount the procedural history of the SORA hearing." *Id.*

Although the Post does not agree that section 50-b requires it to notify Florida prosecutors of its intention to move this Court to unseal briefs filed by the Manhattan District Attorney in a New York sex offenders proceeding, it nonetheless voluntarily withdrew the December 21 Motion on January 4, 2019 to moot the issue and bypass an easily avoidable procedural dispute. Counsel for the Post has contacted the Palm Beach State Attorney's office and the United States Attorney's Office for the Southern District of Florida (collectively, the "Florida Prosecutors") to apprise them of its intention to refile this motion to unseal the appellate briefs with the names of victims redacted. *Id.* ¶¶ 17-18. The Post will also serve the Florida Prosecutors with copies of this motion.

Having mooted the procedural objection raised by the Manhattan District Attorney, the Post now refiles its motion respectfully requesting an order unsealing the appellate briefs and directing the District Attorney's Office to provide the Post with copies – with the names of victims redacted – within seven days of the entry of its order.

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filed by New York prosecutors in a New York court as part of proceedings to register Epstein as a sex-offender in New York State. The statute requires a movant to furnish notice to "the public officer ... with the duty of prosecuting the offense." N.Y. Civ. Rights Law §50-b. Here, the Manhattan District Attorney's Office had "the duty of prosecuting the offense" on behalf of the People of New York – *i.e.*, the sex-offender registration proceedings against Epstein in this State – and there is no question that the Post provided the Manhattan District Attorney with adequate notice of the December 21 Motion.

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ARGUMENT

Despite the Manhattan District Attorney's apparent opposition to releasing any of portion of the appellate briefs, good cause exists to unseal briefs with victims' names redacted because the handling of Epstein's designation as a sex offender by New York prosecutors – including the appellate arguments regarding that designation – are of paramount public concern and should be open to public scrutiny.

I. THE POST HAS THE RIGHT TO MOVE THIS COURT FOR AN ORDER UNSEALING THE APPELLATE BRIEFING

As a threshold matter, the Practice Rules of this Court permit non-parties (like the Post) to submit "[a]pplications for sealing and unsealing documents . . . by motion." 22 NYCRR § 1250.1(e)(3). The Post's right to petition this Court for an order unsealing the appellate briefs is further buttressed by the rule that "affected members of the media should be given the opportunity to be heard" before a Court takes the drastic step of sealing court proceedings, filings or dockets. *In re Capital Newspapers Div. of Hearst Corp. v. Moynihan*, 125 A.D.2d 34, 38, 512 N.Y.S.2d 266, 269 (3d Dep't 1987), *aff'd on other grounds*, 71 N.Y.2d 263, 525 N.Y.S.2d 24 (1988). *See also Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 501, 835 N.Y.S.2d 595, 597 (2d Dep't 2007) ("[P]rior to issuance of an order to seal judicial documents, the court is obligated, where possible, to afford news media an opportunity to be heard.") (citing *In re Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 383, 465 N.Y.S.2d 862, 864 (1983)); *Maxim, Inc. v. Feifer*, 145 A.D.3d 516, 43 N.Y.S.3d 313 (1st Dep't 2016) (reversing order denying motion of press entities to intervene for purpose of seeking access to filed motion papers and other court records).

In addition to guaranteeing the Post's right to move this Court to unseal documents, New York law also requires this Court to make "specific findings to support its determination" before

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limiting public access to judicial records or proceedings. *Daily News, L.P. v. Wiley*, 126 A.D.3d 511, 515, 6 N.Y.S.3d 19, 24 (1st Dep't 2015) (before sealing records, courts "must adhere strictly to the procedures set forth in the controlling case law including affording a full opportunity by any interested members of the press to be heard, and making specific findings to support its determination . . . . [T]rial court[s] . . . cannot . . . seal evidence and transcripts merely because the parties are consenting to same and the case has obtained notoriety."). Therefore, in the unlikely event that this Court declines to grant the Post's motion to unseal, either in part or *in toto*, the Post respectfully requests that this Court issue a written order setting forth the grounds for its decision.

II. GOOD CAUSE EXISTS TO UNSEAL THE APPELLATE BRIEFS

The appellate briefs should be disclosed because they are highly relevant to the public's understanding of whether the Office of the Manhattan District Attorney – whose fundamental mission is to protect the people of this State – initially showed undue deference to a dangerous pedophile, who is unusually rich and well-connected.

New York Civil Rights Law section 50-b permits courts to disclose court documents relating to the commission of a sexual offense whenever a showing is made that "good cause exists for disclosure." N.Y. Civ. Rights Law § 50-b. *See also* 22 NYCCR § 1250.1(e)(3) (permitting the "unsealing [of] court records . . . upon good cause shown"). Good cause clearly exists for disclosing the appellate briefs because they contain a full explanation for why the District Attorney's Office argued before the lower court that Epstein should be registered as a level one sex offender before changing position on appeal. *See Epstein*, 89 A.D. at 571, 933 N.Y.S.2d at 241. The appellate briefs may also shed light on the extent of "the evidence . . . that [Epstein] committed multiple offenses against a series of underage girls," which the District

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Attorney's Office apparently disregarded or was not aware of in the proceedings before the lower court. *Id.*

Not only are the appellate briefs subject to the strong presumption of openness that applies to all judicial documents but there is also an intense public interest in disclosing these specific documents because they will shed light on why the District Attorney's Office initially took the controversial decision to argue in favor of lenient treatment of Epstein.[2] As Justice Burger wrote, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). "Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . ." *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring). In short, the appellate briefs should be unsealed so that the Post can inform the public about the decisions taken by the District Attorney's Office with respect to Epstein so that the public can decide whether there was anything careless or improper about those decisions.

The need for transparency and public understanding of why the District Attorney's Office handled the Epstein case the way it did is heightened by the fact that District Attorney Vance has faced criticism over claims that his office gives favorable treatment to rich and powerful men

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[2] The presumption of openness is grounded in the U.S. and New York Constitutions as well as deeply-entrenched common law rules that govern this Court. The First Amendment to the United States Constitution and article I, section 8 of the New York State Constitution both recognize the presumptive right of the public and press to access and inspect court records. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *In re Associated Press v. Bell*, 70 N.Y.2d 32, 517 N.Y.S.2d 444 (1987). In addition to being well established under the federal and state constitutions, the right of access to court records "is also firmly grounded in common law principles." *Danco Labs., Ltd. v. Chem. Works of Gideon Richter, Ltd.*, 274 A.D.2d 1, 6, 711 N.Y.S.2d 419, 423 (1st Dep't 2000) (citing *inter alia Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). *See also People v. Burton*, 189 A.D.2d 532, 535-36, 597 N.Y.S.2d 488, 491-92 (3d Dep't 1993) ("a common-law presumption" favors public access to court records); *In re Application of National Broad. Co.*, 635 F.2d 945, 949 (2d Cir. 1980) ("[T]he common law right to inspect and copy judicial records is beyond dispute.") (citation omitted).

accused of sexual abuse. As the *New Yorker* reported, DA Vance declined to charge Harvey Weinstein with a sex crime in 2015 even though investigators collected ample evidence that he had groped an actress without consent. *See* Jennie Suk Gersen, *Why Didn't the Manhattan DA Prosecute the Trumps or Harvey Weinstein*, NEW YORKER (Oct. 13, 2017) *available at* https://www.newyorker.com/news/news-desk/why-didnt-manhattan-da-cyrus-vance-prosecute-the-trumps-or-harvey-weinstein. Even after the emergence of the #Me Too movement and the indictment of Harvey Weinstein on rape charges, the Manhattan District Attorney's Office has continued to face criticism for failing to prosecute the Weinstein case aggressively enough. *Id.* District Attorney Vance is an elected official who wields an immense amount of discretion over prosecutions. The people of New York have the right to scrutinize how his office treated this case involving a rich and well-connected sex offender, especially in light of allegations that other notable sexual predators have benefitted from the apparent deference of prosecutors. To put it bluntly, the appellate briefs should be released immediately to avoid any impression of impropriety caused by continued secrecy.

There is also a strong interest in disclosing the appellate briefs to enable the public to review for itself the arguments that led this Court to issue the Decision affirming Epstein's status as a level three sex offender. By ensuring public access to the courts and enabling public discussion of the functioning of the judiciary, the news media help "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." *Globe Newspaper Co.*, 457 U.S. at 606. As courts have recognized time and again, "[w]ithout access to the proceedings, the public cannot analyze and critique the reasoning of the court." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983). Thus, "[o]penness . . . enhances both the basic fairness of [a] trial and the appearance of fairness

HOUSE_OVERSIGHT_016501

so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (citing *Richmond Newspapers*, 448 U.S. 569-71). For this reason, the appellate briefs should be unsealed so that the public has the benefit of seeing the very statements and arguments that formed the basis of this Court's Decision. It is especially important to provide a transparent view into these judicial proceedings because suspicions have already been raised about how the District Attorney's Office handled Epstein's case.

When, as here, "issues of major public importance are involved, the interests of the public as well as the press in access to court records 'weigh heavily' in favor of release." *Danco*, 274 A.D.2d at 8, 711 N.Y.S.2d at 425 (citation omitted). This constitutional presumption of open access to court records requires "the most compelling circumstances" to justify any restriction upon that right. *In re Application of Nat'l Broad. Co.*, 635 F.2d at 952. Here, it is impossible to conceive of any circumstances that might justify wholesale sealing of relevant court documents that are necessary to understand how prosecutors and this Court handled a matter of such intense public concern.

The interest of Epstein's victims to remain anonymous can be satisfied by directing the District Attorney's Office to redact the names of victims before disclosing the appellate briefs. To be clear, the Post has no interest in identifying victims of sexual assault who wish to remain anonymous. It does, however, have a right to know why the Manhattan District Attorney abruptly changed position after initially arguing that Epstein should be treated leniently. The District Attorney's Office has indicated that it "would not oppose producing a copy of the People's brief ... keeping intact those portions of the brief that recount the procedural history of the SORA hearing, the portion of the brief that is seemingly of interest to the Post." Browning Aff. Ex. E. With all due respect to the District Attorney, the Post is simply not in a position to

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evaluate whether the proposed redactions are reasonable. Because the Post cannot review any part of the briefs, it is impossible for the Post to know whether the information it seeks is in the procedural history section of the People's brief or in other parts of the briefing filed in the Appeal. Moreover, courts must order narrow redactions where possible to avoid overbroad sealing. *See, e.g.*, *Burton*, 189 A.D.2d at 535-36, 597 N.Y.S.2d at 491 (requiring courts to "consider less drastic alternatives to sealing the records which would adequately serve the competing interests"); *Maxim, Inc.*, 145 A.D.3d at 518, 43 N.Y.S.3d at 316 ("We recognize that it may be easier for the parties and the motion court to seal an entire court record, rather than make a determination on a document by document basis about sealing, but administrative convenience is not a compelling reason to justify sealing."). In keeping with this State's strong preference against wholesale sealing of documents, section 50-b expressly permits this Court to release judicial documents after ordering redactions "as it deems necessary . . . to preserve the confidentiality of the identity of the victim." N.Y. Civ. Rights Law § 50-b. Since the only information protected by the statute is identity of Epstein's victims, the Post respectfully requests an order directing the District Attorney to redact only the names of Epstein's victims.[3]

Since the Post does not seek the names of victims of sexual abuse and agrees that these names should be redacted before the appellate briefs are disclosed, there should be no need under the statute to provide notice "to the victim or other person legally responsible for the care of the victim." N.Y. Civ. Rights Law § 50-b(2). But to the extent such notice is necessary, the Post is unable to notify any of the victims on its own because it has no knowledge of which victims (if any) may be identified in the requested documents. If the statute requires victims to be notified

[3] Without the benefit of reviewing the appellate briefs, the Post is not in a position to evaluate whether the briefs contain other information that might identify Epstein's victims, such as home addresses. While the Post would not object to the District Attorney's Office making good faith redactions of genuinely identifying information, these redactions should be narrowly tailored and no more expansive than is necessary to protect the victims' identities.

even if their names will not be disclosed, the Post respectfully submits that either the Manhattan District Attorney or the Florida Prosecutors should provide notice promptly. To require the Post to notify victims itself – without any ability to discover who those victims are – would be an absurd result that defeats the purpose of the unsealing provision of section 50-b, which allows "any person" to file an application requesting that information be unsealed for "good cause."[4]

In sum, the strong presumption of openness that governs New York courts compels the conclusion that the appellate briefs in this action must be unsealed (with the names of any victims of a sexual offense redacted).

CONCLUSION

For the reasons set forth above, the Post respectfully requests an order unsealing the appellate briefs, which directs the District Attorney to provide counsel for the Post with copies of these documents, with the names of victims redacted, within seven days of the issuance of this Court's unsealing order.

Dated: New York, New York
January 11, 2018

Respectfully submitted,

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[4] In its affidavit filed in opposition to the December 21 Motion, the Manhattan District Attorney indicated that "to the extent that the Post is unable to furnish notice to the victims, this Office, which was not the prosecuting agency, is not in a position to do so." Browning Aff. Ex. E. The Post has mooted this objection by refiling its motion and providing the Florida Prosecutors with notice of its intent to unseal the appellate briefs with victims' redacted.

88th year, No. 24499 THURSDAY, FEBRUARY 28, 2019 $1

The Virgin Islands

DAILY NEWS

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CELEBRATING THE PEOPLE, CULTURES AND HISTORY OF THE VIRGIN ISLANDS

A brighter future for Lucinda Millin residents

Daily News photo by BRIAN O'CONNOR

A rainbow arches over the Lucinda Millin Home on Wednesday on St. Thomas. V.I. Housing Authority officials say they plan to demolish the existing structure and replace it with senior housing in Oswald Harris Court housing community as part of an $830-million "repositioning" of public housing throughout the territory. Page 3

Michael Cohen calls Trump a racist con man

Pages 2, 4

V.I.'s Plaskett at center of House hearing

Page 2

Senate to ensure art law is followed

Page 3

Perversion of Justice

As cops sought to put serial sex abuser Jeffrey Epstein in prison, prosecutors sought to cut him a break

Pages 12-14

Observers raise concerns with BVI vote

Page 5

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CONTINUED FROM PAGE 12

massage his chest, often instructing them to pinch his nipples, while he masturbated, according to the police report.

At times, if emboldened, he would try to penetrate them with his fingers or use a vibrator on them. He would go as far as the girls were willing to let him, including intercourse, according to police documents.

Sometimes he would instruct a young woman he described as his Yugoslavian sex slave, Nadia Marcinkova, who was over 18, to join in, the girls told Recarey. Epstein often took photographs of the girls having sex and displayed them around the house, the detective said.

Once sexually gratified, Epstein would take a shower in his massive bathroom, which the girls described as having a large shower and a hot pink and mint green sofa.

Kellen Ivone Vickers and Marcinkova, through their attorneys, declined to comment for this story.

Targeting disadvantaged girls

One girl told police that she was approached by an Epstein recruiter when she was 16, and was working at the Wellington mall. Over the course of more than a year, she went to Epstein's house hundreds of times, she said.

The girl tearfully told Recarey that she often had sex with Marcinkova while Epstein watched and choreographed her moves to please himself, according to the police report. Often times, she said, she was so sore after the encounters that she could barely walk, the police report said.

But she said she was firm about not wanting to have intercourse with Epstein.

However, on a day the girl said that Epstein, unable to control himself, held her down on a massage table and penetrated her, the police report said. The girl, who was 14 or 17 at the time, said that Epstein sandwiched and paid her $1,000, the police report said.

Most of the girls came from disadvantaged families, single-parent houses or foster care. Some had experienced troubles that belied their ages. They had parents and friends who committed suicide, mothers abused by husbands and boyfriends, fathers who molested and beat them. One girl had watched her stepfather strangle her 8-year-old stepbrother, according to court records obtained by the Herald.

Many of the girls were one step away from homelessness.

"We were stupid, poor children," said one woman, who did not want to be named because she never told anyone about Epstein. At the time, she recalled that she was 14 and a high school freshman.

"We just wanted money for school clothes, for shoes. I remember wearing shoes too tight for three years in a row. We had no family and no guidance, and we were told that we were going to just have to sit in a room topless and he was going to just look at us. It sounded so simple, and was going to be easy money for just sitting there."

The woman, who went to Epstein's home multiple times, said Epstein didn't like her because her breasts were too big. The last time she went, she said, she got come out crying and they were instructed to leave the house and had to pay for their own cab home.

Some girls told police they were coached by their peer recruiters to lie to Epstein about their ages and say they were 18. Epstein's legal team would later claim that even if the girls were under 18, there was no way he could have known.

However, under Florida law, ignorance of a sex partner's age is not a defense for having sex with a minor.

Willi, who worked for Epstein until she was 21, said he was well aware of their tender ages — because he demanded they be young.

"He told me he wanted them as young as I could find them," she said, explaining that as she grew older and had less access to young girls, Epstein got increasingly angry with her inability to find him the young girls he desired.

"If I had a girl to bring him at breakfast, lunch and dinner, then that's how many times I would go a day. He wanted as many girls as I could get him. It was never enough."

Broadening his reach

Epstein's scheme first began to unravel in March 2005, when the parents of a 14-year-old girl told Palm Beach police that she had been molested by Epstein at his mansion. The girl reluctantly confessed that she had been brought there by two other girls, and those girls pointed to two more girls who had been there.

By the time detectives tracked down one victim, there were two and three more to find. Soon there were dozens.

"We didn't know where the victims would ever end," Reiter said.

File photo by MARY ALICE BELL

Michelle Licata, 40, is overcome with emotion while discussing her sexual encounters with Jeffrey Epstein. "He had no remorse/guilt and doesn't even believe he did anything wrong," she said.

> **I kept looking at the timer because I didn't want to have this mental image of what he was doing.**
>
> — Michelle Licata, Jane Doe No. 2, who told police she has sexual encounters with Jeffrey Epstein

Eventually, the girls told them about still other girls and young women they had seen at Epstein's house, many of whom didn't speak English, Recarey said.

That led Recarey to suspect that Epstein's exploits weren't just confined to Palm Beach.

Police obtained the flight logs for his private plane, and found female names and initials among the list of people who flew on the aircraft — including the names of some famous and powerful people who had also been passengers, Recarey said.

A newly released FBI report, posted on the Herald's website as a result of the Herald's Freedom of Information Act request, shows that at the time the non-prosecution deal was executed, the FBI was interviewing witnesses and victims "from across the United States." The probe stretched from Florida to New York and New Mexico, records show.

Indeed, one lawsuit, still pending in New York, alleges that Epstein used an international modeling agency to recruit girls as young as 13 from Europe, Ecuador and Brazil.

Mike Fisten

The girls lived in a New York building owned by Epstein, who paid for their visas, according to the sworn statement of Maritza Vazquez, the one-time bookkeeper for Mc2, the modeling agency.

Mike Fisten, a former Miami-Dade police sergeant who was also a homicide investigator and a member of the FBI Organized Crime Task Force, said the FBI had enough evidence to put Epstein away for a long time but was overruled by Alexander Acosta, who was Miami's top federal prosecutor at the top.

Some of the agents involved in the case were disappointed by Acosta's bowing to pressure from Epstein's lawyers, he said.

"The day that a sitting U.S. attorney is afraid of a lawyer or afraid of a defendant is a very sad day in this country," said Fisten, now a private investigator for Edwards.

Acosta's path to power

Acosta has never fully explained why he felt it was in the best interests of the underage girls — and their parents — for him to keep the agreement sealed. Or why the FBI investigation was closed even as, recently released documents show, the case was yielding more victims and evidence of a possible sex-trafficking conspiracy beyond Palm Beach.

Alexander Acosta

Upon his nomination by Trump as labor secretary in 2017, Acosta was questioned about the Epstein case during a Senate confirmation hearing.

"At the end of the day, based on the evidence, professionals within a prosecutor's office decided that a plea that guarantees someone goes to jail, that guarantees he register [as a sex offender] generally and guarantees other outcomes, is a good thing," Acosta said of his decision to not prosecute Epstein federally.

California Democratic Sen. Dianne Feinstein, in opposing Acosta for Labor secretary, noted that "his handling of a case involving sex trafficking of underage girls when he was a U.S. attorney suggests he won't put the interests of workers and everyday people ahead of the powerful and well-connected."

Marci Hamilton, a University of Pennsylvania law professor who is one of the nation's leading advocates for reforming laws involving sex crimes against children, said what Acosta and other prosecutors did is similar to what the Catholic Church did to protect pedophile priests.

"The real crime with the Catholic priests was the way they covered it up and shielded the priests," Hamilton said. "The orchestration of power by men only is protected as long as everybody agrees to keep it secret. This is a story the world needs to hear."

Jane Doe No. 2

Michelle Licata climbed a narrow, winding staircase, past walls covered with photographs of naked girls. At the top of the stairwell was a vast master bed and bath, with cream-colored shag carpeting and a hot pink and mint green sofa.

The room was dimly lit and very cold.

There was a vanity, a massage table and a timer.

A silver-haired man wearing nothing but a white towel came into the room. He lay face-down on a massage table, and while talking on a phone directed Licata to rub his back, legs and feet.

After he hung up, the man turned over and

See PERVERSION, page 14

PERVERSION

CONTINUED FROM PAGE 13

dropped his towel, exposing himself.

He told Licata to get comfortable and then, in a firm voice, told her to take off her clothes.

At 16, Licata had never before been fully naked in front of anyone.

Shaking and panicked, she mechanically pulled off her jeans and stripped down to her underwear.

He set the timer for 30 minutes and then reached over and unsnapped her bra. He then began touching her with one hand and masturbating himself with the other.

"I kept looking at the timer because I didn't want to have this mental image of what he was doing," she remembered of the massage. "He kept trying to put his fingers inside me and told me to pinch his nipples. He was mostly saying 'just do that, harder, harder and do this.'"

File photo by Barry Neiman

Michelle Licata says she was 16 when she first visited Jeffrey Epstein's home on El Bible Way to give him a massage. She says he tried to penetrate her with his fingers.

After he was done, he stood up and walked to the shower, dismissing her as if she had been in factory class.

It wasn't long before a list of Licata's fellow students at Royal Palm Beach High School had heard about "a creepy old guy" named Jeffrey who lived in a pink waterfront mansion and was paying girls $200 to $300 to give him massages that quickly turned sexual.

Eventually, the Palm Beach police, and then the FBI, came knocking on Licata's door. In the police report, Licata was referred to as a Jane Doe 2 in order to protect her identity as a minor.

There would be many more Jane Does to follow: Jane Doe No. 3, Jane Doe No. 4, Jane Does 5, 6, 7, 8 — and as the years went by — Jane Does 102 and 103.

Jeffrey Epstein

Long before #MeToo became the catalyst for a women's movement fueled by sexual assault — and a decade before the fall of Harvey Weinstein, Bill Cosby and U.S. Olympic gymnastics doctor Larry Nassar — there was Jeffrey Edward Epstein.

Epstein, a multimillionaire hedge fund manager whose friends included a constellation of entertainers, politicians, business titans and royalty, for years hired teenage girls to his Palm Beach mansion as part of a cult-like sex pyramid scheme, police in the town of Palm Beach found.

The girls arrived, sometimes by taxi, for trysts at all hours of the day and night.

Few were told much more than that they would be paid to give an old man a massage — and that he might ask them to strip down to their underwear or get naked. But what began as a massage often led to masturbation, oral sex, intercourse and other sex acts, police and court records show.

The alleged abuse dates back to 2001 and went on for years.

Prosecutors' special offer

In 2007, despite ample physical evidence and multiple witnesses corroborating the girls' stories, federal prosecutors and Epstein's lawyers quietly put together a remarkable deal for Epstein, then 54.

He agreed to plead guilty to two felony prostitution charges in state court, and in exchange, he and his accomplices received immunity from federal sex-trafficking charges that could have sent him to prison for life.

He served 13 months in a private wing of the Palm Beach County stockade. His alleged co-conspirators, who helped schedule his sex sessions, were never prosecuted.

The deal, called a federal non-prosecution agreement, was sealed so that no one — not even his victims — could know the full scope of Epstein's crimes and who else was involved.

The U.S. attorney in Miami, Alexander Acosta, was personally involved in the negotiations, records, letters and emails show.

Acosta is now a member of President Donald Trump's Cabinet. As U.S. secretary of Labor, he has oversight over international child labor laws and human trafficking.

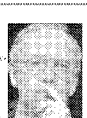
"How come people who don't have money get sent to jail — and can't even make bail — and they have to do their time and sit there and think about what they did wrong? He had no repercussions and doesn't even believe he did anything wrong," said Licata, now 39.

Licata is among 36 women who were officially identified by the FBI and the U.S. Attorney's Office as victims of Epstein, now 66. But after the FBI case was closed in 2008, witnesses and alleged victims testified in civil court that there were hundreds of girls who were brought to Epstein's homes, including girls from Europe, Latin America and former Soviet Republic countries.

But Acosta and Epstein's armada of attorneys — Harvard professor Alan Dershowitz, Jay Lefkowitz, Gerald Lefcourt, Jack Goldberger, Roy Black, Guy Lewis and former Whitewater special prosecutor Kenneth Starr — matched a conscious Epstein would never serve time in a federal or state prison.

Kenneth Starr

There were really just two people willing to risk their careers to go after Epstein: Palm Beach Police Chief Michael Reiter and Detective Joseph Recarey.



Michael Reiter

For Reiter, business tycoon Jeffrey Epstein wasn't any more formidable than any of the other 3,000 or so wealthy and powerful people living on the island. Police had handled sensational cases involving wealthy residents before — from the murders of heiresses to the rape case involving William Kennedy Smith, of the Kennedy family.

The easternmost town in Florida, Palm Beach is a 10.4-square-mile barrier island between the Intracoastal Waterway and the Atlantic Ocean populated by some of the richest people in the country.

President Trump has his "Winter White House" in Palm Beach, and the town makes news as much for its glitz as it does for its unusual efforts to preserve its well-mannered image, like banning shirtless joggers.

But it was a little surprising, even to Reiter, to learn that one of its residents had a revolving door of middle school and high school girls coming to his gates compound throughout the day and night.

In their first media interviews about the case, Reiter and Recarey revealed new details about the investigation, and how they were, in their view, pressured by then-Palm Beach State Attorney Barry Krischer to downgrade the case to a misdemeanor or drop it altogether.

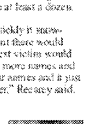
Between March of 2005 — when the case was opened — and seven months later, when police executed a search warrant at Epstein's home, Recarey had identified 24 possible victims, according to a copy of the redacted police report obtained by the Herald.

By the time police felt they had enough evidence to arrest Epstein on sex charges, they had identified about 35 possible underage victims and were tracking down at least a dozen more, the police report said.

"I was surprised at how quickly it snowballed. I thought at some point there would be a last interview, but the next victim would supply me with three or four more names and the next one had three or four names and it just kept getting bigger and bigger," Recarey said.

Blaming the victims

By then, word had gotten back to Epstein from some of the girls that they had been questioned by police. Epstein hired famed lawyer Alan Dershowitz.



Alan Dershowitz

"A lot Dershowitz flew down and met privately with Krischer," Recarey said. "And the shenanigans that happened, I don't think I've ever seen or heard of before."

Police reports show that Epstein's private investigators attempted to conduct interviews while posing as cops, that they picked through Reiter's trash in search of dirt to discredit him, and that the private investigators were accused of following the girls and their families.

In one case, the father of one girl claimed he had been run off the road by a private investigator, police and court reports show.

Several of the girls said they felt intimidated and frightened by Epstein and Sarah Kellen, the millionaire's assistant and alleged scheduler of massages, who warned them not to talk to police, according to the police report.

Dershowitz, in an interview with the Herald, said he had nothing to do with gathering background on the girls — or in directing arrests to follow the police, or the girls and their families.

"I'm not an investigator. My only job was to negotiate and try the case when it comes to trial," he said.

He nevertheless convinced Krischer that the girls would not be credible on the witness stand, according to Reiter and Recarey.

The defense team's investigators compiled dossiers on the victims in an effort to show that Epstein's accusers had troubled pasts.

Dershowitz met with Krischer and Recarey, sharing with them the results of an investigation into one of the girls whom Dershowitz described as "an accomplished drama student" who hurled profanities at his ex-girlfriend at "a furious pace."

"Our investigation had discovered at least one of her websites and I am enclosing some examples. ... the site goes on to detail, including photos, her apparent fascination with lesbianism," Dershowitz wrote in an undated letter to Recarey. He also disputed the claim that one of the defense team's private investigators had misrepresented himself as a police officer.

Recarey stood his ground.

"His attorneys allowed us a MySpace page where one of the girls was holding a beer in her hand, and they said, 'oh look, she is underage drinking,'" Recarey recalled. "Well, tell me what teenager doesn't? Does that mean she isn't a victim because she drank a beer? Basically, what you're telling me is the only victim of a sexual battery could be a nun."

Krischer and the lead state prosecutor on the case, Assistant State Attorney Lanna Belohlavek, began to dodge Recarey and Reiter's phone calls and emails, and they dragged their feet on approving subpoenas, Reiter and Recarey said.

"Early on, it became clear that things had changed, from Krischer saying, 'we'll put this guy away for life,' to 'these are all the reasons why we aren't going to prosecute this.'" Reiter said.

Krischer, who is now retired and in private practice, did not respond to multiple requests from the Herald for comment. Belohlavek also did not respond to an email sent to her office.

"It became apparent to me that some of our evidence was being leaked to Epstein's lawyers, who began to question everything that we had in our probable cause affidavit," Reiter said.

Coming tomorrow: Searching Epstein's mansion

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Article: Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute

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Text

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INTRODUCTION

In light of concerns about mass incarceration and excessive search practices by police, [1] underenforcement of criminal law is not the first problem that springs to mind for American criminal justice. But in fact, some of the prominent contemporary complaints about U.S. criminal justice, as well as some longstanding ones, object to underenforcement of criminal law. Two of the most notable categories are failures to prosecute in cases of unjustified police violence, especially against nonwhite victims, and in cases of sexual assaults. Lower-profile examples abound as well, as do historical examples.

Given the nation's history, underenforcement problems are often related to race. Insufficient law enforcement attention to crimes in minority neighborhoods, for example, has been criticized as depriving African American victims and communities of their fair share of government protection from criminal harm. [2] In earlier eras, law enforcement inattention to, or wholesale neglect **[*845]** of, white offenders' victimization of black victims - in lynchings, attacks on civil right activists, sexual assaults, and other contexts - was often patent. [3] But the problem of unjustified underenforcement is not confined to these contexts, nor to the United States. Failures to prosecute arise from a fundamental structural challenge faced by all criminal justice systems: how to ensure unbiased, evenhanded enforcement practices - safeguards in favor of justified enforcement. This challenge gets less attention than criminal procedure's central preoccupation of guarding against excessive or groundless criminal charges. Concern about misuse of the state's prosecution authority rightly motivates much in criminal procedure, from search and seizure rules [4] and judicial review of arrests [5] to evidence disclosure duties, [6] the right to counsel, [7] and standards of proof. [8]

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[1] U.S. incarceration rates quintupled over the last forty years and are five to seven times higher than those in other advanced democracies. See *Floyd v. City of New York, 959 F. Supp. 2d 540, 572-602 (S.D.N.Y. 2013)* (documenting and holding unconstitutional widespread stop-and-frisk practices by New York City police that disproportionately targeted non-white men); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 6-9 (2010); World Prison Brief Data, Inst. for Crim. Pol'y Res. (2016), *http://www.prisonstudies.org/country/united-states-america* (comparing national data on total prison population and incarceration rates and reporting that the United States has the world's largest prison population at 2,217,947 inmates).

[2] Randall Kennedy, Race, Crime, and the Law 29 (1997).

[3] See, e.g., Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror 39, 48 (3d ed. 2017) (documenting approximately 4000 lynchings in the years 1877-1950; about one percent resulted in a conviction for perpetrators).

[4] See generally Wayne R. LaFave et al., Criminal Procedure 126-63, 512-49 (5th ed. 2009) (discussing search and seizure rules).

Structural responses to the state declining to use its enforcement authority are much fewer and less prominent. At least in common law countries, enforcement decisions are the province of police and prosecutor discretion, and oversight of officials' failures to enforce has been left almost wholly to the political process. Decisions to search, arrest, or charge face modest judicial scrutiny on evidentiary grounds and - at the extreme margins - racial or **[*846]** ethnic bias. [9] Decisions not to arrest or charge are virtually immune from judicial review or other nonpolitical oversight. [10] Like other common law jurisdictions, U.S. justice systems have always rejected an approach long adopted in some civil law jurisdictions to prevent unjustified and disparate nonenforcement - a rule of mandatory prosecution that restricts executive officials' discretion over arrest and charging decisions. [11]

A broader view, however, reveals that all criminal justice systems incorporate one or more strategies to address underenforcement, which can be collectively described as redundant charging authority. All are to some degree familiar, though they are not usually described in these terms or understood as serving this common purpose.

One approach is creation of two distinct enforcement agencies with overlapping or duplicative jurisdiction. This model is a familiar safeguard against underenforcement of transnational crimes or crimes on the high seas; international criminal law routinely grants nation-states coextensive, duplicative jurisdiction to enforce international or domestic criminal laws outside their borders. International treaties on subjects such as public corruption, drug trafficking, and human trafficking [12] can be understood as agreements to create enforcement redundancy among national criminal justice agencies to solve underenforcement problems by particular states. [13] The same arrangement occurs domestically for enforcement of civil or regulatory law when administrative agencies have overlapping, and thus redundant, **[*847]** jurisdiction over the same regulated activities. [14] The most important version of this model in the United States, however, is criminal justice federalism. Due to the steady growth of federal criminal law, jurisdiction, and institutional capacity over the last century, state and federal

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[5] *Gerstein v. Pugh, 420 U.S. 103, 111-16 (1975)* (holding that the Fourth ***Amendment*** requires a judicial determination of probable cause prior to extended detention); *County of Riverside v. McLaughlin, 500 U.S. 44, 52-58 (1991)* (defining "prompt" under Gerstein's requirement of a prompt judicial determination of probable cause).

[6] *Brady v. Maryland, 373 U.S. 83, 86 (1963)* (holding prosecution's withholding of the confession of defendant's confederate violated defendant's due process rights).

[7] *Gideon v. Wainwright, 372 U.S. 335, 342 (1963)* (extending ***Sixth Amendment*** right to assistance of counsel to indigent state criminal defendants); *Powell v. Alabama, 287 U.S. 45, 53 (1932)* (holding defendants' rights to counsel of their choice throughout the prosecution process had been violated).

[8] *In re Winship, 397 U.S. 358, 364 (1970)* (holding that proof beyond a reasonable doubt is constitutionally required under the Due Process Clause).

[9] *United States v. Armstrong, 517 U.S. 456, 456-71 (1996)* (examining selective prosecution claim based on racial bias); see also *Whren v. United States, 517 U.S. 806, 813 (1996)* (holding that, in assessing the legality of police decisions to stop suspects under the Fourth ***Amendment***, courts should ignore officers' subjective motivations).

[10] See, e.g., Abby L. Dennis, Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power, *57 Duke L.J. 131, 132-33 (2007)* (describing prosecutors' "limitless, unmonitored and … unreviewable power").

[11] See infra Part II.B.

[12] See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, annex II (Nov. 15, 2000), *https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html*; United Nations Office on Drugs & Crime, World Drug Report 2017, U.N. Sales No. E.17.XI.7 (2017), *https://www.unodc.org/wdr2017/index.html*; U.S. Dep't of State, Trafficking in Persons Report 438 (2017), *https://www.state.gov/documents/organization/271339.pdf*.

[13] See Neil Boister, An Introduction to Transnational Criminal Law 135-95 (2d ed. 2012), *http://opil.ouplaw.com/view/10.1093/law/9780199605385.001.0001/law-9780199605385-chapter-12*.

[14] See Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, *2006 Sup. Ct. Rev. 201, 201-03 (2007).*

law enforcement substantially overlap for many categories of crime. Much of this enforcement redundancy, as considered in detail below, has been a deliberate federal response to diverse problems of underenforcement in state criminal justice. The point for now, however, is the functional equivalence of duplicative federal-state jurisdiction, nation-state jurisdiction, and agency jurisdiction. All represent a common strategy to reduce underenforcement by empowering redundant enforcement authorities: independent entities with equivalent institutional capacity and expertise share jurisdiction. If one neglects to enforce, the other may. Functionally, each backstops, or provides oversight of, failures to enforce by the other.

A second model for minimizing unjustified failures to prosecute relies on private actors to create redundancy with public prosecutors' authority. Empowering private actors to file and litigate public law claims is familiar in many civil law contexts; numerous federal statutes authorize private rights of action that enable private individuals or groups to supplement public agencies' law enforcement efforts. [15] Through much of the nineteenth century, this kind of duplicative public-private enforcement authority was a familiar feature in the criminal justice systems of many states, which permitted private parties - victims - to prosecute alleged criminal wrongdoing.

Redundant charging authority takes other forms as well. In large hierarchical agencies such as the U.S. Department of Justice, internal administrative review of front-line prosecutors' charging or declination decisions by higher-ups creates a version of redundant enforcement authority; supervisors can make independent determinations and reverse front-line prosecutors. [16] **[*848]** This kind of redundancy through administrative review now exists in English, Irish, and many European criminal justice systems. [17]

More ambitiously from a U.S. perspective - because it is rare here - judicial power to review prosecutorial charging decisions is another means to create some degree of redundant charging authority between the executive and judicial branches. Although criminal charging is a core function of the executive branch, state and federal courts have modest authority to review and bar executive officials' decisions to file criminal charges. It is only as a matter of policy that courts - with a few exceptions - are not empowered to address underenforcement by reviewing the executive's noncharging decisions. (This power is somewhat broader for courts in England and Wales as well as in the law of a few states.) [18] This model of redundancy separates charging authority - for courts as for Department of Justice supervisors, the power to order prosecutors to prosecute - from enforcement authority, which includes the institutional capacity to file and litigate charges. Courts (with rare exceptions) have no administrative capacity to litigate a prosecution; but they could provide some redundancy in charging authority. [19]

In sum, charging redundancy can occur between equivalent agencies in separate governments, between public and private actors, or between agencies or branches of the same government. Criminal justice systems in Europe and the common law world have adopted or strengthened one or more of these mechanisms in recent decades. In the United States, choices among these strategies have changed over time and between jurisdictions. Nearly all states that once authorized private prosecution have long since prohibited it. Federal prosecutors are organized in a centralized hierarchical agency that makes administrative review possible, but few state prosecutors are similarly organized. For these reasons and others, the primary means of enforcement redundancy to combat underenforcement is overlapping federal- **[*849]** state authority made possible by the distinctive U.S. model of federalism.

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[15] Examples of federal statutes authorizing private rights of action include the Clayton Act, *15 U.S.C. § 15* (2006) (granting a private right of action for antitrust violations); Federal Tort Claims Act, *28 U.S.C. § 2680*(h) (1994); Title VI of the Civil Rights Act of 1964, ***42 U.S.C. § 2000e-5***(f) (1994); Americans with Disabilities Act, *42 U.S.C. § 12133* (1994). For an overview, see Pamela H. Bucy, Private Justice, *76 S. Cal. L. Rev. 1, 12-54 (2002).*

[16] See *18 U.S.C. § 3771*(f) (2012) (mandating review of federal prosecutor decisions within the Justice Department upon victim's request).

[17] See infra Part II.A.1.

[18] See infra Parts II.B.3-B.4.

[19] Note that this conception of redundant authority intersects with, but is distinct from, constitutional separation of powers. In a standard account (briefly put), separation of powers describes branches of government having distinct roles, authority, and competencies. In the main, branches do not do the same things; they do different, rival, and complementary things. But if so empowered by the legislature, courts can exercise some degree of charging authority, creating limited redundancy in charging authority between the executive and judicial branches.

This Article has several aims. One is to introduce the concept of enforcement redundancy and demonstrate its utility. Another is to highlight problems of criminal law underenforcement and to situate contemporary complaints about failures to prosecute police violence and sexual assaults as specific examples of broader enforcement deficiencies that stem from bias and favoritism in police and prosecutorial discretion. The Article also defends the observation that enforcement redundancy strategies are responses to versions of this problem. It then assesses the strengths and weaknesses of different such strategies, with primary attention on the effectiveness of the U.S. approach of redundant federal-state authority. A focus on three different categories of criminal law underenforcement - government corruption, police violence, and sexual assaults - clarifies differences in the effectiveness of the U.S. approach. Federalism has proven an effective response to states' failures to address forms of public corruption, and for those crimes, it is likely superior to its alternatives. Federal authority has had some success in compensating for states' failures to prosecute police violence and other police wrongdoing, but its efficacy is harder to judge and arguments for supplemental redundancy strategies are stronger. For sexual assaults, federal authority has failed to assert any meaningful enforcement jurisdiction to compensate for weaknesses in state justice systems. Despite the sustained efforts and notable successes of reform advocates in this area, no model of enforcement redundancy has made inroads.

The Article proceeds as follows. Part II briefly surveys evidence of and reasons for underenforcement. The need for safeguards against unjustified nonenforcement has long been recognized in the United States and elsewhere; outside the United States, as part of victims' rights reforms, it has been the object of institutional reforms. Part III elaborates the mechanisms available to address risks of criminal law underenforcement. The predominant options are (1) some authority for private actors to initiate or participate in criminal prosecutions; (2) judicial or administrative review of initial nonprosecution decisions by public prosecutors; and (3) authority for a separate, independent public prosecutor's office to bring charges when another prosecutor has declined to. Other countries - out of tradition, an absence of federalism, or as part of victims' rights reforms - rely on versions of **[*850]** the first and second options. Part III also considers why U.S. victims' rights laws, which are otherwise robust, lack either of these components adopted elsewhere, especially given that many state criminal justice systems relied on private prosecution for much of the nineteenth century. The likely answers help explain why the United States relies almost exclusively on the third option as a safeguard against underenforcement.

Finally, Part IV assesses how effectively federalism-based enforcement redundancy addresses underenforcement, particularly the recurrent, contemporary controversies around police violence and sexual assault. Redundant enforcement through overlapping federalism has had considerable success addressing some underenforcement problems, such as corruption by state and local officials, certain kinds of civil rights violations, or crimes against disfavored minority groups. [20] It is doubtful that private prosecution or judicial review could match its success. The federalism strategy has a more mixed record on the problem of unjustified police violence. Federal officials have succeeded where state officials have failed in overseeing reform of local police departments to reduce police lawbreaking, and they occasionally prosecute and convict individual officers. [21] But the vast majority of incidents of police violence go unprosecuted, including most that lead to large civil settlements for victims. [22]

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[20] See, e.g., David Grann, Killers of the Flower Moon: The Osage Murders and the Birth of the FBI 57 (2017) (describing "corrupt sheriffs and police departments" that failed to enforce the law and were unable to solve serial murders of Native American victims); Margaret Burnham, The Long Civil Rights Act and Criminal Justice, *95 B.U. L. Rev. 687, 687-88 (2015)* (discussing federalism-based redundancy in the context of the Civil Rights Acts); Gregory L. Padgett, Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies, *75 J. Crim. L. & Criminology 103, 105 (1984)* (advocating for federalism-based enforcement redundancy to ensure punishment in crimes against racial minorities).

[21] On federal reform of local police, see Rachel A. Harmon, Limited Leverage: Federal Remedies and Policing Reform, *32 St. Louis U. Pub. L. Rev. 33, 53-56 (2012);* Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reform, *62 Stan. L. Rev. 1, 20-51 (2009)* [hereinafter Harmon, Policing Reform].

[22] Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States 77-84, nn.149-72 (1998), *https://www.hrw.org/legacy/reports/reports98/police/index.htm* (documenting "civil remedies");*id. at 89-96, nn.182-200, 92-93* tbls.1-2 (documenting "low rate of federal prosecutions"); Joanna C. Schwartz, How Governments Pay: Lawsuits, Budgets, and Police Reform, *63 UCLA L. Rev. 1144, 1147-71 (2016)* (documenting civil settlements for police wrongdoing in 100 localities); Ian Simpson, Prosecution of U.S. Police for Killings Surges to Highest in Decade, Reuters (Oct. 26, 2015), *https://www.reuters.com/article/us-usa-police* - idUSKCN0SK17L20151026 (noting twelve officers were charged for fatal shootings in the first nine months of 2015, compared to about five per year between 2005 and 2014).

It is **[*851]** unclear what portion of those incidents merit criminal prosecution. Key facts are often disputed, and while federal and state jurisdiction are coextensive here, federal criminal law generally sets a higher bar for liability than state law, especially due to its more onerous mens rea requirement. [23] That makes the former an imperfect backstop to the latter, because they are only partially redundant. And as recent changes in federal policy suggest, [24] redundancy between governments is subject to political shifts in those governments; federal oversight of state enforcement works only if federal officials are committed to the oversight role. Moreover, keeping prosecution in the exclusive province of executive officials keeps prosecutorial discretion more closely aligned with political majorities and thereby with popular sentiments about certain groups of defendants (such as police officers) and victim groups (such as criminal suspects). In this context, redundancy in state law charging by courts or private actors, rather than rival prosecutors, might make a real contribution. Finally, cases of sexual assault reveal a weakness of federalism-based redundancy. State and federal criminal jurisdiction in the United States overlap more than elsewhere, but they are not wholly coextensive. Federal prosecutors lack authority over most assaults that do not involve public officials or federal **[*852]** property. Sexual assaults are one context in which the enforcement strategies favored in Europe and England - regulated private prosecution or review of declination decisions - hold more promise.

I. UNDERENFORCEMENT AND REASONS NOT TO PROSECUTE

A. Sources of Unjustified Noncharging Decisions

Public prosecutors are the gatekeepers of criminal law enforcement, and justice systems employ a variety of safeguards against prosecutors' misjudgment, bias, incompetence, or laziness. Most are directed at prosecutors' charging decisions rather than decisions declining to charge (i.e., declination decisions), for familiar reasons - charging creates real burdens and risks for defendants. [25] Many familiar procedural components are aimed at preventing improper criminal charges or the harm they can cause. Requirements that charges are based on sufficient evidence are an obvious example, but double jeopardy laws and restrictions on prosecutors' conflicts of interest serve the same purpose. The full range of pretrial and trial procedures designed to assure accurate and unbiased adjudication are intended to sort out improper charges and attach punishments only to proper ones. [26]

Safeguards against nonenforcement, or unjustified decisions not to prosecute, are fewer, are less explicit, and (in common law jurisdictions) are less often in the form of legal rules and mandates. One explanation for this is simply that the interests at stake are not as high - no individual faces prosecution and possible punishment. Another is that many non-prosecution decisions

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[23] Police violence is often prosecuted under ***18 U.S.C. § 242*** (2012) (criminalizing the deprivation of rights under color of law). On challenges to prosecuting police violence, including federal law's intent requirement, see Barbara E. Armacost, Organizational Culture and Police Misconduct, *72 Geo. Wash. L. Rev. 453, 465-67 (2004);* Mary M. Cheh, Are Lawsuits an Answer to Police Brutality?, in Police Violence 247, 253, 258-66 (William A. Geller & Hans Toch eds., 1996); John V. Jacobi, Prosecuting Police Misconduct, *2000 Wis. L. Rev. 789, 806-11 (2000);* Paul J. Watford, Screws v. United States and the Birth of Federal Civil Rights Enforcement, *98 Marq. L. Rev. 465, 477-86 (2014);* Mark Joseph Stern, Why the Feds Can't Charge Darren Wilson: They Should, but the Supreme Court Gutted the Civil Rights Law He Violated when He Killed Michael Brown, Slate (Mar. 4, 2015), *http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/will_justice_department_charge_darren_wilson_* supreme_court_gutted_civil.html; William Yeomans, The Cognitive Dissonance of Federal Civil Rights Prosecutions and Race, ACS Blog (Feb. 13, 2015), *https://www.acslaw.org/acsblog/the-cognitive-dissonance-of-federal-civil-rights* -prosecutions-and-race.

[24] See, e.g., U.S. Attorney Gen., Memorandum: Supporting Federal, State, Local and Tribal Law Enforcement (2017); Sari Horwitz et al., Sessions Orders Justice Department to Review All Police Reform Agreements, Wash. Post (Apr. 3, 2017), *https://www.washingtonpost.com/world/national* -security/sessions-orders-justice-department-to-review-all-police-reform - agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html.

[25] See, e.g., *United States v. Armstrong, 517 U.S. 456, 463-66 (1996)* (examining the Equal Protection Clause's prohibition on racially-motivated charging); *Wayte v. United States, 470 U.S. 598, 608 (1985)* (holding due process bars prosecution in retaliation for exercising fundamental rights); *Kolender v. Lawson, 461 U.S. 352, 355 (1983)* (holding due process bars unduly vague offense definitions to reduce opportunities for selective enforcement); *Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)* (same).

[26] See *Duncan v. Louisiana, 391 U.S. 145, 156 (1968)* (regarding trial by jury as a "safeguard against the corrupt or overzealous prosecutor").

follow from determinations that there is insufficient evidence to support charging, and common law jurisdictions **[*853]** have long left those assessments in the unregulated discretion of police and prosecutors. [27]

But that is not the whole story. For one, it does not follow from the fact that officials must assess evidentiary sufficiency that their assessments should be unregulated or unsupervised. The tradition in civil law jurisdictions is otherwise, and available evidence often depends on the effort and priority officials give to finding it. More importantly, how rigorously we guard against unmerited nonenforcement depends on how we value the interests harmed by nonenforcement, and on how much we worry about nonenforcement for the wrong reasons. Both have changed over time.

The primary causes of underenforcement are failing to investigate and charge due to biases against certain victims or harms, or favoritism toward certain kinds of suspects. [28] Three kinds of crimes - local government corruption, sexual assaults, and unjustified uses of force by law enforcement officers - illustrate the link between these risks, failures to enforce, and the consequences of underenforcement. Local corruption garners the least public and political attention now; [29] not coincidentally, the United States has found an effective model of enforcement redundancy on this front. [30] The justice system's responses to sexual assault and police violence, on the other hand, are subjects of heated political and policy debates. [31] There has been notable progress in reducing the criminal justice system's disregard of **[*854]** both kinds of offenses, but underenforcement - and almost as important, widespread suspicion of underenforcement - remain significant enough that they illustrate some of the key costs of those failures. Suspicion of underenforcement is itself a cost, because it reflects a loss of legitimacy for criminal justice institutions. That loss in turn undermines the system's efficacy if citizens decline to report victimization or otherwise decline to cooperate with law enforcement officials. Evidence for those effects is strong for both sexual assaults and police violence. [32] More generally, underenforcement is a form of unequal treatment that unevenly - and unjustly - distributes the important public benefits of criminal law enforcement, including the state's commitment to protect everyone equally from unlawful harms. [33] It also deprives victims of the private benefits that criminal justice is now widely recognized to afford, and owe, to victims.

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[27] See *Morrison v. Olson, 487 U.S. 654, 727-28 (1988)* (Scalia, J., dissenting) ("Law enforcement is not automatic … . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain." (quoting Robert H. Jackson, Attorney Gen. of the U.S., Address to the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940))); 483 Parl Deb HC (5th ser.) (1951) col. 681 (UK) ("It has never been the rule … that suspected criminal offences must automatically be the subject of prosecution.").

[28] See Alexandra Natapoff, Underenforcement, *75 Fordham L. Rev. 1715, 1722-39 (2006)* (documenting underenforcement as a significant problem). On underenforcement of sexual assault offenses, see Deborah Tuerkheimer, Underenforcement as Unequal Protection, *57 B.C. L. Rev. 1287, 1292-1303 (2016)* (discussing empirical evidence of bias leading to underenforcement).

[29] Concern about public corruption at the federal government level, by contrast, has increased, precisely where criminal and regulatory level are somewhat weaker. See, e.g., Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United 1-16 (2014).

[30] See infra Part III.B.1.

[31] See, e.g., Do Police Use Deadly Force Too Often?, N.Y. Times: Room for Debate (Apr. 9, 2015), *https://www.nytimes.com/roomfordebate/2015/04/09/are* -police-too-quick-to-use-force.

[32] See Michael Planty et al., U.S. Dep't of Justice, Female Victims of Sexual Violence, 1994-2010, at 6 (2013), *https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf* (estimating portion of sexual assaults reported to police annually varied from fifty-nine to thirty-two percent between 2003-10); Nancy Krieger et al., Police Killings and Police Deaths Are Public Health Data and Can Be Counted, PLOS Medicine 1-4 (2015), *https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1001915&type=printable* (describing underreporting of killings by police); Kate B. Wolitzky-Taylor et al., Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women's Study Replication, 26 J. Interpersonal Violence 807, 807-08 (2011) (estimating fifteen percent of rapes were reported to police in 2006).

[33] This point is better developed in literature on policing than prosecution. See, e.g., Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 166 (2007) (noting that prosecutorial discretion can unintentionally "produce inequitable results for similarly situated

1. Underenforcement Against Corruption

Crimes of corruption by state and local officials are a good example of harms that, at times, criminal justice systems have unduly ignored. [34] Local police and prosecutors are not institutionally well-situated to pursue and evaluate those crimes. They often have professional, if not personal, ties to other local officials, which heightens the risk of undue favoritism or judgments that are otherwise not fully disinterested. That is the main reason **[*855]** that federal investigators and prosecutors have state and local corruption in their portfolios. [35]

2. Underenforcement Against Sexual Assault

Sexual assault offenses are another context in which underenforcement is now widely recognized, but the causes are different. Rather than favoritism toward offenders, the problem seems to be bias against the type of offense, and, in varying degrees, against the victims. Failures of police to rigorously pursue allegations of sexual assaults have been widely documented. [36] Among the explanations that advocates, attorneys and some scholars point to are "the entrenched nature of long-recognized, gender-driven biases by police against domestic violence or sexual assault claims" and "against individuals from particular groups or under particular circumstances," especially against victims who are poor or are racial, ethnic or gender minorities. [37] One large-scale empirical study of why rape-kit evidence remained untested, for example, suggested that the explanation in part was "negative beliefs and stereotypes about victims, which adversely affected the quality of the investigation." [38] It bears noting that much of this bias is understood to be subtle or unconscious patterns built on cultural norms, rather than conscious, purposeful disfavor. [39] But when evidentiary records are incomplete or ambiguous, their effects are substantial.

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3. Underenforcement Against Police Excessive Uses of Force

Failures to prosecute in the wake of police shootings and other possibly excessive uses of force against civilians are scenarios that raise suspicions of both bias against victims, many of whom are black men (and often criminal suspects, another disfavored

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victims and defendants"); Natapoff, supra note 28, at 1753; David Alan Sklansky, Police and Democracy, *103 Mich. L. Rev. 1699, 1822 (2005)* (arguing that policing failures in some communities undercuts "the egalitarian project of protecting all citizens from private violence").

[34] The point extends to private actors, especially organized crime, with ties to local officials.

[35] See infra Part III.B.1. On local corruption, see generally, for example, Corruption and American Cities: Essays and Case Studies in Ethical Accountability (Joaquin Jay Gonzalez III &? Roger L. Kemp eds., 2016) (discussing the role of corruption in American cities); James L. Merriner, Grafters and Goo Goos: Corruption and Reform in Chicago, 1833-2003 (2004) (discussing the role of corruption in Chicago).

[36] See Tuerkheimer, supra note 28, at 1292-99.

[37] ACLU, Responses from the Field: Sexual Assault, Domestic Violence, and Policing 40 (2015); see also Tuerkheimer, supra note 28, at 1292-99 (citing a range of studies to conclude that "in many jurisdictions, the widespread perception that law enforcement officers will likely not pursue allegations of rape [due to race, class or gender bias] is entirely accurate").

[38] Rebecca Campbell et al., The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report 109 (2015).

[39] Davis, supra note 33, at 23-34; Tuerkheimer, supra note 28 (discussing bias in sexual assault prosecutions); cf. ACLU, supra note 37 (surveying advocates, service providers, and attorneys, who described "the entrenched nature of long-recognized, gender-driven biases by police against domestic violence or sexual assault claims" and "against individuals from particular groups or under particular circumstances," including "bias against survivors of color, and against survivors who are poor, Native American, immigrant, or LGBTQ"); Joshua Correll et al., The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot, 8 Soc. & Personality Psychol. Compass 201, 202-09 (2014) (finding that police training reduces some forms of racial bias compared to lay people in shooting simulations but cautioning training effects may be reduced by real-world stress and fatigue conditions); Jeffery J. Pokorak, Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors, *83 Cornell L. Rev. 1811, 1817 (1998)* (discussing unconscious bias in death penalty prosecutions).

group), and favoritism toward the class of perpetrators, law enforcement officers. [40] In the ordinary organization of criminal justice systems, those cases call on officials from one law enforcement agency to assess the evidence against officials from another, even when the agencies regularly work together. [41] As in the context of local public corruption, conflict-of-interest rules [42] are far from adequate to prevent prosecutors from making judgments in light of such professional relationships and circumstances. [43] The possibility of partiality is inevitable. When **[*857]** that possibility combines with the long history of racial disparities in U.S. criminal justice administration, widespread suspicion of non-prosecution decisions in cases of police violence against minority civilians is hardly surprising, as the Black Lives Matter movement demonstrates. [44]

4. Other Underenforcement Contexts

Corruption, sexual assaults, and police violence illustrate the key causes and effects of failures to enforce criminal law, but the same forces are recognizably at work in other social contexts. Scholars and advocates have pointed to biases as explanations for inadequate law enforcement responses to offenses against undocumented aliens, sex workers, institutionalized persons, and targets of anti-LGBT hate crimes. [45] Complaints that police ignored wrongdoing against racial-minority victims in minority communities were prominent in the 1970s and 1980s. [46] Some of **[*858]** the remedies, however - which included harsher drug laws adopted with substantial support from African American politicians and communities - have proven deeply problematic for those same communities. [47]

Finally, less pernicious biases and favoritism are suspected explanations for lenient enforcement patterns in lower-visibility contexts, such as bicyclists killed by motor vehicle drivers, [48] employees injured on the job due to workplace safety violations, and bystanders shot by recreational hunters. [49] Even critics of those enforcement decisions in those settings view them as products of subtle or unconscious empathy with vehicle drivers, employers, and recreational gun users, which incline officials

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[40] Prison guard assaults on inmates raise the same concerns, although they get less public attention. For a notorious failure to prosecute prison guards and law enforcement officials for unjustified lethal force, see generally Heather Ann Thompson, Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy (2016).

[41] Cf. Paul Cassell, Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy, Wash. Post: Volokh Conspiracy Blog (Dec. 5, 2014), *https://www.washingtonpost.com/news/volokh* -conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy (describing the problem of local prosecutors' handling police cases as a "perception of bias" rather than a "conflict of interest" and recommending state attorneys general handle police cases). One solution, followed in Wisconsin, is to assign investigation of deaths involving law enforcement officers to a state-level investigative agency unconnected to the local agency of the officer under investigation.*Wis. Stat.§§175.47*, *950.04(1v)(do)*, *950.08(2g)(h)* (2014).

[42] E.g., Criminal Justice Standards 3-1.3 (A.B.A. 2015); cf. *Braman v. Corbett, 19 A.3d 1151, 1154 (Pa. Super. Ct. 2011)* (describing a situation where a district attorney's office recused itself from decision to prosecute on a private complaint alleging the district attorney committed rape, and the state attorney general investigated and made the decision not to prosecute).

[43] For a disturbing account of prosecutorial deference to police, see Nicole Gonzalez Van Cleve, Crook County: Racism and Injustice in America's Largest Criminal Court 127-56 (2016); David A. Harris, The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How This Affects Police Reform Efforts, in The Prosecutor in Transnational Perspective 54, 55, 60-63 (Erik Luna & Marianne Wade eds., 2012) (describing reasons why the prospect of police reform through the efforts of state prosecutors is "bleak"); Nicole Gonzalez Van Cleve, Chicago's Racist Cops and Racist Courts, N.Y. Times (Apr. 14, 2016), *https://www.nytimes.com/2016/04/15/opinion/chicagos-racist-cops-and-racist-courts.html*; see also Kate Levine, The Ultimate Conflict, Slate (Sept. 11, 2014),*http://www.slate.com/articles/news_* and_politics/jurisprudence/2014/09/local_prosecutor_bob_mcculloch_should_not_be_the_one_to_decide_whether_to.html. For a harrowing account of a federal prosecutor who did not show deference to fellow law enforcement officials and faced apparent retaliation for it, see Paul Butler, Let's Get Free: A Hip-Hop Theory of Justice 1-21 (2009).

HOUSE_OVERSIGHT_016517

to assess conduct as non-negligent rather than reckless. [50] Yet even those relatively benign affinities can lead to sub-optimal enforcement policies that might benefit from redundant evaluation of charging decisions.

B. Other Contributions to Underenforcement

It is worth noting that prosecutors themselves might not share those biases so much as take account of them in a local community and jury pool. Expecting juries will be unreceptive to a case is one reason that some prosecutors cite for not charging in some cases. There is evidence for this with regard to hate **[*859]** crimes against LGBT victim groups, for example, [51] and the difficulty prosecutors have faced in convicting police officer defendants is a well-recognized hurdle in police violence cases. [52] The same considerations can cut against prosecutions when victims are undocumented immigrants, sex workers, prisoners, and suspects in custody. [53] Redundant enforcement authority can do less to redress this barrier, although depending on its form, it is not powerless. A separate prosecuting authority might bring better investigation and fact development, or different jurisdictional rules that change the composition of jury venires. [54]

Inadequate funding for criminal justice agencies can also play a role in aggravating areas of unjustified underenforcement. Lack of public resources is an accepted (and inevitable) justification for declining to prosecute in some cases where evidence is sufficient to prove guilt. [55] But funding constraints are **[*860]** not an affirmative good on par with other policy-based, public-interest justifications for non-prosecution, such as judgments finding that civil, regulatory, or public-health remedies are preferable to criminal sanctions, or concluding that third-party harms outweigh prosecution's benefits. [56] Resource constraints are a problem justice systems would like to minimize. Two of the three primary forms of enforcement redundancy do exactly that, or have in the past. Expanding federal law enforcement jurisdiction over crimes already within state jurisdiction was designed to bring federal resources to bear on crimes where state resources were insufficient. [57] And private prosecution, where it **[*861]** still exists, has an equivalent effect - it permits victims to contribute private funds to public enforcement efforts. It is no coincidence that common law jurisdictions relied on private prosecution most heavily - through the mid-nineteenth century - when state capacity, including criminal justice infrastructure, was much thinner. [58]

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[44] See, e.g., Paul D. Butler, Poor People Lose: Gideon and the Critique of Rights, *122 Yale L.J. 2176, 2204 (2013)* (describing protest movements and other responses to racially disparate criminal justice policies); Roseanna Sommers, Will Putting Cameras on Police Reduce Polarization?, *125 Yale L.J. 1304, 1307-17 (2016)* (describing polarized public perceptions of, and protests against, police uses of force and non-prosecution of police); What We Believe, Black Lives Matter, *https://blacklivesmatter.com/about/what-we-believe* (last visited Oct. 30, 2018).

[45] See Avlana Eisenberg, Expressive Enforcement, *61 UCLA L. Rev. 858, 861-64 (2014)* (studying the reasons prosecutors choose not to charge hate crimes); Natapoff, supra note 28 (summarizing evidence of underenforcement of crimes against prostitutes, undocumented immigrants, residents of certain low-income neighborhoods, and drug-crime suspects); see also Human Rights Watch, supra note 22, at 102 ("In fiscal year 1997, the [DOJ] Civil Rights Division received a total of 10,891 complaints [against law enforcement officers], … leading to twenty-five indictments and informations, involving sixty-seven law enforcement agents; nine were convicted, nineteen entered guilty pleas, and four were acquitted."); Ryan Gabrielson et al., Deadly Force, in Black and White, ProPublica (Oct. 10, 2014), *https://www.propublica.org/article/deadly-force-in-black-and-white* ("Analysis of killings by police shows outsize risk for young black males.").

[46] See Kennedy, supra note 2, at 29-75 (providing a broader account of complaints about law enforcement providing insufficient protection to black communities); Rod K. Brunson & Ronald Weitzer, Police Relations with Black and White Youths in Different Urban Neighborhoods, 44 Urb. Aff. Rev. 858, 876 (2009) ("Perceived police under-protection or poor service in poor, minority neighborhoods has been complained about for generations … .").

[47] Michael Javen Fortner, Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment 173-216 (2015) (describing support from working-class and middle-class blacks for punitive drugs laws in the 1970s as a means to fight growing disorder in black communities); Kennedy, supra note 2, at 351-86; David A. Sklansky, Cocaine, Race, and Equal Protection, *47 Stan. L. Rev. 1283, 1285-90 (1995)* (describing the effects of anti-cocaine laws on black communities). Underenforcement of criminal law by southern states through the 1960s, when civil rights activists were the victims, are another example.

When resource constraints remain, however, they force officials to choose which cases get priority. That creates more opportunity for biases and favoritism to play a role in determining which cases to charge and which to forgo. That is especially so with crimes in which evidence development is more costly, so officials have to decide whether to invest scarce resources in those that require substantial investigative efforts. Both sexual assault and police violence cases often require larger-scale investments to develop evidence sufficient for prosecution. Failures to make those investments are common reasons for non-prosecution in both contexts. [59]

II. MECHANISMS OF PROSECUTORIAL ACCOUNTABILITY

For a range of reasons and across a range of contexts, public prosecutors' failures to enforce criminal law have been of sufficient concern to lead contemporary justice systems to devise checks against unjustified underenforcement. Approaches take three basic forms: (1) limited authority for private parties to initiate or participate in criminal prosecutions; (2) independent review of initial non-prosecution decisions, upon petition from a **[*862]** victim; and (3) multiple, independent public prosecution agencies with independent authority to bring charges for the same wrongdoing. Outside the United States, the first two options predominate; their expansion in recent years is a direct consequence of broader reforms to expand crime victims' rights. [60] U.S. jurisdictions, however, rely almost wholly on the third model. Despite having adopted otherwise expansive victims' rights laws in recent decades in response to an influential movement for crime victims' rights, state and federal laws consistently and explicitly avoid granting any formal authority to private parties, or courts, over criminal charging. The next three Sections provide an overview of these options, where they exist. Largely with regard to U.S. policy choices only, they also suggest reasons that one model prevailed over others.

A. Victim Rights and Private Versus Public Interests

In the wake of victims' rights movements in North America and Europe, crime victims now have an array of legal rights once criminal charges are filed. Victims in the U.S. and European jurisdictions now commonly have rights to participate that include rights to consult with prosecutors, to be notified of and present at court proceedings, and to offer statements at stages such as hearings on bail, sentencing, and parole. [61]

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[48] See Daniel Duane, Is It O.K. to Kill Cyclists?, N.Y. Times (Nov. 9, 2013), *https://www.nytimes.com/2013/11/10/opinion/sunday/is-it-ok-to-kill-cyclists* .html (discussing failures to prosecute motor vehicle drivers who injure or kill bicyclists); see also BikeMaps.org, *https://bikemaps.org* (last visited Oct. 30, 2018) (displaying a crowd-sourced map of locations of cyclist injuries and fatalities).

[49] See John F. Decker, Don't Forget to Wear Your Hunter Orange (or Flack Jacket): A Critique on the Lack of Prosecution of Hunting "Accidents," *56 S.C. L. Rev. 135, 166-73 (2004).*

[50] See id.; Duane, supra note 48.

[51] Eisenberg, supra note 45, at 893-96 (discussing data from prosecutor interviews). In the contexts Eisenberg describes, prosecutors typically forgo hate-crime offenses in favor of other charges rather than declining to prosecute altogether. Though the focus here is on prosecutors, they may not be the key cause of underenforcement. For similar reasons, police may not investigate or arrest in such cases, or if they do prosecution can be undermined by lax evidence-gathering. Police practices are the focus on much of the scholarship on underenforcement of certain offenses. Much of the literature on inadequate enforcement of sexual assault crimes focuses on weaknesses in the police rather than prosecutors. See, e.g., Tuerkheimer, supra note 28, at 1292-99 (discussing evidence of police bias).

[52] See, e.g., Alan Blinder, Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence, N.Y. Times (Dec. 7, 2017), *https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html* (explaining that an officer pled guilty in federal court after a 2016 prosecution in state court ended with a hung jury).

[53] See Natapoff, supra note 28.

[54] See, e.g., id.

[55] See U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.230 cmt. 1 (1997) (recognizing limited prosecution resources); see also Human Rights Watch, supra note 22, at 99 (listing "lack of investigative or prosecutorial resources" among the most common reasons noted by the federal Civil Rights Division for declining to prosecute); U.S. Dep't of Justice, FY 2013 Performance Budget: Civil Rights Division 39 (noting that strengthening of civil rights enforcement efforts under the "Vulnerable People Priority" policy "has been reversed because full

Under the criminal justice systems of all other major common law countries and nearly all European states, victims' rights also include authority to challenge prosecutors' decisions not to prosecute, either by a limited right to initiate prosecutions as private parties or by enabling victims to trigger judicial or **[*863]** administrative review of noncharging decisions. [62] By contrast, nearly every U.S. jurisdiction rejects these mechanisms. State and federal laws consistently avoid permitting victims any power to challenge or encroach on public prosecutorial authority. Federal law, for example, explicitly dictates that "nothing in this [victims' rights] chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." [63] State statutes manifest the same policy in various ways, such as by prohibiting legal remedies for violations of participation rights they create. [64] U.S. laws limit victims' participation to "non-dispositive" forms, such as providing information and personal statements to prosecutors, judges, and parole boards, which facilitates victims' influence on public officials' decisionmaking. [65] But state and federal policy rejects enlisting victims as "agents of accountability" for public prosecution. [66]

In U.S. jurisdictions and elsewhere, the conceptual innovation of victims' rights laws was to recognize victims' distinct private **[*864]** interests in public criminal litigation. Most rights are specific entitlements to advance victims' broader, dignitary right to be "treated with fairness and with respect for the victim's dignity." [67] These provisions conceive of victims as "agents of individual rights" and "independent from systemic interests," and their interests can either conflict or align with those of law enforcement. [68] At the same time, victim participation rights can also be understood to serve a broader public interest in procedural outcomes, on the premise, for example, that prosecutors' and judges' decisions will improve with direct input from victims. Public decisionmaking risks substantive deficiency, and criminal process would be procedurally deficient, without due regard for victims' interests. Jurisdictions that empower victims to challenge non-prosecution decisions enable private parties themselves to address the problem of criminal law underenforcement. The remainder of this Section provides some detail on contemporary forms of private prosecution authority, their capacity to advance public as well as private interests, and reasons for its absence (or demise) in U.S. jurisdictions.

1. Private Prosecution in the Shadow of Public Prosecution

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funding of these program areas was not provided"). In specific contexts as diverse as tax law and marijuana control, legislators intentionally limit enforcement budgets in order to restrict enforcement efforts. See Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, *46 UCLA L. Rev. 757, 793-99 (1999)* (discussing agency budget appropriations as a mechanism of congressional control over some agencies, such as the IRS, more than others, such as the FBI); Rachael Bade, Republicans Seek to Cripple IRS: The GOP's Moves Will Gut the Tax Agency, Advocates Warn, Politico (Dec. 11, 2014), *https://www.politico.com/story/2014/12/republicans-irs-regulations-113484* (quoting a senator's aim to use "the power of the purse" to "push back on the regulatory overreach" of the IRS and EPA); Douglas A. Berman, Mixed Outcomes for Marijuana Reform Efforts in Latest Omnibus Spending Bill from Congress, Sent'g L. & Pol'y Blog (Dec. 16, 2015),*http://sentencing.typepad.com/sentencing_law_and_policy/2015/week51/index.html* (describing H.R. 4660, enacted as part of a spending bill, which prohibited spending of Justice Department funding to hinder state medical marijuana policies).

[56] See, e.g., Crown Prosecution Serv., The Code for Crown Prosecutors 4 (2013), *https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf* (providing guidelines for England and Wales). Familiar policies include declinations based on first-offender or drug-court diversion programs, the adequacy of civil penalties, a policy preference for public health responses to drug abuse, and - with regard to marijuana - federal deference to state policymaking. See Memorandum from James M. Cole, Deputy Attorney Gen. to U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013),http://www.justice. gov/iso/opa/resources/3052013829132756857467.pdf (describing Justice Department policy not to prosecute marijuana dealers who comply with state law). For local examples, see Joseph Goldstein, Spare a Swipe? New York City Eases Rules for a Subway Request, N.Y. Times (Apr. 17, 2016), *https://www.nytimes.com/2016/04/18/nyregion/spare-a-swipe-new-york-city-eases-rules-for-a-subway-request.html* (describing a new policy "by the Manhattan district attorney's office to no longer prosecute people arrested for minor infractions such as swipe-begging, smoking in the subway, or taking up two seats on a subway car"); Greg LaRose, No Arrests for Pot Possession in New Orleans, Council Decides, Nola.com (Mar. 17, 2016), *https://www.nola.com/politics/index.ssf/2016/03/marijuana_possession_* city_coun.html (reporting city council vote to expand range of marijuana offenses for which police do not have to arrest offenders or charge as state criminal misdemeanors); Max Taves & Justin Scheck, San Francisco Police Ease Drug Enforcement, Wall St. J. (Aug. 1, 2012), *https://www.wsj.com/articles/SB10000872396390444226904577559243414878630* (describing police treating drug possession crimes as a low priority in part because the chief prosecutor "looks at drug possession as a health issue"). Seattle city voters in 2003 approved Initiative 75, which established adult personal marijuana use as "Seattle's lowest law enforcement priority." Seattle Voters Approve Initiative Making Marijuana Enforcement City's "Lowest Priority," NORML (Sept. 18, 2003),*http://norml.org/news/2003/09/18/seattle-voters-approve-initiative-making* -marijuana-enforcement-city-s-lowest-priority.

HOUSE_OVERSIGHT_016520

Public prosecutors now dominate enforcement decisions in both common law-based and civil law-based justice systems worldwide. That is hardly surprising, given the far-reaching regulatory scope of modern criminal law and high expectations that the state will ensure security against social disorder and innumerable harms, and will intervene in risk creation long before manifest criminal conduct or injury. [69] That agenda requires capacity, resources, and expertise that only public agencies can marshal. Moreover, a criminal enforcement regime that relied heavily on private plaintiffs would be one skewed against redress for poor victims who cannot bear litigation costs to vindicate their own interests. [70] Without safeguards, such a regime **[*865]** also could be at the mercy of the varied, perhaps idiosyncratic motives and interests of private actors lodging criminal complaints.

Still, many countries continue to authorize private citizens to initiate criminal prosecutions when public officials do not, and others allow privately funded attorneys to assist or supplement public prosecutors in litigating criminal cases. Canada, Australia, New Zealand, and England and Wales all continue to allow private prosecutions, [71] and fifteen of the twenty-eight member states of the European Union grant victims some comparable **[*866]** authority. [72] Details vary across jurisdictions, but everywhere private prosecutors' authority is limited by oversight from public **[*867]** prosecutors and courts. [73] The standard common law model is that public prosecutors retain the power to take over privately filed charges and then either try the case themselves, negotiate a plea bargain, or - more commonly when intervention occurs - dismiss the charges altogether. In this framework, private actors can press charges when public officials do not, but functionally they serve primarily as a mechanism for political accountability. Through private charging in the wake of public prosecutors' declination, victims force public officials to justify publicly their reasons for not charging and for vetoing privately filed charges - and to do so on grounds other than public resource constraints, given that a private actor has offered to bear the costs. Given the private cost barriers and the capacity of public prosecution agencies, it is unsurprising that, even where permitted, privately initiated charges nonetheless contribute to a tiny fraction of prosecutions on criminal dockets. [74]

2. Abolition of Private Prosecution in State Criminal Justice

U.S. jurisdictions are comparative exceptions; nearly all long ago prohibited privately initiated prosecutions, [75] even though in other contexts private actors continue to enforce public law in service of public interests. [76] But private criminal charges were

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[57] See Harmon, Policing Reform, supra note 21, at 20-51. Federal funding to state and local enforcement agencies is a more direct example of supplementing resources. Federal influence over local enforcement policies that comes with such funding is an attenuated version of enforcement redundancy. Id. at 66.

[58] On staffing of state prosecutor offices in the nineteenth century, see Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780-1940, at 11-23 (2013).

[59] On sexual assault cases (especially reasons for not testing evidence gathered in rape kits), see Campbell et al., supra note 38, at 60-100; Tuerkheimer, supra note 28, at 1297. On police use-of-force cases, see Human Rights Watch, supra note 22, at 99 (reporting that the Justice Department Civil Rights Division's "most common reasons for declining prosecution were: weak or insufficient admissible evidence … ; lack of evidence of criminal intent; … and lack of investigative or prosecutorial resources"). For a good analysis of how police shootings of "unarmed victims" vary widely in critical factual details and why many are justified, see Heather Mac Donald, Black and Unarmed: Behind the Numbers: What the Black Lives Matter Movement Misses About Those Police Shootings, Marshall Project (Feb. 8, 2016), https://www .themarshallproject.org/2016/02/08/black-and-unarmed-behind-the-numbers.

[60] See, e.g., Council Directive 2012/29, 2012 O.J. (L 315) 57 (EC), http://eur -lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029 (defining standards for treatment and rights of crime victims in E.U. member states); Marie Manikis, Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition, in Oxford Handbook on Criminal Process (Darryl K. Brown et al. eds., forthcoming 2019) (manuscript at 18-19) (on file with author).

[61] For an overview of victim rights in Europe, see Slawomir R. Buczma, An Overview of the Law Concerning Protection of Victims of Crime in the View of the Adoption of the Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in the European Union, 14 ERA F. 235, 239-41 (2013). On U.S. jurisdictions, see Crime Victim Rights Act (***CVRA***), *18 U.S.C. § 3771*(a) (2012) (enumerating the federal rights of victims of crime); Michael Solimine & Kathryn Elvey, Federalism, Federal Courts, and Victims' Rights, *64 Cath. U. L. Rev. 909, 913-14 & nn.30-31 (2015)* (collecting all thirty-two state constitutional provisions and all fifty state statutes relating to victims' rights).

[62] See infra Part II.B.

HOUSE_OVERSIGHT_016521

once common and significant in many state justice systems. U.S. colonies and states created public prosecution offices much earlier than England. [77]

[*868] Even so, in the nation's earliest decades, those officials were often part-time or short-term officials, whose duties were often primarily quasi-judicial or administrative. [78] For those reasons, in many states those officials coexisted alongside private prosecutors with whom they shared some similarities. Early public prosecutors were paid by the case or the conviction [79] and pursued cases from private complainants. [80] But by the mid-nineteenth century, every state had public prosecutor offices of some sort. [81] Increasingly, they were full-time and accompanied by **[*869]** public police forces. In this context, private prosecutions diminished, then vanished. [82]

However, because public prosecutors continued to suffer from poor funding (and consequently were held in low regard), [83] some states continued an alternate form of private prosecution: privately funded attorneys could assist in criminal prosecutions as long as the public prosecutor supervised or retained formal control. [84] This form of ancillary or supplementary private prosecution, which leaves charging decisions in public hands, is still permitted in several states. [85] Otherwise, only vestiges of private **[*870]** prosecution remain in a few states. Pennsylvania seems to have the strongest version: it permits private prosecutions for any offense upon the approval from a state prosecutor or a judge. [86] Rhode Island authorizes private prosecutions only for misdemeanors. [87] Under state common law, New Hampshire might permit the same for nonjailable offenses. [88] Beyond that, judges in many states can issue an arrest warrant or criminal summons based on a private person's testimony, but public prosecutors control whether to go forward with the case. [89]

[*871] In sum, U.S. jurisdictions are unusual among common law jurisdictions in having abolished private prosecution as a means to vindicate victims' private interests, a supplement to public enforcement resources, and a structural check on selective underenforcement from biases in public prosecutors' discretionary decisions not to charge. English authorities, in contrast, explicitly recognize this public function for private prosecution. Private actors' authority to second-guess declination decisions - charging decision redundancy - operates as "the ultimate safeguard for the citizen against inaction on the part of the authorities." [90] The only remnant of this view in the United States seems to be in Pennsylvania. Its courts view victim-initiated

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[63] *18 U.S.C. § 3771*(d)(6). Elsewhere, regarding victim complaints of rights violations to the Justice Department, the statute provides that "the Attorney General … shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant." Id. § 3771(f)(2)(D); see also *United States v. Thetford, 935 F. Supp. 2d 1280, 1282 (N.D. Ala. 2013)* ("These rights, however, do not extend to giving crime victims veto power over the prosecutor's discretion."); *Does v. United States, 817 F. Supp. 2d 1337, 1343 (S.D. Fla. 2011)* ("To the extent that the victims' pre-charge ***CVRA*** rights impinge upon prosecutorial discretion, under the plain language of the statute those rights must yield.").

[64] See, e.g., *Ohio Rev. Code Ann. § 2930.06(A)* (West 2004) ("A prosecutor's failure to confer with a victim … does not affect the validity" of a decision to dismiss charges, plea agreement, or other disposition). Only a few jurisdictions, such as California and the federal system, provide for meaningful enforcement of participation rights by, for example, allowing victims to intervene in trial proceedings to demand rights, or to appeal trial court violations; to facilitate a remedy, courts may order that a guilty plea or sentence be re-opened. See Cal. Const. art. I, § 28(c)(1) (stating that a victim may enforce a list of enumerated rights in trial or appellate court "as a matter of right"); *18 U.S.C. § 3771*(d); cf. *Paroline v. United States, 134 S. Ct. 1710, 1718 (2014)* (providing an example of a decision resulting from a victim's appeal of a restitution order).

[65] See Ian Edwards, An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making, 44 Brit. J. Criminology 967, 974 (2004) (classifying "dispositive" and "non-dispositive" forms of victim participation and putting modes of consultation, information-provision, and expression under the latter heading).

[66] See Marie Manikis, Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process, Pub. L. 63, 69 n.29 (2017).

[67] See, e.g., Ohio Const. art. I, § 10(a) (establishing victims' rights to "fairness, dignity, and respect"); Tex. Const. art. I, § 30(a)(1) (establishing victims' "right to be treated with fairness and with respect for the victim's dignity and privacy"); *18 U.S.C. § 3771*(a)(8) (establishing victims' "right to be treated with fairness and with respect for the victim's dignity").

[68] Manikis, supra note 60.

prosecutions as fulfilling the same structural purpose. Allowing private actors to begin prosecutions meets "the need for a system of checks and balances on the office of the district attorney" and "constitutes a recognition by the legislature that the office of the district attorney should be subject to a system of checks and balances." [91]

The rarity of private charges in jurisdictions that authorize them hardly justifies their abolition. Private prosecutions should be rare in well-functioning public prosecution systems, because public agencies pursue most provable cases and because private actors must bear considerable costs to press charges themselves. Moreover, other rules and institutions - including other safeguards on prosecutorial charging - endure despite few indications of their utility. There has never been a successful claim that a criminal charge violated the Equal Protection prohibition on racially biased charging, [92] but few argue the doctrine lacks at least normative value. [93] Grand juries rarely reject prosecutors' **[*872]** charging requests for indictments, but courts continue to tout them as a structural check on prosecutors. [94] Like private prosecution, these safeguards may work by deterring biased or ill-conceived prosecutorial decisions; their efficacy is probably impossible to measure.

A contributing explanation for the U.S. aversion to private prosecution may lie in a familiar theme of U.S. law and history: race. During the first several decades of the nineteenth century, when private citizens could prosecute crimes, many states - and not only Southern ones - either denied African Americans legal capacity as litigants [95] or barred them from testifying under oath on the basis of race. Among other effects, those barriers barred private prosecutions by African Americans. [96] After 1865 - an era in which rights to litigate and testify were viewed by many as more meaningful than the right to vote [97] - those race-based legal disabilities were abolished. [98] In the same period, private charging authority, already on the decline, was abolished in most **[*873]** states that still permitted it. States that retained a formal litigation role for crime victims did so by allowing privately funded attorneys to assist in prosecutions filed and controlled by public prosecutors, thus ensuring that public officials are the exclusive gatekeepers of criminal law enforcement. Between the 1840s and 1860s, prosecutors had become locally elected officials in nearly all states. That effectively aligned their charging monopoly with the preferences of local white majorities (or white minorities in localities in which black citizens were the majority, once Southern whites succeeded in disenfranchising black citizens). [99] Evidence for the relationship between race and the demise of private prosecution is

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[69] Among myriad examples are crimes of preparation, conspiracy, possession of contraband, consensual exchanges (e.g., of drugs or sex for money), and many kinds of criminal attempts. See Andrew Ashworth & Lucia Zedner, Preventive Justice 95-118, 171-223 (2014).

[70] Douglas Campbell, 2 The Puritan in Holland, England, and America 444 (1892) (criticizing the English system of private prosecution as one "by the rich for the rich"); Joan E. Jacoby, The American Prosecutor: A Search for Identity 17 (1980). German victims who challenge a non-prosecution decision must put up security to cover the public costs of judicial review. See Strafprozessordnung [StPO] [Code of Criminal Procedure], § 176, translation at *https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo* .html; Ante Novokmet, The Right of a Victim to a Review of a Decision Not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of Its Transposition in Germany, Italy, France and Croatia, 12 Utrecht L. Rev. 86, 94 (2016).

[71] For England and Wales, see Prosecution of Offences Act 1985, c. 23, § 6, *https://www.legislation.gov.uk/ukpga/1985/23* (stating that the creation of Crown Prosecution Service shall not "preclude any person from instituting any criminal proceedings or conducting any criminal proceedings"). For Canada, see, for example, Ontario Provincial Offences Act, R.S.O. 1990, c. P.33; Director of Public Prosecutions Act, S.C. 2006, c 9, § 121, para. 3(3)(f) (describing DPP "duties and functions," which includes "exercising the authority of the Attorney General respecting private prosecutions, including to intervene and assume the conduct of - or direct the stay of - such prosecutions"); Private Prosecutions, Ministry Att'y Gen., *https://www.attorneygeneral.jus.gov.on.ca/english/private_prosecution.php* (last modified Oct. 29, 2015) (describing private prosecutions and noting "the Criminal Code and the Crown Attorneys Act authorize Crown Counsel to supervise privately laid charges to ensure that such prosecutions are in the best interest of the administration of justice" and to "take over the prosecution" of indictable offences); Private Prosecutions, Pub. Prosecution Serv. Can.,*http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch26* .html (last modified Dec. 24, 2008). For Australia, see, for example, Director of Public Prosecutions Act 1983 s 10(2) (Austl.) (preserving private prosecution); id. s 9(5) (giving the Director power to take over a prosecution for a Commonwealth offence that has been instituted by another and either carry on or discontinue it); Annual Report 2014-15, Commonwealth Dir. Pub. Prosecutions (2015), *https://www.cdpp.gov.au/2014* -15-annual-report-html-0 (reporting three private prosecutions in 2014-15, two of which were discontinued by the DPP); see also Director of Public Prosecutions Act 1984 (Queensl.) s 10(c)(2) (Austl.) (giving DPP the power to "take over and conduct" criminal proceedings); Director of Public Prosecutions Act 1986 (N.S.W.) s 9 (Austl.) (using similar language to Commonwealth DPP Act); Dir. of Pub.

HOUSE_OVERSIGHT_016523

correlative rather than causal, but it nonetheless suggests a reason for why state justice systems took a different path from other common-law jurisdictions and abolished private charging. Local white majorities had little need for a structural check on prosecutors they elected, and they likely did not want a way for African-American citizens to challenge prosecutors and independently pursue their interests in criminal courts. Prosecution redundancy would reduce the control of local majorities to dictate enforcement policies, including preferences for selective underenforcement.

B. Judicial and Administrative Review of Decisions Not to Charge

A second structure that creates some redundant authority over decisions not to prosecute exposes those prosecutorial decisions to review, either by courts or by supervising officials within an administrative hierarchy. As with private prosecution, this mechanism is almost nonexistent among U.S. jurisdictions, with the significant exception of federal law. But this option has gained ground elsewhere, in England and throughout E.U. countries. In all these contexts, its adoption responds to demands for expanded victims' rights in the criminal process. This Section briefly surveys prominent examples of noncharging review in federal law and Europe, then considers why state justice systems uniformly reject it.

[*874]

1. Oversight of Declination Decisions in Europe

Pursuant to an E.U. Directive, [100] twenty-five of the twenty-eight member states of the European Union grant crime victims formal rights to seek review of decisions not to file criminal charges based on their complaints. [101] The details of these review procedures vary. Some authorize judicial review of prosecutors' decisions; most jurisdictions, including Scotland and France, provide at least a means for review by independent officials within the prosecution agency, perhaps with an additional possibility for judicial review. [102] Although E.U. nations with common law-based legal systems, such as Ireland, Northern Ireland, [103] and England, have adopted versions of this practice, the **[*875]** practice is more established in civil law jurisdictions, likely because it is consistent with the longstanding duty in some civil law countries of mandatory prosecution. [104]

Prosecutions Vict., Annual Report 14-15, at 86,*http://www.opp.vic.gov.au/getattachment/8bc2fefc-8715-4516-9fb8-57ea3e4b6342/OPP_Annual_Report_14_15_Full_web* .aspx (noting that pursuant to discretion granted under § 22(b)(ii), the DPP took over and dismissed one private prosecution instituted for an "improper purpose"). Regarding New Zealand, see Criminal Disclosure Act 2008 (N.Z.); Criminal Procedure Act 2011 (N.Z.); Crown Law, Solicitor-General's Prosecution Guidelines 4 (2013), http://www .crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf. Scotland is much more restrictive. See Criminal Procedure (Scotland) Act 1975, c. 21, § 310A (Scot.) (stating in a provision added in 1996 that "except where any enactment otherwise expressly provides, all prosecutions under this Part of this Act shall be brought at the instance of the procurator fiscal"); Frazer McCallum, Scottish Parliament Info. Ctr., The Scottish Criminal Justice System: The Public Prosecution System 2 (2016), http://www .parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-47_The_ Scottish_Criminal_Justice_System_The_Public_Prosecution_System.pdf ("Prosecutions by private individuals are possible in some circumstances, but are very rare."). Before 1995, judicial approval was granted for only two private prosecutions in Scotland in the twentieth century. See Woman Loses Attempt to Bring Private Prosecution. Judges Reject Move on Rape Case, Herald Scot. (June 1, 1995), *http://www.heraldscotland.com/sport* /spl/aberdeen/woman-loses -attempt-to-bring-private-prosecution-judges-reject-move-on-rape-case-1 .677607.

[72] See Challenging the Decision Not to Prosecute, Eur. Union Agency for Fundamental Rts. (2014) [hereinafter FRA Report], *http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support* -services/prosecution (summarizing policies of EU nations). This source arguably overstates private-prosecution jurisdictions by characterizing "private prosecution" broadly to include states, such as France, in which victims can initiate petty offense charges and inquiries by investigating judges but may pursue only civil actions without public prosecutors. See Country Studies for the Project "Victim Support Services in the EU: An Overview and Assessment of Victims' Rights in Practice,' Eur. Union Agency for Fundamental Rts. (Feb. 2016), *http://fra.europa.eu/en/country-data/2016/country-studies-project-victim-support* -services-eu-overview-and-assessment-victims. For separate developments in the Council of Europe, including standards for victim assistance and procedural rights to be informed about and participate in criminal proceedings, and for a victim's right to review decisions not to prosecute, see Comm. of Ministers, Council of Eur., Recommendation Rec(2006)8 of the Committee of Ministers to Member States on Assistance to Crime Victims (2006); Comm. of Ministers, Council of Eur., Recommendation No. R (87) 4 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice (1987); Comm. of Ministers, Council of Eur., Recommendation No. R (87) 4 of the Committee of Ministers to Member States on the Protection of Workers in the Event of

HOUSE_OVERSIGHT_016524

The mandatory prosecution duty, known as the "legality principle," is itself a safeguard against selective underenforcement due to bias or favoritism. It is primarily an anti-discrimination injunction, intended to ensure that prosecutors treat like cases alike, rather than a mandate to ensure public safety and order through full enforcement. [105] Administrative and judicial enforceability of that duty is intended to ensure its effectiveness.

2. Oversight of Declination Decisions in England and Wales

The United Kingdom was an E.U. member state when the victim's right Directive was issued, [106] and its largest criminal **[*876]** justice system - the combined jurisdictions of England and Wales - provides several grounds on which victims or other aggrieved parties may obtain both administrative and judicial review of non-prosecution decisions. Yet the reasons for this relate foremost to public rather than private interests: "a decision not to prosecute, especially in circumstances where it is believed or asserted that the decision is or may be erroneous, can affect public confidence in the integrity and competence of the criminal justice system." [107]

In line with other E.U. member states, English victims can seek administrative review within the Crown Prosecution Service. The process appears to be meaningful; in recent years, between seven and thirteen percent of prosecution decisions challenged in this way have been reversed. [108] Moreover, noncharging decisions are also subject to judicial review - a policy rarely seen in other common law jurisdictions. [109] The standard is deferential, but English courts do periodically overturn non-prosecution decisions after evaluating them against written standards in the Code for Crown Prosecutors and other guidelines. [110] English courts have disapproved of decisions not to prosecute upon finding they were based on an unlawful policy [111] or were found to be **[*877]** "perverse" under a general reasonableness standard. [112] And in particular contrast to U.S. law with regard to lethal force by police, English judges give special scrutiny to cases that arise from deaths in state custody, which by their nature raise the specter of prosecutorial favoritism toward fellow law enforcement officials. [113]

Employers' Insolvency (1987); Comm. of Ministers, Council of Eur., Recommendation No. R (85) 11 of the Committee of Ministers to Members States on the Position of the Victim in the Framework of Criminal Law and Procedure (1985). For analysis of Directive 2012/29 as well as Council of Europe recommendations, see Buczma, supra note 61, at 242-48. In Germany, victims can initiate a private prosecution for certain minor offenses, and for more serious offenses may take a formal role as accessory prosecutors with rights to participate in proceedings and to be heard before charges are dismissed. See Strafprozessordnung [StPO] [Code of Criminal Procedure], §§374-94, translation at *https://www.gesetze-im-internet.de/englisch_* stpo/englisch_stpo.html (describing rights of privateklage); id. §§153, 395-402 (describing rights of nebenklager); see also id.§§403-406c (describing compensation); id. § 172 (describing victim's right to seek court order to compel public prosecution); Michael Bohlander, Principles of German Criminal Procedure 25, 64 (2012).

[73] This describes, for example, the German system that allows private parties to act as accessory prosecutors alongside public prosecutors. See Strafprozessordnung [StPO] [Code of Criminal Procedure],§§153, 395-402 (describing rights of nebenklager).

[74] See, e.g., Commonwealth Dir. of Pub. Prosecutions, supra note 71 (reporting three private prosecutions in federal courts in 2014-15).

[75] By the end of the nineteenth century, state and federal justice systems were firmly committed to the principle that prosecution is an exclusive power of public officials in which private victims have no role or standing. See *Malley v. Lane, 115 A. 674, 676 (Conn. 1921);* cf. *Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)* ("[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution… . In American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

[76] See Manikis, supra note 66.

[77] See Jacoby, supra note 70, at 5-7; Jack M. Kress, Progress and Prosecution, 423 Annals Am. Acad. Pol. & Soc. Sci. 99, 100 (1976); Allen Steinberg, From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History, 30 Crime & Delinq. 568, 571-72 (1984) (finding that private prosecutions predominated in the colonies). In 1704, Connecticut established what was probably the first public prosecutor's office. See Jacoby, supra note 70, at 17; Kress, supra, at 103. When Blackstone described criminal law as predominantly directed at public wrongs, he did so in the context of a late eighteenth century justice system in which private prosecutions were common. See 4 William Blackstone, Commentaries on the Laws of England: Book the Fourth 5-6 (1795).

[78] See Jacoby, supra note 70, at 23 (concluding that after 1789 "for the first half-century at least" the public prosecutor was "clearly a minor actor in the court's structure" with a more judicial than executive role); Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, *99 Yale L.J. 1069, 1073 (1990)* ("First, colonial attorneys general and district attorneys performed non-prosecutorial tasks … ."); see also Steinberg, supra note 77, at 577 (noting public prosecutor's duties included responsibility

[*878]

3. Federal Oversight of Declination Decisions

In the United States, only the federal justice system provides for a process of administrative review somewhat comparable to those in E.U. member states. Federal law grants victims a right to seek review of prosecutors' decisions within the Department of Justice hierarchy, although it also explicitly bars judicial review of Justice Department decisions in this process. [114] Although decision makers in an internal review process have less institutional independence from those they review than do judges engaged in judicial review, they also have a comparative advantage in institutional expertise, which could translate into less deference to, and more meaningful oversight of, front-line prosecutors.

In addition, federal law guarantees victims "the reasonable right to confer with the attorney for the Government in the case." [115] The Department of Justice interprets this not to create a right to confer before charges are filed, reasoning that no "case" exists until charges are filed. [116] Some lower courts have interpreted the statute differently, however, and concluded that it **[*879]** creates an enforceable right for victims to confer with prosecutors before, and about, the charging decision. One held that prosecutors cannot enter a non-prosecution agreement with a suspect until they confer with victims, and that if they fail to do so the court can order prosecutors to re-open the non-prosecution agreement. [117] A few other lower federal courts have reached similar conclusions, [118] although at least two have opposing conclusions. [119]

Even in its stronger form, this is a limited entitlement, in effect, to an opportunity to try to influence charging decisions. Even the most aggressive federal courts on this point do not examine prosecutors' good faith during consultations or their reasons for disagreeing with victims. In sum, neither the consultation right nor the right to review by Justice Department supervisors infringes federal prosecutors' monopoly power over charging from judicial oversight.

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for the court calendar). England had no full-scale prosecution agency until the creation of the Crown Prosecution Service in the Prosecution of Offences Act 1985. See Prosecution of Offences Act 1985, c. 23. The Director of Public Prosecutions office was established in 1879, but it supplemented rather than displaced private prosecution. See Glanville Williams, The Power to Prosecute, Crim. L. Rev. 596, 601-03 (1955) (noting 1879 creation of Director of Public Prosecutions and describing police as de facto public prosecutors).

[79] See Parrillo, supra note 58.

[80] Professional police forces did not arise until the 1850s, so victims investigated crimes and arrested offenders. See Peggy M. Tobolowsky, Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime, 25 New Eng. J. Crim. & Civ. Confinement 21, 25 (1999) (explaining that, to arrest offenders, victims could enlist the "aid of the local watchman, justice of the peace, or constable for whose assistance the victim paid").

[81] See, e.g., Mike McConville & Chester Mirsky, Jury Trials and Plea Bargaining: A True History 25-42 (2005) (describing early systems in New York of judicial or gubernatorial appointment of prosecutors, until the office first became elective in 1847); Allen Steinberg, The Transformation of Criminal Justice: Philadelphia, 1800-1880, at 152-58 (1989) (stating that Philadelphia first elected its district attorney in 1850). Prosecutors as well as judges became elected positions in many states as part of a wave of state constitutional reform in the mid-nineteenth century. See, e.g., Ind. Const. art. 7, § 11 (1851); Md. Const. art. 5 (1851); see also id. art. 3 (forbidding creation of state attorney general office); Mich. Const. arts. 8, 10 (1850); N.Y. Const. art. 10 (1846); N.C. Const. art. 4, § 29 (1868); Va. Const. art. 6,§§6, 8, 30 (1851).

[82] See Jacoby, supra note 70, at 6 (arguing that American prosecutors evolved from weak to strong figures largely because they were popularly elected and tied to local government organization). Public and private prosecutors coexisted for a few decades in some places. See *Cantrell v. Commonwealth, 329 S.E.2d 22, 25 (Va. 1985)* (describing the history of private prosecution in Virginia); State v. Stein, 30 S.C.L. (1 Rich.) 189, 190 (S.C. 1845) (affirming that private individuals may file criminal or civil actions for the same offense but must elect the form before trial); Corley v. Williams, 17 S.C.L. (1 Bail.) 588, 588-89 (S.C. 1830) (providing an example of private prosecution). Pennsylvania and New York relied heavily on private prosecutors for criminal law enforcement before 1850. See *Stewart v. Sonneborn, 98 U.S. 187, 198 (1879)* (Bradley, J., dissenting) ("Every man in the community, if he has probable cause for prosecuting another, has a perfect right, by law, to institute such prosecution, subject only, in the case of private prosecutions, to the penalty of paying the costs if he fails in his suit."); McConville & Mirsky, supra note 81 (describing New York courts with private prosecutors and, prior to 1847, judicial or gubernatorial appointments of public prosecutors); Steinberg, supra note 81, at 24-69, 152-57 (describing private prosecutions, screened by aldermen acting as magistrates, and creation of elected district attorney's office in 1852).

[83] Robert M. Ireland, Privately Funded Prosecution of Crime in the Nineteenth-Century United States, 39 Am. J. Legal Hist. 43, 44-45 (1995) (recounting numerous comments by state supreme courts on the low quality and inadequate funding of public prosecutor offices).

[*880]

4. Oversight of Declination Decisions in State Justice Systems

State justice systems do not go as far as the federal system does, much less provide the kind of oversight or victim recourse that European systems now offer. And this is so despite the fact that all states have adopted substantial victims' bills of rights, nearly all of which include rights for victims to consult with prosecutors. Most make clear that the consultation right attaches only after the prosecutor decides to file charges. [120] Rights of administrative review are rare. [121] One reason for that is surely structural. The U.S. Department of Justice is a hierarchically organized agency within which all federal prosecutors operate, a structure that enables supervisory and quasi-independent review within the agency. But few states follow that model. Instead, prosecutors in most states are locally elected and operate **[*881]** autonomously from state justice departments or attorneys general, which generally exercise little, if any, oversight. [122] Administrative review of state prosecutors' charging decisions is simply not feasible without major reorganization of state justice systems.

That structural barrier probably explains why state prosecutors' decisions are functionally immune to administrative oversight, but the lack of judicial oversight has a different origin. In accord with common law tradition, state and federal courts have never meaningfully reviewed public prosecutors' noncharging decisions. [123] In particular, they have unambiguously rejected victims' claims of standing to challenge those decisions. [124] A few **[*882]** limited exceptions prove the rule. In cases of private criminal complaints filed by alleged victims, Colorado, Michigan, Nebraska, and Pennsylvania authorize judges to review public prosecutors' decisions not to charge. [125] Even when statutes grant courts the power to review (or even mandate review) of charging and dismissal decisions, state judges consistently have refused to scrutinize the merits of prosecutors' judgments. Many states have replaced the common law rule that gave prosecutors complete discretion to nolle prosequi (or dismiss) any criminal charge with statutes that require judges to confirm that non-prosecution is in the interest of justice. [126] Yet courts uniformly refuse to engage in meaningful review, inferring instead that those statutes require deference to prosecutors. [127]

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[84] See *Erikson v. Pawnee Cty. Bd. of Cty. Comm'rs, 263 F.3d 1151, 1154 (10th Cir. 2001)* (finding no due process violation because private attorney assisting prosecution did not "control[] critical prosecutorial decisions"). The first states to prohibit privately funded prosecutors even under supervision of public prosecutors were Massachusetts, Michigan, and Wisconsin. See *Commonwealth v. Gibbs, 70 Mass. (4 Gray) 146, 147-48 (1855); Meister v. People, 31 Mich. 99, 104-06 (1875); Biemel v. State, 37 N.W. 244, 248-49 (Wis. 1888).* See also Ireland, supra note 83, at 49 (listing fifteen states that still approved privately funded prosecutors in 1900). Other states abolished this practice more recently. See *State ex rel. Wild v. Otis, 257 N.W.2d 361, 365 (Minn. 1977)* (holding that party has no right of private prosecution); *State v. Harrington, 534 S.W.2d 44, 48 (Mo. 1976)* (holding that a right of private prosecution should not be permitted); *People v. Calderone, 573 N.Y.S.2d 1005, 1007 (N.Y. City Crim. Ct. 1991)* (concluding that under New York law private prosecutions by interested parties or their attorneys present inherent conflicts of interest which violate defendants' due process rights); *State v. Best, 186 S.E.2d 1, 4 (N.C. 1972)* (noting that a public prosecutor must be in charge of all prosecutions).

[85] See, e.g., N.J. Ct. R. 3:23-9 (permitting private prosecutor with approval of the public prosecutor and court); N.J. Ct. R. 7:8-7(b) (permitting private prosecutor for cross-complaints with court approval); *State v. Harton, 296 S.E.2d 112, 113 (Ga. 1982)* (private party not allowed to prosecute without state approval); *State v. Moose, 313 S.E.2d 507, 512-13 (N.C. 1984)* (stating that private attorneys may assist public solicitors where public solicitors retain control and management of prosecution); *Cantrell, 329 S.E.2d at 25* (stating that private attorneys may assist commonwealth attorneys with the permission of the prosecutor and the court); *63C Am. Jur. 2d Prosecuting Attorneys § 12* (2018) (citing authority in some states that private attorneys may assist public prosecutors). For a state statute that apparently gives the "prosecuting witness" a right to pay a private attorney to assist the public prosecutor without the latter's consent, see *Kan. Stat. Ann. § 19-717* (2017); see also John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, *47 Ark. L. Rev. 511, 529, nn.71-72 (1994)* (citing cases in majority of states allowing private prosecutors to assist in public prosecutions). Bessler identifies three states that "allow private prosecutors to participate without the consent or supervision of the district attorney," but in all three states, the public prosecutor initiated and litigated the criminal charge, while the private prosecutor assisted in the litigation as counsel to a victim. *Id. at 529, n.71.*

[86] 234 Pa. Code § 506 (2001); *In re Private Criminal Complaints of Rafferty, 969 A.2d 578, 582 (Pa. 2009)* (discussing the ability of a prosecutor to approve or disapprove of private complaints). Judges may authorize private counsel to take over as prosecutor upon finding that a district attorney has "neglected or refuseed to prosecute" a properly grounded charge. See 16 Pa. Stat. and Cons. Stat. Ann. § 1409 (West

[*883] This is a stark contrast with European justice systems, but U.S. jurisdictions are not alone in shielding prosecution decisions from judicial oversight. Aside from England and Wales, courts in other common law jurisdictions - notably Canada and Australia - take roughly the same approach and defer to prosecutorial charging discretion. [128]

5. Summary of Declination Oversight

Both private prosecution and review procedures provide a kind of redundancy that checks prosecutorial declination decisions, and both can do so in service of public interests as well as victims' private interests. Both options have some capacity to challenge prosecutorial judgments affected by political or personal biases, institutional allegiances (especially between police and local politicians), or other illicit sources of favor or disfavor. As one commentator put it in the English context, private prosecution authority recognizes that victims possess some capacity to be independent "assessors of the evidence as well as the public interest." [129] Review procedures enable judges and supervisory **[*884]** officials to do much the same thing, without the cost barriers for victims posed by private prosecutions. (Although it may well be that poorer victims are less likely even to petition for review, especially if they lack legal counsel to press their review requests.)

Why, then, have U.S. jurisdictions so uniformly rejected both options? As noted, both racial politics and the power of common law tradition are probable contributing reasons. [130] Another is the singular choice of most state justice systems to make prosecutors locally elected officials, which does much to prevent kinds of over-and underenforcement disfavored by local majorities. That, in turn, likely reduces pressure for reforms that would improve other safeguards against decisions not to prosecute - especially decisions that cut against popular local preferences, which in many communities include rigorous

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2016) (authorizing victims dissatisfied with public prosecutor to petition the court and granting courts the power to allow victim's attorney to take over as private prosecutor).

[87] See 12 *R.I. Gen. Laws§§12-4-1*, *12-4-2*, *12-4-6*, *12-12-1.3* (2017); *Cronan ex rel. State v. Cronan, 774 A.2d 866, 871 (R.I. 2001)* (approving private misdemeanor prosecution for assault under state statutes).

[88] See *State v. Martineau, 808 A.2d 51, 54 (N.H. 2002);* see also *State by Tucker v. Gratta, 133 A.2d 482, 482 (N.H. 1957)* (holding that state prosecutors retain power to dismiss private criminal complaints).

[89] See, e.g., *N.C. Gen. Stat.§§15A-303*, 304 (2016); *Moose, 313 S.E.2d at 512-13* (requiring that the public prosecutor remain in continuous control of the case). Scattered marginal remnants of private enforcement may remain elsewhere, such as an Oklahoma statute providing that prosecutions for adultery (a felony) may be "commenced and carried on against either of the parties to the crime only by his or her own husband or wife." *Okla. Stat. tit. 21 § 871* (2017) ("Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime.").

[90] The Royal Commission on Criminal Procedure, 1981, Cmnd. 8092, P 7.47 (UK); see also Gouriet v. Union of Post Office Workers [1978] AC (HL) 435 at 477 (Eng. and Wales) (private prosecutions are a "valuable constitutional safeguard against inertia or partiality on the part of the authority"); cf. Manikis, supra note 66, at 67, 71 (describing review as a means to correct prosecution errors).

[91] *In re Hickson, 2000 PA Super 402, PP 22, 41;* see also *In re Piscanio, 344 A.2d 658, 660-61 (Pa. Super. Ct. 1975)* ("The judge's independent review of the complaint checks and balances the district attorney's decision and further hedges against possibility of error.").

[92] *United States v. Armstrong, 517 U.S. 456, 461-64 (1996).*

[93] Arguments for strengthening the doctrine to make claims easier to pursue are common. See, e.g., Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of Armstrong, *73 Chi.-Kent L. Rev. 605, 606 (1998)* (discussing use of the equal protection doctrine but challenging current precedent).

[94] Grand juries remain a fixture in the federal system and in roughly half the states. See Sara Sun Beale et al., Grand Jury Law and Practice § 1:5 (2d ed. 2017) (describing grand jury status and rules in states and noting states that have partially or wholly abolished grand juries); Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, *80 Cornell L. Rev. 260, 274-75 (1995)* (noting difficulty of getting data on grand jury screening and offering reasons why grand juries rarely reject requests for indictments). To extend the comparison, public officials (judges) have a long track record of doing the same task that trial and grand juries do. That available substitute did not lead to calls for juries' abolition. Yet the availability of public prosecutors as replacements led to the U.S. jurisdictions to abolish private prosecutors.

HOUSE_OVERSIGHT_016528

prosecution of excessive police uses of force. Finally, another institution responds to some of the same underenforcement problems that private prosecution and judicial review could address - redundant prosecution authority in a federal system.

C. Federalism Safeguards on Prosecutorial Discretion

The scope of the U.S. federal criminal code expanded vastly in the twentieth century, as did the federal government's institutional capacity to enforce that code and its regulatory authority more generally. The result has been a distinctive form of criminal justice federalism: federal enforcement authority wholly overlaps the territorial scope of state criminal law, and the federal code substantially overlaps much of what is covered in state criminal codes. The resulting structure of redundant federal-state authority has evolved into a means - unusual even among federal nation-states - to second-guess and effectively trump state prosecutors' declination decisions without empowering courts or private parties.

No other nation built on a federal model incorporates nearly **[*885]** the same degree of redundancy between state and federal justice systems. [131] The more common model of criminal justice federalism is found in Canada and Germany: each has a single national criminal code that is administered by separate state-level prosecution agencies and court systems. [132] Other federal states follow the U.S. model and have separate criminal codes, prosecution agencies, and court systems in each state as well as for the federal government. Australia follows this model, but the scope and jurisdiction of Australian federal criminal law is much more limited than is U.S. federal law; federal crimes are largely confined to offenses that implicate distinct federal interests - it is probably closer to U.S. federal criminal law in 1910 than 2010. The result is that in Australia federal criminal law enforcement overlaps much less with state criminal law. [133]

The broad redundancy provided by U.S. federalism enables federal prosecutors to serve as checks on underenforcement by state prosecutors, at least for some large and important categories **[*886]** of crime. In effect, federal prosecutors can review the declination decisions of state prosecutors - as well as the adequacy and success of their prosecutions - and then decide whether to file federal charges in cases that their state counterparts declined to pursue, charged too leniently, or in which they failed to win a conviction or sufficiently harsh sanctions. (In theory state prosecutors conduct the same oversight over much of

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[95] See George Fisher, The Jury's Rise as Lie Detector, *107 Yale L.J. 575, 671-96 (1997)* (discussing the impact of racial policies in post-Civil War jury and court processes).

[96] I am aware of no historical research on African American private prosecutors, and I have found no evidence of any in case law or general accounts of private prosecutions.

[97] See, e.g., Fisher, supra note 95, at 684 n.514 ("Denial to the freedman of the power to testify in court against the white man … strikes not at a mere civil franchise, but at a natural right - the right of protecting life and property. When a white man may take a freedman's life or property with impunity, if no other white men be present, the freedman has no security for either." (quoting The Progress of Reconstruction, N.Y. Times, Oct. 3, 1865, at 4)).

[98] When Southern states were compelled to grant African American citizens litigation rights, they imposed strict conditions, permitting African Americans the right to testify only when the crime victim (or the opposing civil litigant) was African American. Id. at 684. Those limitations likewise restricted African Americans' private prosecution authority, although in many places racial customs, backed by the prospect of racial violence, was probably discouragement enough. See generally Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008) (discussing history of African Americans' distrust of America's judicial system); Nicholas Lemann, Redemption: The Last Battle of the Civil War (2007) (exploring incidents after the Civil War and the impact on politics during the Reconstruction Era).

[99] Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 49-51 (2004). Northern states were not models of race-blind democracy. Connecticut voters in 1865 rejected a proposal to enfranchise African American citizens in their state. Fisher, supra note 95, at 685.

[100] See Council Directive 2012/29, art. 11, 2012 O.J. (L 315) 57 (EC) (EU), *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029* (requiring member states to give crime victims means to challenge non-prosecution decisions, either through private prosecution or a right to review).

[101] See FRA Report, supra note 72 (summarizing policies of EU member states and noting that only Cyprus and Malta provide victims neither right).

federal enforcement practice, but this is less common.) [134] State prosecutors' decisions, at least for certain categories of serious wrongdoing, face de facto review by federal executive officials.

Or so the law for a century has permitted. The constitutional double jeopardy doctrine since at least 1922 has recognized the "dual sovereignty" of state and federal governments. Notwithstanding the guarantee that no person shall "be subject for the same offence to be twice put in jeopardy," the Double Jeopardy Clause has been understood not to preclude federal prosecutors' power to charge a person who has previously been prosecuted by state officials for the same criminal conduct, and federal prosecutions likewise do not limit subsequent state enforcement efforts. [135] By granting certiorari in United States v. Gamble this term, [136] the U.S. Supreme Court is set to revisit this doctrine, which provides the foundation for the federalism-based check on underenforcement.

Federal prosecutors do not attempt to keep an eye on all state prosecution decisions and practices, and federal criminal **[*887]** law is not fully coextensive with state criminal law; significant gaps are discussed in the next Part. But the substantive redundancy is considerable. For some areas of dual authority - such as drug crimes, fraud, child pornography, and human trafficking - federal and state agencies often coordinate investigative efforts and divide up prosecution responsibilities. But federal Justice Department policy to exercise oversight of state enforcement practices in certain categories of crime is deliberate and formalized. Notable examples include state and local government corruption, excessive use of force and other wrongdoing by police, and other criminal civil rights violations. [137] Especially in these areas, federal prosecutors assess whether to file their own charges in cases in which their state counterparts declined to charge, charged too leniently, or in which they failed to win appropriate convictions. Federal prosecution in the wake of state declination is hardly the norm - it should not be, if state prosecutors decline cases for the right reasons [138] - but federal officials do remedy meaningful enforcement gaps left by state prosecutors. [139]

Functionally, this inter-governmental model of review resembles intra-agency administrative review with greater independence between initial decision makers and subsequent reviewers. Oversight of state prosecutors rests with the policy **[*888]** priorities of federal executive branch officials. The Justice Department has well-established written guidelines for much of this oversight activity, although they are not formally binding. [140] Although the Justice Department bureaucracy has a stronger

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[102] On Scotland, see Victims and Witnesses (Scotland) Act 2014, (ASP 1) § 4 ("The Lord Advocate must make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence, a decision of the prosecutor not to prosecute a person for the offence."); Crown Office & Procurator Fiscal Serv., Lord Advocate's Rules: Review of a Decision Not to Prosecute - Section 4 of the Victims and Witnesses (Scotland) Act 2014, at 5 (2015), *http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Lord%20Avocates%20Rules%20-%* 20June%2015%20v2.pdf. On France, see Novokmet, supra note 70, at 101-02. In addition to judicial review, England also provides administrative review. See Dir. of Pub. Prosecutions, Victims' Right to Review Guidance 6-9 (2016), *https://www.cps.gov.uk/sites/default/files/documents/publications/vrr_* guidance_2016.pdf (noting that victims may seek administrative review of decisions not to prosecute, which are checked in a local CPS office by a prosecutor who has not been involved with the case previously, then at the victim's request in a review by the Appeals and Review Unit); Victims' Right to Review Scheme, Crown Prosecution Serv., https://www.cps. gov.uk/legal-guidance/victims -right-review-scheme (last updated July 2016). Decisions are reviewed as questions of law - that is, whether they are correct as a matter of law, even if reasonable.R v. Killick [2011] EWCA (Crim) 1608, [2012] 1 Crim. App. 10 [48] (recognizing victim right to review under EU Directive art. 10, and noting original prosecution decision was reasonable but wrong); see also Keir Starmer, Human Rights, Victims and the Prosecution of Crime in the 21st Century, Crim. L. Rev. 777, 783-84 (2014) (describing aims of review policy).

[103] See Carlin v. Dir. of Pub. Prosecutions [2010] IESC 14, 3 IR 547, at P 12 (Ir.) ("If … it can be demonstrated that [the DPP] reaches a decision mala fide or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court." (quoting State (McCormack) v. Curran, [1987] ILRM 225, 237 (Ir.))); Office of the Dir. of Pub. Prosecutions, The Role of the DPP 16 (2015), *https://www.dppireland.ie/filestore/documents/victims_* directive_publications/ENGLISH_-_Role_of_the_DPP.pdf (noting crime victims, among others, can seek DPP review of prosecutors' decisions). On Northern Ireland, see Pub. Prosecution Serv. for N. Ir., Victims of Crime: Requesting a Review of a Decision Not to Prosecute 2-4 (2017), *https://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Rquests%20For%* 20Review/Victims%20of%20Crime%20-%20Requesting%20a%20Review% 20of%20a%20Decision%20not%20to%20Prosecute%20(October%202017).pdf.

HOUSE_OVERSIGHT_016530

institutional culture of professionalism than many state prosecutor offices, departmental policies and priorities can change substantially with presidential administrations - as they have recently. [141] Nonetheless, this federalism-based model of prosecutorial oversight has an advantage shared by the administrative review schemes within single prosecution agencies. In both settings, those with review power are prosecutors who should have greater institutional competence and legitimacy to second-guess other prosecutors' charging decisions, and consequently less inclination than courts to defer to prosecutorial judgments.

This federalist model of enforcement redundancy did not evolve from earlier common law institutional arrangements, like private prosecution, nor from the modern victims' rights movement, like judicial and administrative review of decisions not to prosecute. Federal criminal law enforcement expanded for several reasons, but behind many of those reasons is a common purpose: to remedy glaring patterns of underenforcement by the states. For example, federal law and institutional capacity (such as the advent of the Federal Bureau of Investigation) expanded in response to states' inability to confront adequately the rise of interstate violence and drug crimes (as well as, for a time, prohibition on alcohol manufacture and distribution). [142] Federal law **[*889]** took on the primary role in combatting local government corruption - including police corruption and excessive uses of force - which local prosecution agencies often lacked the ability, or political independence, to confront. [143] And federal law has long attempted to fill the gap when racially biased local police, prosecutors, and juries declined to arrest, prosecute, or convict suspects - especially white ones - who victimized black citizens. [144] In sum, the redundant enforcement

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[104] Strafprozebetaordnung [StPO] [Code of Criminal Procedure], §§152, 160, 170, translation at *https://www.gesetze-im-internet.de/englisch_* stpo/englisch_stpo.html (Ger.) (defining prosecution duty to investigate suspected crime and indict when evidence is sufficient); id. §§171-75 (providing for judicial orders to prosecute, including victim's right to seek order compelling prosecution); Bohlander, supra note 72, at 25-27, 67-71, 103-04 (describing German procedures to compel prosecutions under statutory legality principle); Novokmet, supra note 70, at 92-93. Failures to charge when required to do so can expose a prosecutor to discipline or even criminal liability. See Strafgesetzbuch [StGB] [Penal Code], § 339, translation at https://www .gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.) (establishing that rechtsbeugung, or perversion of justice, is punishable by one to five years in prison); id.§§258, 258a (establishing punishment for police or prosecutor's failure to investigate or prosecute colorable offenses).

[105] See Shawn Marie Boyne, The German Prosecution Service: Guardians of the Law? 8-10, 91-92 (2014) (quoting Hans-Heinrich Jescheck, The Discretionary Powers of the Prosecuting Attorney in West Germany, 18 Am. J. Comp. L. 508, 511 (1970)); Markus D. Dubber, Criminal Process in the Dual Penal State: A Comparative-Historical Analysis, in *Oxford Handbook of Criminal Process, supra* note 60; see also Klaus Sessar, Prosecutorial Discretion in Germany, in The Prosecutor 255, 272-73 (William F. McDonald ed., 1979). For the German example of this principle, see Strafprozebetaordnung [StPO] [Code of Criminal Procedure],§§152, 160, 170, translation at *https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html* (Ger.) (defining prosecution duty to investigate suspected crime and indict when evidence is sufficient).

authority developed as part of the modern model U.S. federalism has much in common, in functional terms, with private prosecution and review of prosecutorial declination decisions. All are mechanisms to guard against unjustified nonenforcement, or underenforcement, by jurisdictions' primary prosecution agencies. The next Part examines the relative strengths of these alternatives.

III. PROS AND CONS OF FEDERALISM-BASED ENFORCEMENT REDUNDANCY

A. Comparative Limits of Enforcement-Oversight Strategies

Each of the institutional approaches to reducing underenforcement of criminal law by public prosecutors has comparative strengths and weaknesses. All three share the common virtue of being a means to reduce instances of bias, favoritism, or other misjudgments that result in unjustified nonenforcement. All three enable outside reevaluation of declination decisions. Private prosecution empowers motivated private parties - crime victims - to initiate the challenge to a public prosecutor's decision not to charge by filing charges themselves. The same is true in jurisdictions that subject declination decisions to formal administrative or judicial review; victims trigger that process by petitioning for an independent evaluation. Both of those practices harness the motivations of interested private parties to, in effect, screen which declination decisions should be subject to reassessment, although private prosecution poses a significant cost barrier for victims who want to take advantage of it. At the same time, both of these practices give public officials the final **[*890]** word on whether a prosecution (public or private) will proceed.

The federalism route to prosecutorial oversight, by contrast, gives private parties no formal role, although victims can file complaints and lobby federal prosecutors just as they can with local police and prosecutors for any alleged crime. Put differently, federal prosecution as check on state underenforcement rests more directly on the initiative, diligence, and judgment of federal prosecutors than private victims. In some areas, federal commitment is significant. [145] But it also varies with the policy priorities of presidential administrations, which can vary considerably in their commitment to fighting certain kinds of crimes and to federal oversight of state criminal justice administration. [146]

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[106] The U.K. is scheduled to leave the European Union in 2019. See Alex Hunt & Brian Wheeler, Brexit: All You Need to Know About the U.K. Leaving the E.U., BBC (Sept. 13, 2018), https ://*www.bbc.co.uk/news/uk-politics-32810887*.

[107] R (Da Silva) v. DPP [2006] EWHC (Admin) 3204 [20] (Eng. and Wales).

[108] See Victims' Right to Review Data, CPS, *http://www.cps.gov.uk/victims_* witnesses/victims_right_to_review/vrr_data/index.html (last updated June 2017) (noting that 6.8% of appeals (137 out of 1988) succeeded in 2016-17; thirteen percent of appeals (210 out of 1674) succeeded in 2014-15). The percentage of prosecution decisions challenged in this way has been well below one percent - 0.13% in 2016-17, and 0.17% in 2014-15 - which suggests the administrative burden is manageable. See id.

[109] See Balderstone v. R (1983), 23 Man. R. (2d) 125, at para. 28 (Can. Man. C.A.) ("If a judge should attempt to review the actions or conduct of the Attorney-General - barring flagrant impropriety - he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.").

[110] Decisions to discontinue a prosecution after charging get similar scrutiny. For an example of a court finding wrongful a decision to discontinue prosecution, see R (FB) v. DPP [2009] EWHC (Admin.) 106, [2009] Crim. App. 38, at P 70 (Eng. and Wales). On prosecutor's nolle pros authority, see R v. B(F) [2010] EWCA (Crim.) 1857, [2010] 2 Crim. App. 35, at P13 (Eng.); R (Gujra) v. CPS [2013] AC 484, at 484 (Eng. and Wales). See also R v. DPP [1995] (QB) 1 Crim. App. 136, at 145 (Eng.).

[111] For leading decisions on the issue, see R v. DPP [2001] QB 330, at 344-48 (Eng. and Wales); R (Da Silva) v. DPP [2006] EWHC (Admin) 3204 [24] (Eng. and Wales); Sharma v. Brown-Antoine [2006] UKPC 57, [2007] 1 WLR 780, at 792-96 (appeal taken from Trin. And Tobogo); Marshall v. DPP [2007] UKPC 4 (appeal taken from Jam.); R v. Metropolitan Police Commr. [1968] 2 QB 118, at 119-20 (Eng.); R v. DPP (Kebiline) [2000] 2 AC 326, at P 2 (Eng.). England created its prosecution agency, the Crown Prosecution Service, only in 1985. See Prosecution Offences Act 1985, c. 23, § 1 (Eng. and Wales); Andrew Ashworth & Mike Redmayne, The Criminal Process 222-23 (4th ed. 2010). The Director of Public Prosecutions was created in 1879 but did not handle most prosecutions until the creation of the Crown Prosecution Service. In the intervening century, police came to dominate filing of criminal charges, supplemented by private prosecutions, a system that eventually was viewed as providing insufficient supervision of charging decisions by police. See Williams, supra note 78.

HOUSE_OVERSIGHT_016532

But that distinction has an upside: private prosecution and judicial review do not work in cases in which there is no direct victim - or in which private parties do not realize they have been victimized, as in some cases of large-scale corporate or government fraud, or in some cases of child pornography. [147] Federal prosecutors, however, take on just such cases as a core part of their enforcement agenda. [148] On the other hand, federal oversight is limited in other important respects: federal criminal enforcement authority is not fully coextensive with state criminal law; notably, for example, it provides effectively no enforcement redundancy for ordinary domestic violence, rape, and other sexual assault offenses. [149]

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B. Three Kinds of Offenses: Corruption, Police Violence, Sexual Assault

Consider the efficacy for these oversight options with respect three types of offenses: local fraud or corruption, excessive use of force and other wrongdoing by local law enforcement officers, and sexual assaults. These three classes of offenses have in common that they have proven to be especially vulnerable to underenforcement. At the same time, the differences in how U.S. criminal justice institutions have responded to underenforcement in each area highlight the efficacy and limits of the federalism-based enforcement redundancy compared to the alternatives - both those U.S. jurisdictions reject (private prosecution and judicial review) and a fourth, unique strategy they embrace: politically accountable prosecutors.

1. Public Corruption

Corrupt conduct by government officials is a category of wrongdoing especially likely to suffer from underenforcement, for obvious reasons: we depend on one set of public officials, prosecutors and investigative agents, to stop wrongdoing by other public officials - as well as by colleagues within their own ranks. Professional and even personal relationships often exist between these groups of public officials. Even when the boundaries between lawful and unlawful conduct are clear and law

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[112] R (Da Silva) v. DPP [2006] EWHC (Admin) 3204 [24] (Eng. and Wales) (summarizing three grounds for review and citing R v. DPP [1995] (QB) 1 Crim. App. 136 (Eng.)); R (Guest) v. DPP [2009] EWHC (Admin.) 594, [2009] 2 Crim. App. 26, at P 34 (Eng. and Wales); R v. General Council of the Bar [1990] 3 All ER 137 (QB), at 137-38 (Eng. and Wales). For an overview, see Ashworth & Redmayne, supra note 111; Christopher Hilson, Discretion to Prosecute and Judicial Review, Crim. L. Rev. 739 (1993) (examining case law regarding prosecution decisions and subsequent judicial review); Appeals: Judicial Review of Prosecutorial Decisions, CPS, *https://www.cps.gov.uk/legal-guidance/appeals* -judicial-review-prosecutorial-decisions (last updated May 21, 2009). The European Convention on Human Rights may impose affirmative obligations on member states that certain instances require prosecutions, or that more generally require a state to maintain a criminal justice system that provides sufficient protection to citizens. English courts found that their established standards of review of noncharging decisions, based in domestic law, have been held sufficient to meet any such obligation. See R (FB) v. DPP [2009] EWHC (Admin.) 106,[2009] Crim. App. 38, at P 64 (Eng. and Wales) (discussing state obligations under Articles 2 and 3); see also R v. Killick [2011] EWCA (Crim.) 1608, [2012] 1 Crim. App. 10 at [48] (confirming victims' right to review). Judges may require disclosure of internal prosecution documents, but they assess the lawfulness of nonprosecution without examining the underlying evidence. See R (Da Silva) v. DPP [2006] EWHC (Admin) 3204 [24] (Eng. and Wales) (noting use of redacted investigative report and case notes from CPS but disavowing evaluation of evidence).

[113] See R v. DPP [2001] QB 330 at 337 (Eng. and Wales); R v. Metro. Police Commr. [1958] 2 QB 118, at 123-25 (Eng. and Wales); Ashworth & Redmayne, supra note 111, at 221-22. Decisions by U.S. courts give no special solicitude to instances of nonprosecution in the wake of injuries or deaths caused by prison guards or other law enforcement officials. See, e.g., *Leeke v. Timmerman, 454 U.S. 84, 85-87 (1981)* (rejecting state prison inmates' federal civil claim alleging bad faith by state officials to block issuance of arrest warrants against guards on allegations of unnecessary beatings during prison uprising); *Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 382-83 (2d Cir. 1973)* (rejecting request, on behalf of inmates injured or killed by state prison guards in the wake of a prison riot, that federal courts compel state and federal prosecutors to charge guards, reaffirming that prosecutorial discretion is immune to judicial review). To facilitate review, English prosecutors in some circumstances must provide public reasons for choosing not to file charges. See Jordan v. United Kingdom (No. 2) [2003] 37 Eur. Ct. H.R. 52 PP 82-86, 122-23, 142-45 (holding that under article 2 of the European Convention on Human Rights prosecutors should give reasons explaining a decision not to bring criminal charges after an investigation into a death caused by police shootings); see also R v. DPP [2001] QB 330, at 347 (Lord Bingham, CJ) (Eng. and Wales) ("In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case [of non-prosecution]: to meet the reasonable expectation of interested parties that either a prosecution will follow or a reasonable explanation for not prosecuting be given … ."); EU Council Directive 2012/29, supra note 100, art. 6, at 67 (requiring explanations to victims that can be subjected to review). Irish victim rights laws that took effect in 2015 now require prosecutors to provide reasons to victims for declining to prosecute. See Mark Hilliard, New Laws on Rights of

HOUSE_OVERSIGHT_016533

enforcement can learn of misconduct done mostly in secret, political or personal incentives for enforcement officials that discourage zealous enforcement can exist for enforcement officials in the same jurisdiction - perhaps enmeshed in the same political networks. In short, underenforcement in this realm follows more from favoritism toward offenders than the biases against victim groups or types of offenses.

"Corruption" is a notoriously hard concept to define, [150] but that difficulty is actually somewhat useful for present purposes. Some of what constitutes public corruption is relatively clearly **[*892]** defined in positive law. Easy cases involve straightforward property theft or embezzlement, quid pro quo bribery, and extortion. [151] Statutes also make clear at least some cases of illegal gratuities and breaches of regulations that govern activities such as campaign finance. [152] More ambiguous or marginal cases of alleged corruption, however, illustrate the federal government's ambitious commitment to enforcing broad interpretations of federal anti-corruption laws to conduct of state and local officials. That enforcement track record demonstrates the strong commitment to enforcement redundancy in this area.

States have their own regulatory strategies to address government corruption, although independent assessments do not judge them to be particularly successful. [153] The federal government seems to share that view. The Justice Department created a Public Integrity Section within the Criminal Division in 1976, [154] and in the four decades since, federal prosecutors have **[*893]** aggressively prosecuted conduct of state and local officials that it determines breaches federal anti-corruption statutes. [155] For the past two decades, federal anti-corruption prosecutions of state and local officials typically average 350-400 per year. [156] Combatting "public corruption" is a top priority for the Federal Bureau of Investigation, on par with combating threats of terrorism, foreign espionage, and cyber-warfare. [157] And many of these prosecutions targeted wrongdoing far removed from property theft or quid pro quo bribery. [158] They extend to conduct involving undue influence, breaches of fiduciary duty, or failure to provide citizens with "honest services" [159] - wrongdoing for which the public harm is sometimes hard to identify. [160]

[*894] By some accounts, including the U.S. Supreme Court's on occasion, [161] this enforcement agenda has been overly aggressive. [162] But Congress has generally encouraged far-reaching federal enforcement, notably by expanding the scope of federal anti-corruption law in response to narrow judicial interpretation. [163] And the key point here is that the federal executive

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Crime Victims are Criticized, Irish Times (Nov. 16, 2015), http://www.irishtimes.com/news/crime-and-law/new-laws-on-rights-of -crime-victims-are-criticised-1.2431095. By contrast, seeSinger v. United States, 380 U.S. 24, 34-37 (1965) (holding that due to judicial "confidence in the integrity of the federal prosecutor," U.S. attorneys need not give reasons for refusing to consent to defendant's waiver of jury trial). For rare examples of U.S. rules requiring prosecutors to give reasons for not charging, see Colo. Rev. Stat. § 16-5-209 (2014) (requiring prosecutor's reasons upon private complaint objecting to non-prosecution); Pa. R. Crim. P. 506.

[114] Review within the U.S. Justice Department hierarchy is mandated by 18 U.S.C. § 3771(f) (2016); see also id. § 3771(f)(2)(D) (protecting Justice Department decisions from judicial review).

[115] See 18 U.S.C. § 3771(a)(5).

[116] The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 8 (2010). For a vigorous argument against the OLC position, see Paul Cassell et al., Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed, 104 J. Crim. L. & Criminology 59, 61-63 (2014) (arguing for victims' right to confer and that the right to fair treatment extends to pre-charging stage).

[117] Doe v. United States, 950 F. Supp. 2d 1262, 1267-68 (S.D. Fla. 2013) (re-opening and setting aside a pre-charge non-prosecution agreement between prosecutors and defense because prosecutor had not consulted with victim in violation of 18 U.S.C. § 3771).

[118] See In re Dean, 527 F.3d 391, 395 (5th Cir. 2008) (acknowledging lower court's interpretation of § 3771(a) before any prosecution is underway); Does v. United States, 817 F. Supp. 2d 1337, 1342-45 (S.D. Fla. 2011) (recognizing that 18 U.S.C. § 3771(a) can apply before formal charges are filed); Jordan v. Dep't of Justice, 173 F. Supp. 3d 44, 52 (S.D.N.Y. 2016) (citing In re Dean, 527 F.3d at 395); United States v. BP Prod. N. Am., Inc., No. H-07-434, 2008 WL 501321, at 11 (S.D. Tex. Feb. 21, 2008) (discussing 18 U.S.C. § 3771 and a broad duty to confer before charges are filed). Another district court refused prosecutors' request to dismiss charges before the prosecutor consulted the victim. United States v. Heaton 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (citing victim's right under 18 U.S.C. § 3771(a)(8) "to be treated with fairness and with respect for [her] dignity and privacy").

branch is firmly committed to a robust enforcement policy against local government corruption that is also criminalized under state law, and Congress has supported this agenda by enacting federal crimes intended to duplicate, or greatly overlap, state offenses. [164] In fact, federal statutes used in anti-corruption cases - **[*895]** like other federal criminal statutes - rely on and incorporate state law in federal offense definitions. In light of this structure, federal prosecutions can claim to effectuate state law goals - an especially straightforward version of federalism-based enforcement redundancy. [165]

2. Sexual Assault

In sharp contrast to public corruption, enforcement redundancy through coextensive jurisdiction is largely nonexistent for a large portion of the serious crimes that dominate state felony dockets, including sexual assaults, domestic violence, and homicide. [166] Federal law reaches only a small number of these offenses when they intersect a special basis for federal jurisdiction, such as interstate conduct - like human trafficking - or wrongs that occur on federal property or involve federal employees. [167] For most kinds of homicides, the lack of redundancy is only a modest hindrance to adequate enforcement; holding aside distinctive exceptions - such as homicides by police or racially motivated lynchings - there is little evidence to suggest patterns of homicide underenforcement in state justice systems. [168] Domestic violence and sexual assaults are a different story. Like local public corruption, sexual assaults have long been a key example of **[*896]** serious wrongdoing to which the responses of state and local criminal justice agencies have been deeply problematic. [169]

Underenforcement is hard to measure for sexual assaults as it is in other contexts, but central features of the problem are clear enough. Rape and other forms of sexual assault are dramatically underreported crimes. [170] The leading government effort to collect data on sexual assaults (and other crimes), the National Crime Victimization Survey, is widely thought to undercount incidents of those offenses. [171] And rates of victim reports to police departments are even lower. The FBI Uniform Crime Reports collects data on sexual assaults reported to local police agencies; the number is consistently well below the annual number reported in the National Crime Victimization Survey. [172]

One reason that victims do not to report rapes to law enforcement is the perception that police and prosecutors (as well as juries) are unduly skeptical of rape allegations. [173] And there is good evidence that law enforcement agencies' responses to

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[119] See In re Petersen, No. 2:10-CV-298 RM, 2010 WL 5108692, at 2 (N.D. Ind. Dec. 8, 2010) (concluding that prosecutors control charging decisions and certain victim rights under *18 U.S.C. § 3771*(a), including the right ""to confer with the attorney for the Government in the case,' … arise only after charges have been brought against a defendant and a case has been opened," although a "victim's "right to be treated with fairness and with respect for [his or her] dignity and privacy,' … may apply before any prosecution is underway" (quoting *18 U.S.C. § 3771*(a))); cf. *United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008)* (assuming without deciding that some federal victim rights may apply before any prosecution is under way, but "cannot be read to include the victims of uncharged crimes that the government has not even contemplated … [or] has not verified to at least an elementary degree").

[120] Many state laws grant victims a right to consult only "after the crime against the victim has been charged" or "regarding the charges filed." Others create only a general right to confer, or "to communicate," "with the prosecution." E.g., Alaska Const. art. I, § 24 (granting "the right to confer with the prosecution"); Ariz. Const. art. 2, § 2.1(A)(6) (granting the right to "confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition"); Cal. Const. art. I, § 28(b)(6) (granting the right to "reasonably confer with the prosecuting agency, upon request, regarding … the charges filed … ."); Idaho Const. art. I, § 22(5) (granting the right to "communicate with the prosecution"); Ill. Const. art. I, § 8.1(a)(4) (granting the right to "communicate with the prosecution"); Ind. Const. art. I, § 13(b) (amended 1996) (granting the right to "confer with the prosecution"); La. Const. art. I, § 25 (granting the "right to confer with the prosecution prior to final disposition of the case"); Mich. Const. art. I, § 24(1) (granting the "right to confer with the prosecution"); N.M. Const. art. 2, § 24(A)(6) (granting the "right to confer with the prosecution"); N.C. Const. art. I, § 37(1)(h) (granting the "right as prescribed by law to confer with the prosecution"); Or. Const. art. I, § 42(1)(f) (granting the "right to be consulted, upon request, regarding plea negotiations involving any violent felony"); S.C. Const. art. I, § 24(A)(7) (granting the right to "confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition"); Tenn. Const. art. I, § 35(a) (granting the "right to confer with the prosecution"); Tex. Const. art. I, § 30(b)(3) (granting the "right to confer with a representative of the prosecutor's office"); Va. Const. art. I, § 8-A(7) (granting the "right to confer with the prosecution"); Wis. Const. art. I, § 9m (granting an "opportunity to confer with the prosecution"); *Del. Code Ann. tit. 11, § 9405* (2018); *Ga. Code Ann. § 17-17-11* (2018); *Haw. Rev. Stat. § 801D-4(a)(1)* (2017) (granting the right of victim to be informed of the final disposition of the case); *Neb. Rev. Stat. 29-120* (2017) (requiring the prosecution to make a good faith effort to consult with victim); N.Y. Exec. Law § 642(1) (LexisNexis 2018) (providing standards for fair treatment of victims); *Ohio Rev. Code Ann. § 2930.06(A)* (LexisNexis 2018) (stating

HOUSE_OVERSIGHT_016535

sexual assault reports are ineffective. Police clearance-by-arrest rates are low. [174] Detailed studies of how police departments handle reported sexual assault cases find "substantial attrition," **[*897]** typically at the point when police decide whether to make an arrest. [175] In the Los Angeles Police Department, only one report in nine was cleared by arrest; one in ten resulted in prosecution. [176] One hurdle lies in forensic evidence development: law enforcement agencies nationwide have suffered long backlogs in testing rape evidence kits, [177] although federal funding has recently helped reduce that problem. [178]

Notoriously, things used to be much worse. Under the common law definition, rape convictions required proof that the offender used force to overcome the victim's "utmost resistance." [179] Evidence of women's - and only women's - prior sexual conduct or reputation for "unchastity" was a permissible basis on which to infer consent. [180] The law excluded rape of one's spouse from **[*898]** the offense definition. [181] Prosecutors and police were openly skeptical of rape accusations and reluctant to investigate. [182]

Yet much of this legal infrastructure intended to restrict rape law enforcement has been abolished. Rape offenses have been revised to eliminate resistance requirements, and many states also removed the requirement to prove use of force. [183] Evidence rules are now more favorable to sexual assault complainants: rape shield laws in all jurisdictions prohibit use of a complainant's past sexual behavior as character evidence or a basis on which to infer consent, [184] while evidence rules in federal courts and nineteen states permit evidence of the defendant's past sexual offenses to show propensity to commit sexual assaults. [185] Some police departments have officers specially trained in sexual assault investigations, and prosecutors' offices (as required by statute in some states) have specially trained units dedicated to sexual assault prosecutions. [186] Hospitals and **[*899]** social service agencies likewise now have staff trained in forensic interviewing and evidence-gathering in the course of aiding assault victims. [187]

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that the "prosecutor … shall confer with the victim in the case before pretrial diversion is granted … [or] before amending or dismissing a charge").

[121] No rights of administrative review are specified in the state victims' rights laws cited supra note 120.

[122] Five states place all their prosecutors within a single state agency, which at least potentially makes possible hierarchical oversight. In New Jersey, Connecticut, Rhode Island, Delaware, and Alaska, local prosecutors are appointed by, and under the supervision of, the state attorney general. See Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, Prosecutors in State Courts, 2005, at 2 (2006), *https://www.bjs.gov/content/pub/pdf/psc05.pdf* (noting Alaska, Connecticut, and New Jersey do not elect prosecutors; Delaware and Rhode Island elect attorneys general who appoint all prosecutors; all other states elect prosecutors at the local level). Id. at 11. For an example of a state attorney general's limited authority over locally elected prosecutors, see, for example,*Va. Code § 2.2-511* (2018).

[123] Equal protection and due process doctrines nominally empower courts to review charging decisions motivated by racial bias or retaliation for exercising fundamental rights, and inquiry into selective charging implicitly requires examining biased declinations as well. But these doctrines are wholly deferential to prosecutorial discretion. See *United States v. Armstrong, 517 U.S. 456, 469 (1996)* (holding that equal protection doctrine bars racially biased charging); *Wayte v. United States, 470 U.S. 598, 607-08 (1985)* (holding that due process bars charging in retaliation for exercising fundamental rights); see also *McCleskey v. Kemp, 481 U.S. 279, 312-314 (1987)* (holding that statistical evidence of bias in death penalty administration insufficient to prove constitutional violation without proving purposeful discrimination in defendant's case). For a classic account, see Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 188, 207-08 (1969) ("The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse… . The plain fact is that nine-tenths of local prosecutors' decisions are supervised or reviewed by no one.").

HOUSE_OVERSIGHT_016536

This basic overview - drawn from a substantial scholarly literature - paints a somewhat contradictory picture. On the one hand, the primary story is one of longstanding underenforcement - a combination of explicit legal policies, practical evidence-gathering and proof challenges, and cultural biases resulted in a notoriously weak response to sexual assaults by state criminal justice systems. On the other hand, there is a story, over the last forty years or so, of wide-ranging success in achieving reforms on several fronts - substantive and procedural law, institutional design, and resource allocation - designed to improve enforcement capacity. In other words, U.S. jurisdictions made substantial progress against an ingrained tradition of underenforcement without turning to any model of enforcement redundancy - federalization, private prosecution, or judicial review. That is more than state justice systems were ever able to do with regard to local government corruption, where the remedy instead was the rise of federal criminal law enforcement.

And yet, few seem to consider this reform story a success. [188] The data on underreporting by victims, low arrest rates by police, and charging rates by prosecutors (along with the rape kit **[*900]** testing backlog) make it easy to view state criminal justice systems as failing to achieve adequate enforcement responses to sexual assaults despite the scope and gravity of the problem - 124,000 offenses reported to police in 2015, and 431,000 assault reports estimated by the National Crime Victim Survey. [189]

This story of reform, its decidedly limited success, and the responses to that record all reveal insights about the prospects for redressing underenforcement through redundancy in this context. Intersecting feminist, victim rights, and rape-law-reform movements have achieved some remarkable reforms through the political process over the last four decades. U.S. criminal justice, like U.S. public law generally, is responsive to popular sentiment, well-organized reform movements, and interest groups. [190] But these movements never sought any mechanism of enforcement redundancy, and federal and state lawmakers never seriously considered one. Even now, when offense definitions, victim rights, evidentiary rules, and organizational changes in law enforcement agencies offer few plausible options for further improvement, there is effectively no sign of interest in private prosecution and judicial or administrative oversight. Instead, the sole focus of further innovation to address endemic underenforcement of sexual assault offenses is the federal government. And most federal policy - and policy proposals - stop short of expanding federal law to cover sexual assaults now within the jurisdiction solely of state courts. [191] A notable

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[124] Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (rejecting private plaintiff's challenge on federal equal protection grounds to state policy of prosecuting only married men for failures to pay child support, concluding "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); Leeke v. Timmerman, 454 U.S. 83, 84 (1981) (extending Linda R.S. to hold that private citizens have "no cognizable interest" in process by which magistrates decide whether to issue warrants on criminal complaints); cf. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 382-83 (2d Cir. 1973) (rejecting purported crime victims' request that court order prosecutors to charge).

[125] See, e.g., Colo. Rev. Stat. § 16-5-209 (2017) ("The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If … the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so."); Mich. Comp. Laws § 767.41 (2017) ("If, upon examination, the court is not satisfied with the [prosecution's] statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial."); Neb. Rev. Stat. § 29-1606 (2017) ("If, upon such examination, the court shall not be satisfied with the [prosecution's] statement, the county attorney shall be directed by the court to file the proper information and bring the case to trial."); Pa. R. Crim. P. 506(B)(2) (requiring prosecutors to give reasons for declining to prosecute a criminal complaint filed by a private party, and permitting "the affiant [to] petition the court of common pleas for review of the decision"); In re Hickson, 2000 PA Super 402, PP 12-19 (describing victim standing to seek judicial review of decisions not to prosecute based on private complaints); see also ***State ex rel. Clyde v. Lauder, 90 N.W. 564, 569 (N.D. 1902)*** ("The more modern rule, and that adopted in this state, is the reverse of that at common law. In this state, while the prosecutor may file with the court his reasons for not filing an information … it is the province of the court to determine the ultimate question whether the case shall be prosecuted or dismissed."); cf. Olsen v. Koppy, 593 N.W.2d 762, 765-67 (N.D. 1999) (citing ***Lauder, 90 N.W. 564,*** with approval).

[126] See Cal. Penal Code § 1385 (West 2016) ("The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed."); Darryl K. Brown, Free Market Criminal Justice 35-37 (2016); Valena E. Beety, Judicial Dismissals in the Interest of Justice, 80 Mo. L. Rev. 629, 640-43 (2015) (advocating for a shift in court-reviewed dismissals).

exception is Professor Donald Dripps's current proposal to expand federal criminal law to cover most sexual assault offenses - precisely the model of federal-state enforcement redundancy that **[*901]** exists now for drug crimes, corruption, police violence, and much else. [192] But otherwise, existing policies and reform proposals emphasize more modest, although meaningful, federal efforts to improve state justice administration through, for example, funding grants (as for rape kit testing) [193] and occasionally by litigation to force institutional reforms in local agencies.

In fact, federal law empowers the U.S. Justice Department to sue local police departments and other agencies, and authorizes structural injunctions to remedy systemic misconduct. [194] But the Department's use of this authority has largely focused on police violence rather than sexual assault underenforcement. [195] Various local law enforcement agencies have entered consent decrees under which they adopt institutional and policy reforms to reduce patterns of misconduct, even though federal intervention is hampered by the paucity of data on police misconduct, limited federal resources, and at times the political commitment of the presidential administration. [196] More to the point here, in only a few cases have federal officials targeted local agencies' inadequate responses to sexual assault. [197]

In sum, and in sharp contrast to public corruption, the problem of underenforcement in the sexual assault context reveals the resistance, and cost, of U.S. criminal justice to institutional structures of enforcement redundancy. Having ruled out judicial review and private prosecution from the imaginations of reform-movement activists, the only alternative is the one that U.S. criminal justice always favors - federalism. Where federal criminal law takes on an enforcement agenda, it is usually effective. [198] Where tradition, politics, jurisdictional limits, or policy **[*902]** choices restrict the reach of federal law, as with sexual assault, the U.S. justice system is largely out of options. States were willing to change substantive and procedural law in hopes of improving rape prosecutions, but not to infringe prosecutors' monopoly control of charging by expanding modes of judicial, administrative, or private-party oversight.

3. Police Violence

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[127] New York granted courts nolle prosequi authority in 1829, during its era of private and judicially appointed prosecutors. McConville & Mirsky, supra note 81, at 35 (citing 1829 N.Y. Rev. Stat. tit. IV, § 68, p.730 & § 54. p.726). For a broad overview of state nolle pros laws, see Annotation, Power of Court to Enter Nolle Prosequi or Dismiss Prosecution, 69 A.L.R. 240 (1930). The federal rule is *Fed. R. Crim. P. 48(a)*. Note that these rules give judges implicit power to compel prosecutors to litigate charges they would rather dismiss. For decisions insisting on judicial deference, see, for example, Genesee *Prosecutor v. Genesee Circuit Judge, 215 N.W.2d 145, 147-48 (Mich. 1974).* For similar examples in federal cases, see *United States v. Smith, 55 F.3d 157, 159-60 (4th Cir. 1995); United States v. Perate, 719 F.2d 706, 710-11 (4th Cir. 1983); United States v. Smith, 853 F. Supp. 179, 183-84 (M.D.N.C. 1994); Dawsey v. Gov't of Virgin Islands, 931 F. Supp. 397, 402-04 (D.V.I. 1996).* A standard explanation for deference is that judges lack means to compel prosecutors to litigate charges at trial. See, e.g., *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964)* ("Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to … , in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine."). But judges have options short of mandamus. Presumably they could hold prosecutors in contempt for failures to appear, as they could for all other attorneys. And whenever prosecutors retain an interest charges they seek to dismiss, judges could incentivize them by ruling that failure to litigate charges results (as for civil parties) in forfeiture of the claim, or dismissal with prejudice.

[128] For an overview of Canadian law on this point, see Mark Phillips, The Public Interest Criterion in Prosecutorial Discretion: A Lingering Source of Flexibility in the Canadian Criminal Process?, 36 Windsor Rev. Legal & Soc. Issues 43 (2015) (describing case law requiring great judicial deference to prosecutorial discretion). For Australia cases on prosecutorial discretion, see Miller v Commonwealth Dir. of Pub. Prosecutions [2005] 142 FCR 394, 399-400 (Austl.).

[129] Manikis, supra note 60, at 29. In addition, many nineteenth-century state courts justified privately funded prosecutions by citing the public value of these contributions to supplement underfunded district attorney offices. See Ireland, supra note 83, at 47, 49-51 (citing and quoting multiple state courts). Private prosecutors may have different reasons to proceed when despite comparatively low odds of winning a conviction. Some of those motivations, at least, can be public-regarding. Avlana Eisenberg makes the point that prosecuting hate crimes cases, for example, can have expressive and educative value that justifies pursuing well-grounded cases despite skeptical juries. Eisenberg, supra note 45, at 893-95, 902-18.

[130] For discussions on the common law aversion to private prosecution, see Ireland, supra note 83 and for a review of the impact of racial tensions on private prosecution, see Blackmon, supra note 98.

Responses to unjustified police violence reveal a third outcome for enforcement redundancy confined to the federalism model. Federal enforcement authority extends to cases of police violence to a much greater degree than for sexual assaults. That authority extends as well to other kinds of bias-motivated wrongdoing by both private actors and government officials, which local police and prosecutors have at times ignored or devalued, and for which state-level enforcement commitment continues to be uneven. [199] Federal jurisdiction is coextensive with state jurisdiction regarding police wrongdoing, and the Justice Department's institutional capacity for enforcement probably exceeds that of its state counterparts, but in one respect the overlap is not complete. The key substantive criminal offenses available to prosecutors in the federal code are somewhat more restrictive. The primary federal statute used to charge cases of **[*903]** police excessive use of force requires proof of willful deprivation of rights, [200] a strict mens rea standard that makes it harder for federal prosecutors to prove liability than it would be for state prosecutors relying on typical assault or homicide offense definitions. [201] The fact that Congress has for decades let stand this mens rea hurdle to excessive-force prosecutions suggests that federal legislators, if not Justice Department officials, are less committed to a full federal-state enforcement redundancy - or "to altering the federal-state balance in order to reinforce state law enforcement" - than they are for public corruption offenses. [202]

That limit notwithstanding, federal prosecutions in this area have a track record of succeeding where state prosecutions failed or were never attempted, and in that way providing at least a partial remedy for underenforcement by state criminal justice officials. Much of the federal advantage comes from the fact that federal prosecutors are, in general, better situated to objectively investigate, assess, and prosecute wrongdoing by police officers than are local prosecutors who ordinarily interact with and depend upon those officers (or at least their agencies). This is not a particular criticism of local prosecutors' offices; it is one instance of the basic problem that officials (and people generally) are untrustworthy judges of the conduct of others with whom they have affiliations, allegiances, or ongoing relationships. For that reason a few states assign such cases to state-level, rather than local, officials. [203] And the U.S. Justice Department attempts to collect data on deaths in jails, prison, or during **[*904]** attempted arrests, to facilitate Justice Department oversight. [204] The same concerns motivate English laws applying special judicial scrutiny (when triggered by requests from victims' families) to prosecutor's decisions not to charge in the case of death caused by law enforcement officials or occurring in official custody. [205]

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[131] Some federal states such as Germany and Canada lack enforcement redundancy because they use a single, nationwide, criminal code, which is enforced for prosecution agencies and courts organized at the state or provincial level. See generally Eric P. Polten & Eric Glezl, Federalism in Canada and Germany: Overview and Comparison (2014) (describing similarities in German and Canadian federalism, including allocating authority over substantive criminal law to the federal government but criminal justice administration to state or provincial prosecutors and courts). In Australia, like in the United States, states and the federal government each have their own criminal codes. But Australian federal criminal authority is confined much more narrowly than in the United States to conduct that implicates a distinct federal interest. See generally Arther B. Gunlicks, The Lander and German Federalism 59, 72, 129 (2003) (describing German criminal affairs and jurisdictions as compared to the United States); Polten & Glezl, supra, at 5-6, 10, 13-14; Brian Galligan, Comparative Federalism, in The Oxford Handbook of Political Institutions 261, 266-75 (Sarah A. Binder et al. eds., 2008) (discussing federalism and judicial review and regulations); Kathleen Daly & Rick Sarre, Criminal Justice System: Aims and Processes, in Crime and Justice: A Guide to Criminology 357 (Darren Palmer et al. eds., 5th ed. 2017) (examining the processes and purposes of the criminal justice system); Vicki Waye & Paul Marcus, Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2, *18 Tul. J. Int'l & Comp. L. 335 (2010)* (highlighting similarities and differences between the two countries in relation to criminal laws and policies).

[132] Since 2011, Switzerland also now has unified national criminal law and procedure codes administered in all cantons. See Anna Petrig, The Expansion of Swiss Criminal Jurisdiction in Light of International Law, 9 Utrecht L. Rev. 34, 36 (2013).

[133] See Director of Public Prosecutions Act 1983 s 10(2); Annual Report 2014-15, supra note 71.

[134] In unusual circumstances, two states may also have concurrent jurisdiction over the same crime, enabling one to assess the adequacy of the other's enforcement effort. For a rare example, see *Heath v. Alabama, 474 U.S. 82, 91-93 (1985).*

[135] See ***U.S. Const. amend. V*** (Double Jeopardy Clause); *Bartkus v. Illinois, 359 U.S. 121, 136-39 (1959)* (affirming power of state to prosecute defendant after a federal prosecution for the same bank robbery); *United States v. Lanza, 260 U.S. 377, 384-85 (1922)* (approving federal prosecution after state prosecution based on same conduct).

HOUSE_OVERSIGHT_016539

U.S. victims lack a right to challenge noncharging decisions in cases of homicides by police. But they, along with organized interest groups, can lobby prosecutors to prosecute. In some cities, voters and activist groups have pressured local prosecutors on police violence cases. [206] It is difficult to assess what role public sentiment plays (and should play) in charging decisions. But it is not hard to find instances of potent political challenges to non-prosecution of police officers in the wake of fatal shootings. Chief prosecutors in Cleveland, Ohio, and Chicago, Illinois, lost reelection bids in the wake controversial failures to charge police officers in fatal-shooting cases. [207] In the midst of popular and activist attention on such cases, prosecutors in several other cities have charged officers for offenses related to suspects' deaths, with mixed records of success. [208] Chicago prosecutors did so a year **[*905]** after police fatally shot a suspect and only upon public release of video of the incident [209] - a scenario that suggests public attention corrected a noncharging decision influenced by improper considerations.

However, U.S. localities vary widely in their demographics, politics, and community sentiments toward these cases. [210] That variation, plus local election of prosecutors, contributes to widely varying enforcement policies across prosecution offices. [211] And it means victims who urge prosecutions when local majority sentiment disfavors it have lower odds of successfully influencing **[*906]** prosecutors. The political variability of local prosecutors' charging policies - and the vulnerability of those decisions to local sentiment that favors unjustified underenforcement - are a key reason federal redundancy is important in this context. Given that police misconduct is an established part of the U.S. Justice Department's enforcement agenda, federal prosecutors should be a check on political judgments of local prosecutors. They also provide victims with a different agency to appeal to for investigation and prosecution.

This federalism-based model of redundant enforcement has advantages as a strategy to reduce risks of unmerited underenforcement. The alternative model authorizing judicial review of declination decisions, as is used in England, relies on the independence of judges from the prosecutors whom they review. [212] The federalism model relies on the independence of federal prosecutors from state prosecutors and police. The executive branch of one sovereign scrutinizes the enforcement response of another. And it has the capacity to act on its independent judgment, while courts are confined to ordering

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[136] See *United States v. Gamble, 694 Fed. App'x. 750 (11th Cir. 2017),* cert. granted, ***Gamble v. United States, 138 S. Ct. 2707 (2018).*** Even if the Court abolishes the dual sovereignty doctrine in Gamble, federal and state prosecutors will continue to be able to prosecute the same offenders for the same conduct in many cases. Under *Blockburger v. United States, 284 U.S. 299, 304 (1932),* the Double Jeopardy Clause precludes multiple prosecutions only if the subsequent charge has the "same elements" as the first. See *United States v. Dixon, 509 U.S. 688, 696 (1993)* (affirming Blockburger's same-elements test as the sole basis for double jeopardy claims). Unlike the firearm offenses that gave rise to Gamble's Double Jeopardy claim, federal and state crimes covering the same conduct often have distinct elements. For an example, see infra notes 200-02 and accompanying text.

[137] See, e.g., U.S. Dep't of Justice, United States Attorneys' Manual, supra note 55, § 9-2.031 (explaining the "Petite policy" criteria for federal prosecution of same conduct after state prosecution).

[138] For an example of a high-profile federal declination in the wake of state declination, see U.S. Dep't of Justice, Department of Justice Report Regarding the Criminal Investigation Into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson 5-9 (2015), *https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf*. For a study of federal declination, see Reuters, U.S. Police Escape Federal Charges in 96% of Rights Cases, Fortune (Mar. 13, 2016),*http://fortune.com/2016/03/13/us-police-federal-charges-data* (explaining that between 1995 and 2015, "[federal] prosecutors turned down 12,703 potential civil rights violations out of 13,233 total complaints. By contrast, prosecutors rejected only about 23 percent of referrals in all other types of criminal cases").

[139] See, e.g., *Koon v. United States, 518 U.S. 81, 113-14 (1996)* (remanding for new sentence calculation of police officers convicted in federal court after acquittals in state court); Blinder, supra note 52 (describing federal conviction of South Carolina police officer after an unsuccessful homicide prosecution of the officer in state court); Seven Baltimore City Police Officers Arrested for Abusing Power in Federal Racketeering Conspiracy, U.S. Dep't Just. (Mar. 1, 2017), *https://www.justice.gov/usao-md/pr/seven-baltimore-city-police-officers* -arrested-abusing-power-federal-racketeering.

[140] Moreover, internal Justice Department decisions are not subject to judicial review. See, e.g., U.S. Dep't of Justice, Criminal Resource Manual § 162 (2016); U.S. Dep't of Justice, United States Attorneys' Manual, supra note 55, § 9-2.031.

[141] For a recent example of change in Justice Department policies, see Eric Lichtblau, Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies, N.Y. Times (Feb. 28, 2017), *https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html*.

prosecutors to reverse their earlier non-prosecution decisions (or, occasionally, to appointing substitute prosecutors). This "executive separation of powers" model has proven effective, although whether it is effective enough is debated; it depends on whether all cases of police violence that should have been prosecuted - based on the evidence and the public interest in enforcement - were prosecuted. State and federal prosecution offices have distinct professional cultures and are responsive to different constituencies and modes of political supervision, which increases the independence of one from the other. [213] On the other hand, federal prosecution is still to some degree political; it varies with the policy priorities of presidential administrations [214] to a degree that judicial review **[*907]** (in theory) should not. When there is less federal commitment to oversight of states' approaches to police violence, enforcement redundancy is weak. [215] Victims and other interested parties have no other recourse.

C. Underenforcement and Prosecutor Political Accountability

In short, U.S. strategies of enforcement redundancy have a relatively strong track record for some crimes such as public corruption, are robust but vulnerable to political shifts for others such as a police violence, and are notably weak with regard to certain offenses, such as sexual assaults. That last category is important because that weakness extends well beyond sexual assault offenses; many of the routine crimes that make up typical state criminal dockets are not within the scope of federal criminal law enforcement. And since private prosecution and judicial or administrative review of prosecutorial decisions are almost completely absent from state criminal justice systems, there is no charging-decision oversight of state prosecutors' declination decisions and enforcement policies - save for local electoral accountability. In forty-five of fifty states, chief prosecutors are directly elected in local constituencies. [216] This form of democratic accountability operates as a kind of check on underenforcement, although it has significant limits in its capacity to play that role.

State prosecutors' elected status is likely the best explanation **[*908]** for why victim-based checks on declination - private prosecution or judicial review - never became a part of victims' rights reforms enacted in U.S. jurisdictions in recent decades. First, prosecutors are politically powerful groups with legislatures, and they zealously guard their unfettered discretion over criminal charging. [217] Second, it has led even courts to disfavor any degree of judicial review of charging decisions, on the

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On Justice Department professionalism, see Jim McGee & Brian Duffy, Main Justice: The Men and Women Who Enforce the Nation's Criminal Laws and Guard Its Liberties 7-9 (1996); Jed Handelsman Shugerman, The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service, *66 Stan. L. Rev. 121, 125-26 (2014).*

[142] The arguable exceptions are federal crimes for race-based and civil rights-related violence and for local officials' abuses of power; in those realms federal authorities responded to widespread failures by state law enforcement and justice systems. See generally Michal R. Belknap, Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South 154-58 (1987) (highlighting the federal response to southern violence in mid-twentieth century); Rhodri Jeffreys-Jones, The FBI: A History 19-24 (2007) (tracing FBI to nineteenth century federal efforts to combat Ku Klux Klan terrorism of voters); William J. Stuntz, The Collapse of American Criminal Justice 99-157 (2011) (documenting the expansion of federal role in law enforcement and prosecution in the late nineteenth century).

[143] See infra Part III.B.1.

[144] See, e.g., *Screws v. United States, 325 U.S. 91, 110-14 (1945).*

[145] For an indication that federal enforcement policy is designed to protect specific victim interests, see U.S. Dep't of Justice, FY 2014 Annual Performance Report and FY 2016 Annual Performance Plan I-16-17 (2015), *https://www.justice.gov/sites/default/files/doj/pages/attachments/2015/02/06/fy2014aprfy_2016app2.pdf* (describing aspects of the "Vulnerable People Priority Goal").

[146] See Lichtblau, supra note 141.

[147] See Paul G. Cassell & James R. Marsh, Full Restitution for Child Pornography Victims: The Supreme Court's Paroline Decision and the Need for a Congressional Response, *13 Ohio St. J. Crim. L. 1, 7 (2015).*

[148] See U.S. Dep't of Justice, supra note 145, at II-22, I-33 (describing prioritization of federal prosecutions into financial or government fraud and child exploitation).

[149] See Jane Kim, Taking Rape Seriously: Rape as Slavery, *35 Harv. J.L. & Gender 263, 277-83 (2012)* (criticizing inadequate federal criminalization of rape); Donald A. Dripps, Why Rape Should Be a Federal Crime 4 (2018), (unpublished manuscript),

rationale that oversight of prosecutors lies in the political process rather than judicial enforcement of legal parameters for charging. [218] Third, popular and political pressure has succeeded in redressing some underenforcement practices by prosecutors (and police) when victim groups, or issues tied to specific offenses, achieve political potency. Intoxicated driving is perhaps the best example of harmful wrongdoing about which many enforcement agencies have successfully revised their policies to increase enforcement. [219] Domestic violence and sexual assaults are other examples where enforcement shifts have been more limited but still significant. [220]

Responses by local agencies to this type of pressure have taken three basic forms. First, chief prosecutors adopted internal office policies that mandate - or set a strong presumption for - **[*909]** prosecution of specific crimes when evidence is sufficient. [221] Second, prosecutors get specialized training on how to address the particular challenges posed by specific kinds of cases such as domestic violence or sexual assault. [222] Finally, many offices have established dedicated, in-house units of prosecutors who specialize in these same kinds of crimes. [223] States legislatures have encouraged these reforms, [224] but virtually everywhere, the adoption, content, and enforcement of policies is left to local chief prosecutors. No legislation sets specific charging criteria, authorized judicial review, or gives enforceable rights to victims. [225]

These responses to underenforcement are meaningful, but their form is more political than legal. They are the kinds of responses produced by a system of electorally accountable prosecutors and legislatures. [226] Often they are in large part attributable to successful political efforts by advocacy groups. Mothers Against Drunk Driving (MADD), for example, successfully urged reforms of laws and enforcement practices against intoxicated driving. [227] Feminist groups and women's advocates play important, ongoing roles in reforming police and prosecution policies, substantive criminal laws, and evidence rules for domestic **[*910]** violence and sexual assault offenses. [228] These efforts have succeeded in changing attitudes, professional cultures, and enforcement practices in police and prosecution agencies that had contributed to underenforcement in these areas. [229] Prosecution units specializing in offenses such as domestic violence, for example, strengthen professional culture committed to enforcement by attracting lawyers who share that commitment and who develop expertise to act on it. [230]

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https://papers.ssrn.com/sol3 /papers.cfm?abstract_id= 3095741. Without grounds for federal jurisdiction - such as conduct involving interstate travel or occurring on federal property - sexual assaults and other violent offenses are the exclusive province of state officials. Kim, supra, at 277. For examples of the limits built into federal offenses, see18 U.S.C. § 1591(a)(1) (2016) (knowingly recruiting or enticing minors to engage in commercial sex acts); 18 U.S.C. § 2423(b) (2016) (prohibiting travel in interstate commerce for purpose of engaging in illicit sexual conduct with minor females).

[150] The scholarly literature on public corruption is considerable. For a short overview of the debate and the federal law, see David Mills & Robert Weisberg, Corrupting the Harm Requirement in White Collar Crime, 60 Stan. L. Rev. 1371, 1377-94 (2008). For longer treatments, see generally Political Corruption: A Handbook (Arnold J. Heidenheimer et al. eds., 2d ed. 1989) (compiling comparative scholarly work on political corruption); Routledge Handbook of Political Corruption: A Handbook (Paul M. Heywood ed., 2015) (focusing on international and comparative corruption issues).

[151] See, e.g., McDonnell v. United States, 136 S.Ct. 2355, 2365 (2016) (describing quid pro quo requirement for federal bribery offense, ***18 U.S.C. § 201,*** in relation to extortion and honest-services fraud statutes, 18 U.S.C. §§1951(a) & 1346, used to prosecute corruption by state officials); Skilling v. United States, 561 U.S. 358, 407-09 (2010) (clarifying quid pro quo requirements for bribery and kickback conduct in honest-services fraud prosecutions).

[152] See ***18 U.S.C. § 201*** (2012) (criminalizing bribes and gratuities); ***18 U.S.C. § 666*** (2012) (criminalizing theft or bribery related to federally funded programs); ***18 U.S.C.§§1341,*** 1343, 1346 (2016) (criminalizing mail, wire, and "honest services" fraud); 18 U.S.C. § 1951 (2012) (criminalizing extortion "under color of official right").

[153] See, e.g., Nicholas Kusnetz, Only Three States Score Higher Than D+ in State Integrity Investigation; 11 Flunk, Ctr. for Pub. Integrity, https://www .publicintegrity.org/2015/11/09/18693/only-three-states-score-higher-d-state -integrity-investigation-11-flunk (last updated Nov. 23, 2015) (scoring states and explaining methodology; all but three states scored a "D+" or below on A-to-F scale); see also Corruption Perceptions Index 2016, Transparency Int'l (Jan. 25, 2017), https://www.transparency.org/news/feature/corruption_ perceptions_index_2016#table (ranking 174 countries by corruption scores; the United States ranked eighteenth). On the challenges facing corruption measures, see generally Staffan Andersson, Beyond Unidimensional Measurement of Corruption, 19 Pub. Integrity 58 (2017) (analyzing the challenges posed by treating corruption as a one-dimensional phenomenon); Adriana S. Cordis & Jeffrey Milyo, Measuring Public Corruption in the United States: Evidence From Administrative Records of Federal Prosecutions, 18 Pub. Integrity 127 (2016)

Successes notwithstanding, reliance on this kind of political supervision cannot be an equally effective remedy for underenforcement across all contexts. The independence of local prosecution and police agencies means that policies, resources, and constituent support for rigorous enforcement inevitably vary. [231] They will differ not only across localities but also according to the type of offense and the identity of the victim. Some groups, such as victims of intoxicated drivers, can succeed at achieving more rigorous enforcement policies. [232] Other victims with less political support or popular sympathy - undocumented immigrants, sex workers, prison inmates, and casualties of police shootings [233] - have dimmer prospects when prosecutors are responsive to local majorities' preferences. In some places, public **[*911]** sentiment is a force in favor of charging in categories of wrongdoing that have suffered from patterns of underenforcement. In other places, the same can be a force against charging and can reinforce underenforcement practices. Either way, electoral accountability can lead to undue pressure on prosecutors to yield to majoritarian or interest-group pressure to avoid "commiting political suicide." [234]

In short, political supervision, as an institutional structure to minimize unjustified failures to prosecute, is an institutional structure with a highly uneven track record and decidedly mixed prospects. On the other hand, some of the strategies for enforcement redundancy examined above that take the form of legal entitlements would likely also achieve partial success. Private prosecution is an unpromising device to aid certain marginalized victim groups such as inmates, undocumented immigrants, or low-income people generally. Other options - review of declination by courts, or concurrent jurisdiction of a separate prosecution agency - hold somewhat more promise. Judicial review is somewhat more removed from political influence (though perhaps less so in jurisdictions that elect judges), [235] although that mechanism still depends on victims to petition for review. The overlap of federal and state criminal jurisdiction subjects enforcement to review by a rival agency subject to, at worst, different political influences. At best, as with a Justice Department that can minimize political influence with professional and bureaucratic norms, it expands the prospect for less political review. [236]

(criticizing the use of federal convictions data in public corruption analysis and advocating instead for the use of administrative data). For a list of state criminal laws and ethical rules governing corruption, see Penalties for Violations of State Ethics and Public Corruption Laws, Nat'l Conf. St. Legislatures,*http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties* -for-public-corr.aspx (last updated Sept. 10, 2018).

[154] Pub. Integrity Section, U.S. Dep't Of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 2015, at i (2015), *https://www.justice.gov/criminal/file/891961/download*.

[155] See, e.g., id. at 17-19 (providing examples of the Justice Department's prosecution of state and local officials).

[156] Id. at 23-24 tbl.2 (tracking the number of convictions of corrupt public officials during 1996-2015); id. at 25-28, tbl.3 (tracking public corruptions prosecutions by federal district during 2006-2015); Patricia Salkin & Bailey Ince, It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts, *46 Urb. Law. 249, 250 (2014)* (describing federal prosecution of state and local officials).

[157] Fed. Bureau of Investigation, U.S. Dep't of Justice, The FBI Story: 2017, at 11 (2017), *https://www.fbi.gov/file-repository/the-fbi-story-2017* .pdf/view (describing public corruption as a "key responsibility").

[158] See, e.g., id. at 10-20 (providing specific examples of federal public corruption prosecution for various types of conduct).

[159] Id.

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CONCLUSION

All justice systems suffer from pockets of unjustified, even pernicious, underenforcement. All recognize that public prosecutors can be vulnerable to biases and institutional interests that distort enforcement decisions. Especially in recent decades, nearly all have adopted mechanisms to address those risks. Outside the United States, victim rights legislation has included provisions directed at unjustified decisions not to prosecute. In other common law countries and in Europe, most victims may now either seek independent review of prosecutors or initiate prosecutions on their own. Independent review keeps the safeguard against underenforcement in public hands while strengthening the principle that charging decisions should be nonpolitical and ministerial in nature. Victim rights reforms in general manifest a judgment that modern criminal justice had focused excessively on public interests and unduly neglected victims' private interests in criminal prosecutions. Authorizing victims to challenge declination decisions extends this idea by recognizing victims' private stake in those decisions and enabling victims to serve the public interest in preventing unjustified failures to prosecute. [237]

Virtually all U.S. jurisdictions reject both of those strategies. [238] And rather than insulate their prosecutors from political **[*913]** influence, most states rely on electoral politics for oversight of prosecution practices. Instead, the U.S. model opts for duplicative federal-state jurisdiction against a background of politically attuned state prosecutors. Both this federalism model of redundant prosecutorial authority - which may be reduced this term by the Supreme Court's decision in Gamble - and the model of politically responsive prosecutors have proven effective at redressing some types of underenforcement. Both serve some victims' interests without taking the form of victim rights. And both reflect a preference for political over legal safeguards against biased or ill-conceived uses of prosecutorial discretion.

American criminal justice is more sanguine than other legal systems about the downsides of prosecutors' electoral accountability and attention to majoritarian sentiments. U.S. prosecutors' democratic legitimacy works against arguments for more formal oversight or regulation. Even against the potent political power of victims' rights movements, unfettered executive charging discretion has proven immutable. [239] But federal prosecutors provide significant oversight, at least for some

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[160] United States v. Alfisi, 308 F.3d 144, 155-56 (2d Cir. 2002) (Sack, J., dissenting) (arguing that payments to federal officials prosecuted under ***18 U.S.C. § 201*** caused no clear harm or "corruption"); Mills & Weisberg, supra note 150, at 1373-74 (discussing the role of fiduciary duties in criminal liability); id. at 1377, 1386-90, 1404-05 (discussing uncertainty of "harm" in some contexts); id. at 1395-1400 (discussing honest services); Lex Hemphill, Acquittals End Bid Scandal that Dogged Winter Games, N.Y. Times, Dec. 6, 2003, at D1 (reporting a federal district judge's criticism of the prosecution, saying "in his 40 years of working in the criminal justice system, he had never seen a case so devoid of "criminal intent or evil purpose'").

[161] For Supreme Court decisions rejecting broad applications of federal anti-corruption statutes, see generally McDonnell v. United States, 136 S. Ct. 2355 (2016) (reversing the former Virginia Governor's conviction for honest-services fraud and extortion); McNally v. United States, 483 U.S. 350 (1987) (reversing the conviction of state officials and holding that federal mail fraud statute, ***18 U.S.C. § 1341,*** does not apply to schemes to defraud state citizens of the intangible "right to have the Commonwealth's affairs conducted honestly"). As a matter of statutory interpretation, the Court requires a "clear statement" that Congress intends a federal criminal statute to duplicate a state crime and thereby "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." United States v. Bass, 404 U.S. 336, 349-50 (1971); see also Rewis v. United States, 401 U.S. 808, 811-12 (1971). But Congress has made such intent sufficiently clear for the Court in numerous statutes, including those at issue in Bass (18 U.S.C. § 1202(a), now codified at ***18 U.S.C. § 922***(g)) and in Rewis (18 U.S.C. § 1952). See, e.g., Perrin v. United States, 444 U.S. 37, 50 (1979) (finding that § 1952 reflects congressional intent "to alter the federal-state balance in order to reinforce state law enforcement").

[162] See, e.g., Roderick M. Hills, Jr., Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?, 6 Theoretical Inquiries L. 113, 137-44 (2005) (arguing that federal enforcement of public corruption in local governments harms local styles of democracy); Harvey A. Silverglate & Emma Quinn-Judge, Tawdry or Corrupt? McDonnell Fails to Draw a Clear Line for Federal Prosecution of State Officials, 2016 Cato Sup. Ct. Rev. 189, 213-19 (2016) (arguing that the honest services statute is too vague to be fairly enforced); cf. John C. Coffee, Jr., Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 Am. Crim. L. Rev. 427, 430-31 (1998) (arguing that federal prosecutors rely on broad federal common law crimes in fraud cases against state and local public officials); Salkin & Ince, supra note 156, at 266-67 (describing aggressive federal enforcement of public corruption in the context of land

use). But see Mark S. Gaioni, Federal Anticorruption Law in the State and Local Context: Defining the Scope of ***18 U.S.C. § 666,*** *46 Colum. J.L. & Soc. Probs. 207, 237-45 (2012)* (arguing for broad interpretation of § 666 to cover state and local officials).

[163] See, e.g., *18 U.S.C. § 1346* (2012) (criminalizing "honest services" fraud). The statute was enacted in 1988 in response to the Supreme Court's 1987 decision in United States v. McNally, which held that ***18 U.S.C. § 1341*** did not cover "honest services" fraud. Gaioni, supra note 162, at 243 n.192.

[164] See, e.g., *Perrin, 444 U.S. at 50* (finding that section 1952 reflects congressional intent "to alter the federal-state balance in order to reinforce state law enforcement").

[165] See, e.g., *18 U.S.C. § 1952* (2012) (prohibiting interstate travel for "unlawful activity," which can be made unlawful by state law); *Perrin, 444 U.S. at 50* ("In defining "unlawful activity' [in *18 U.S.C. § 1952],* Congress has clearly stated its intention to include violations of state as well as federal bribery law."); *United States v. Welch, 327 F.3d 1081, 1092-1103 (10th Cir. 2003)* (reinstating an indictment and holding that Utah law serves as predicate to define violations of *18 U.S.C. § 1952).*

[166] See Kim, supra note 149; Dripps, supra note 149, at 3 (noting that sexual assaults in federal law are confined to very limited contexts, such as human trafficking).

[167] See Kim, supra note 149.

[168] See Lynching in America: Confronting the Legacy of Racial Terror, Equal Just. Initiative, *https://lynchinginamerica.eji.org/report* (last visited Oct. 30, 2018) ("Of all lynchings committed after 1900, only 1 percent resulted in a lyncher being convicted of a criminal offense" (citing Paula J. Giddings, Ida: A Sword Among Lions 473-74 (2008))). Data on prosecutorial charging decisions is harder to come by, but clearance rates for homicides - meaning the percentage of cases police resolve, usually by arrest - are higher for homicides than other offense categories. See 2016 Crime in the United States, FBI: UCR, *https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-17* (last visited Oct. 30, 2018) (reporting that the 2016 national clearance rate for homicides was 59.4%, compared to 45.6% for all violent crime and 18.3% for property crimes).

[169] See S. Rep. No. 103-138, at 42 (1994) ("Police may refuse to take reports [of crimes against women]; prosecutors may encourage defendants to plead to minor offenses … . At every step of the way, the criminal justice system poses significant hurdles for victims."); Catharine A. MacKinnon, Rape Redefined, *10 Harv. L. & Pol'y Rev. 431, 439 (2016)* ("One out of about ten acts of rape or attempted rape that fit basic legal definitions in the United States is reported to authorities. Dramatically fewer [reported cases] are prosecuted or result in convictions … ."). For detailed examination of prosecutor decision-making on sexual assault complaints in three jurisdictions, see Cassia C. Spohn et al., Nat'l Criminal Justice Reference Serv., Prosecutors' Charging Decisions in Sexual Assault Cases: A Multi-Site Study 85-88 (2001), *https://www.ncjrs.gov/pdffiles1/nij/grants/197048.pdf*.

[170] See Dripps, supra note 149, at 6 & n.25 (noting a National Violence Against Women survey by the Centers for Disease Control found twice as many rapes as the NCVS survey reported for the same year). See generally Candace Kruttschnitt et al., Estimating the Incidence of Rape and Sexual Assault (2014) (describing the reasons why it is "highly likely" that the National Crime Victimization Survey, conducted by the Bureau of Justice Statistics, underestimates rapes and other sexual assaults).

[171] Kruttschnitt et al., supra note 170; Dripps, supra note 149.

[172] Dripps, supra note 149, at 9 (summarizing and comparing Federal Bureau of Investigation Uniform Crime Reports and National Crime Victimization Survey data).

[173] See supra note 169 and accompanying text.

[174] Dripps, supra note 149, at 13-15 (summarizing clearance-rate data from Federal Bureau of Investigation Uniform Crime Reports and from the Los Angeles County Sheriff's Department).

[175] See, e.g., Cassia Spohn & Katharine Tellis, Nat'l Criminal Justice Reference Serv., Policing and Prosecuting Sexual Assault in Los Angeles City and County VII (2012), *https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf*.

[176] Id. at VII-VIII, 8. Data on clearance rates is itself suspect; departments sometimes do not disclose all reports of sexual assaults they receive. Id. at IV (finding that the L.A. Police Department and the L.A. Sheriff's Department both substantially exaggerated their clearance rates).

[177] Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 21 (2010) (statement of Rep. Anthony Weiner, Member, H.

Comm. on the Judiciary) (noting that there are over 542,000 untested rape kits); Caitlin Dickson, How the U.S. Ended Up With 400,000 Untested Rape Kits, Daily Beast (Sept. 23, 2014), https://www .thedailybeast.com/how-the-us-ended-up-with-400000-untested-rape-kits; Dayton Uttinger, Why Is There Still a Rape Kit Backlog?, Women's Media Ctr. (Aug. 1, 2017),*http://www.womensmediacenter.com/fbomb/why-is-there-still-a-rape-kit-backlog* ("There are an estimated 175,000 untested rape kits … across the US … ").

178 See Office on Violence Against Women, U.S. Dep't of Justice, Sexual Assault Kit Testing Initiatives and Non-Investigative Kits 3 (2017), *https://www.justice.gov/ovw/page/file/931391/download* (noting that $ 100 million was awarded to states and localities in 2014-16 to reduce rape kit backlog).

179 Note, Recent Statutory Developments in the Definition of Forcible Rape, 61 Va. L. Rev. 1500, 1505-07 (1975).

180 See, e.g., ***State v. Sibley, 33 S.W. 167, 171 (Mo. 1895)*** ("The rule in this state permitting a witness to be impeached by proof of general reputation for unchastity is confined to females."); *People v. Abbot, 19 Wend. 192, 194 (N.Y. 1838)* (permitting questions to the rape complainant about her past sexual conduct because in rape prosecutions "the material issue is on the willingness or reluctance of the prosecutrix - an act of the mind").

181 Susan Estrich, Real Rape 8 (1987).

182 See id. at 8-22 (describing traditional rape definitions, spousal exception, evidentiary rules, and police responses to rape reports); Recent Statutory Developments in the Definition of Forcible Rape, supra note 179, at 1505-07 (describing the "utmost resistance" requirement); see also *State v. Terry, 215 A.2d 374, 376 (N.J. Super. Ct. App. Div. 1965)* (affirming that, to prove liability for rape, "it must be shown that [the victim] did, in fact, resist the assault").

183 Kathleen F. Cairney, Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement, *69 St. John's L. Rev. 291, 298-99 (2012).*

184 See *Fed. R. Evid. 412*; Leah DaSilva, The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on Myspace, 13 Suffolk J. Trial & App. Advoc. 211, 219 (2008) ("In 1974, Michigan became the first jurisdiction to enact a rape shield law. The federal government and remaining forty nine states followed, most within several years."); cf. Joel E. Smith, Annotation, Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences, 1 A.L.R. 4th 283 (2018) (discussing constitutional limits on rape shield rules).

185 See *Fed. R. Evid. 413*, *414*.

186 See, e.g., Cyrus R. Vance, Jr., N.Y. Cty. Dist. Attorney's Office, Sexual Assault and the Criminal Justice System (2010), *http://manhattanda.org/sites/default/files/Sex_Crimes.pdf* [*https://web.archive.org/web/20170702150412/ http://manhattanda.org/sites/default/files/Sex_Crimes* .pdf] (describing the "Sex Crimes Prosecution Unit" and special units for sexual assaults crime and victims in hospitals police precincts, and social service agencies). See generally Jennifer G. Long & John Wilkinson, The Benefits of Specialized Prosecution Units in Domestic and Sexual Violence Cases, AEquitas: Strategies Brief, Dec. 2011, at 1, 1 (describing how experienced prosecutors improve handling of domestic and sexual violence cases). Similar strategies of offense reform and creation of dedicated prosecution units have more recently been strategies against another context of endemic underenforcement - crimes against inmates. See Alysia Santo, Preying on Prisoners: In Texas, Staffers Rarely Go to Jail for Sexually Abusing Inmates, Marshall Project (June 7, 2015), *https://www.themarshallproject.org/2015/06/17/preying-on-prisoners* (describing a special prosecution unit in Texas focused on crimes against inmates, and noting that between 1990 and 2006, the number of states with statutes that expressly criminalize sexual abuse of inmates rose from eighteen to fifty, and prosecution rates rose from thirty-seven to forty-nine percent of staff sexual misconduct case referrals).

187 See *State v. Stahl, 855 N.E.2d 834, 836 (Ohio 2006)* (describing the "Developing Options for Violent Emergencies (DOVE) unit" in a hospital designed to gather evidence from and provide care to sexual assault victims); History of the Movement, Wash. Coalition Sexual Assault Programs, http://www .wcsap.org/history-movement (last updated May 9, 2016) (describing the establishment of the first rape crisis centers in 1972). See generally Office Violence Against Women, U.S. Dep't of Justice, A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents (2013), *https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf* (describing recommendations, techniques, and strategies for health care providers to maximize forensic evidence gathering during provision of medical care).

HOUSE_OVERSIGHT_016546

important kinds of crimes within states' jurisdictions. This federalism-based model of enforcement redundancy is a distinctive if

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188 Cassia Spohn & Julie Horney, Rape Law Reform: A Grassroots Revolution and Its Impact 77 (1992) (describing expectations that legal reforms would improve prosecution rates); id. at 100 ("Legal changes did not produce the dramatic results that were anticipated by reformers. The reforms had no impact in most of the jurisdictions.").

189 Jennifer L. Truman & Rachel E. Morgan, Bureau Justice Statistics, U.S. Dep't of Justice, Criminal Victimization, 2015, at 2 tbl.1 (2016), *https://www.bjs.gov/content/pub/pdf/cv15.pdf* (reporting that the National Crime Victimization Survey estimated 431,840 rapes/sexual assaults in 2015); Crime in the United States by Volume and Rate Per 100,000 Inhabitants, 1996 -2015, Fed. Bureau Investigation, *https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-1* (last visited Oct. 30, 2018) (reporting 124,047 rape reports under the "revised definition").

190 Cf. Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, *154 U. Pa. L. Rev. 927, 946-50 (2006)* (arguing that social movements significantly shape the application of constitutional principles); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, *150 U. Pa. L. Rev. 279, 328-44 (2001)* (arguing that the history of the Nineteenth ***Amendment*** and the Equal Rights ***Amendment*** show that the U.S. Constitution is amenable to contestation by social movements).

191 Violence Against Women Act of 1994, Pub. L. 103-322 (1994) (codified at *34 U.S.C.§§12291*-12511) (2017) (establishing a broad set of policies directed at violence against women that creates no federal criminal offenses).

192 Dripps, supra note 149, at 46-49, app. I. For an earlier proposal along the same lines, see Kim, supra note 149, at 304-09.

193 E.g., Office on Violence Against Women, supra note 178 and accompanying text.

194 The statutory authority is *42 U.S.C. § 14141* (2016).

195 See Harmon, Policing Reform, supra note 21 (discussing structural reform aimed at police violence without noting any instances of targeting sexual assault offenses).

196 Leading observers view this structural reform as insufficient to address the scope of the police-misconduct problems. See id. at 59-61 (describing injunctive relief under *42 U.S.C. § 14141,* noting limits on data about police misconduct, and explaining how insufficient data limits the effectiveness of reform efforts). On the prospect of reduced federal commitment to this strategy in the Trump administration, see *U.S. Attorney Gen., supra* note 24; Horwitz et al., supra note 24.

197 See Dripps, supra note 149, at 19 & n.100 (citing five federal actions under § 14141 addressing local agencies' responses to sexual assault crimes).

198 That is, federal criminal law is effective at successful prosecutions, if not at reducing the underlying social problem targeted by criminal law. See generally, e.g., Steven B. Duke & Albert C. Gross, America's Longest War: Rethinking Our Tragic Crusade Against Drugs (1993) (examining and critiquing American drug policies).

199 See, e.g., ***18 U.S.C. § 241*** (2012) (criminalizing conspiracy); id. § 242 (criminalizing willful deprivation of federal rights while acting under color of law); id. § 249 (criminalizing willful bodily injury because of victim's race, religion, sexual orientation, or gender identity). Federal prosecutors focus on other serious direct-victim crimes as well, such as human trafficking and child pornography. See U.S. Dep't of Justice, supra note 145 (describing prioritization of such cases). But federal involvement in that realm is presumably motivated not so much by a need for oversight of untrustworthy state prosecutors as by the greater resources, expertise, and interstate jurisdictional advantages that federal prosecutors bring to such cases. Criminal prosecution is only one aspect of federal policies to reduce custodial deaths and improper uses of force by police. Other strategies include investigating abuse and corruption in local police agencies and using civil injunctive remedies against those agencies to change patterns of wrongdoing, as well as gathering data on custodial deaths and police uses of force. See Harmon, Policing Reform, supra note 21; Simone Weichselbaum, Policing the Police: As the Justice Department Pushes Reform, Some Changes Don't Last, Marshall Project (May 26, 2015), *https://www.themarshallproject.org/2015/04/23/policing* -the-police (describing the difficulties in achieving lasting reforms in local police departments through federal consent decrees).

200 See ***18 U.S.C. § 242*** (liability for an official who "willfully subjects any person … to the deprivation of any [federal] rights"); *United States v. Screws, 325 U.S. 91, 103 (1945)* (interpreting § 242's willfulness term to require "specific intent to deprive a person of a federal right").

201 The prosecution of South Carolina police officer Michael Slager provides an example. State prosecutors charged Slager with murder; federal prosecutors charged him with criminal violation of civil rights under ***18 U.S.C. § 242.*** For an example of this contrast between state and federal charges for the same offense, see Blinder, supra note 52; Michael S. Schmidt & Matt Apuzzo, Officer Is Charged with Murder of a Black Man Shot in the Back, N.Y. Times, Apr. 8, 2015, at A1.

HOUSE_OVERSIGHT_016547

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202 See *Perrin v. United States, 444 U.S. 37, 50 (1979)* (broadly interpreting "bribery" in *18 U.S.C. § 1952* to include bribery of private individuals); supra Part III.B.1 and note 161 (citing Perrin in discussion of anti-corruption prosecutions under *18 U.S.C. § 1952).*

203 See, e.g., *Wis. Stat.§§175.47*, *950.04(1v)(do)*, *950.08(2g)(h)* (2014) (codifying Wis. Act 348 (2013)) (requiring investigations of "officer-involved deaths" to be conducted by investigators from a different agency).

204 See Data Collection: Mortality in Correctional Institutes (MCI) (Formerly Deaths in Custody Reporting Program (DCRP)), Bureau Just. Stat., *https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243* (last visited Oct. 30, 2018) (providing data collection since 2000 for jails, since 2001 for prisons, and since 2003 during arrests). The Death in Custody Reporting Act of 2000,*42 U.S.C. § 13704* (2006), required local agencies to report deaths until it lapsed in 2006. Hunter Schwartz, Congress Decides to Get Serious About Tracking Police Shootings, Wash. Post (Dec. 11, 2014), *https://www.washingtonpost.com/news/post-politics/wp/2014/12/11/congress-decides-to-get-serious-about-tracking* -police-shootings. It was renewed in 2014. Death in Custody Act of 2013, Pub. L. 113-242,***128 Stat. 2860*** (codified as amended in scattered sections of 42 U.S.C). In the interim years, the Bureau collected data voluntarily reported by local agencies. Pete Kasperowicz, House Bill Would Require States to Report on Prisoner Deaths, Hill (Dec. 6, 2013), *https://thehill.com/blogs/floor-action/government-oversight/192354-house-to-require-states-to-report-on-prisoner* -deaths.

205 See supra note 113.

206 E.g., Ed Krayewski, Prosecutors in Chicago, Cleveland Lose Re-Election Bids After Police Abuse Controversies, Reason (Mar. 16, 2016), http://reason .com/blog/2016/03/16/prosecutors-in-chicago-cleveland-lose-re.

207 Id.; see also Justin Glawe, Anita Alvarez, Chicago's Top Prosecutor, Cleared Killer Cops 68 Times, Daily Beast (Mar. 14, 2016), http://www .thedailybeast.com/articles/2016/03/14/anita-alvarez-chicago-s-top-prosecutor -cleared-killer-cops-68-times.html.

208 See Manslaughter Conviction for Ex-Officer, N.Y. Times, Aug. 5, 2016, at A15; Richard Perez-Pena, Officer Indicted in Shooting Death of Unarmed Man, N.Y. Times, July 30, 2015, at A1; Mark Berman, Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed From Police Force, Wash. Post (June 17, 2017), *https://www.washingtonpost.com/news/post* -nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting -philando-castile-during-traffic-stop; Chris Dixon, Ex-Officer Seeks Bond in Shooting Death of Walter Scott, N.Y. Times (Sept. 11, 2015), https://www. nytimes.com/2015/09/12/us/officer-seeks-bond-in-shooting-death-of-walter -scott.html (stating that officer was charged with murder); Wil S. Hylton, Baltimore vs. Marilyn Mosby, N.Y. Times Mag. (Sept. 28, 2016), *https://www.nytimes.com/2016/10/02/magazine* /marilyn-mosby-freddie-gray-baltimore.html (describing the failure to convict any of six officers indicted for the April 2015 death of Freddie Gray); Justin Juozapavicius, Tulsa Officer Acquitted In Man's Shooting Death Is Returning To The Police Force, Associated Press (May 19, 2017), *https://www.apnews.com/9af40bcdbbd84f6e95fb3a430d4016c0*.

209 Monica Davey & Mitch Smith, Justice Department Is Expected to Investigate Chicago Police, N.Y. Times, Dec. 7, 2015, at A10 (reporting on the Justice Department's investigation into the patterns and practices of the Chicago Police Department in the wake of Laquan McDonald shooting); Mitch Smith, Chicago Officer Pleads Not Guilty to Charge of Murder in Death of a Teenager, N.Y. Times, Dec. 30, 2015, at A12 (stating that a police officer was charged for the 2014 fatal shooting of a teenager just before video footage of the incident was released).

210 For one notable political response, see La. Stat. Ann. §§14:107.2(A), (E) (2018) (creating the "Blue Lives Matter" law); Kevin Conlon, Louisiana Governor Signs "Blue Lives Matter' Bill, CNN (May 27, 2016), *https://www.cnn.com/2016/05/26/us/louisiana-blue-lives-matter-law/index.html* (describing passage of House Bill 953).

211 See, e.g., W. David Ball, Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates - And Why It Should, *28 Ga. St. U. L. Rev. 987, 1018-34 (2012)* (analyzing data from 2000-2009 and describing how county-level criminal justice officials, including prosecutors, vary greatly in their use of state incarceration as a response to crime); Erika Martin, While Some California DAs Are Throwing Out Old Pot Convictions, L.A. County's Jackie Lacey Takes a Different Path, KTLA5 (Feb. 3, 2018), *https://ktla.com/2018/02/03/while-some-california-das-are-throwing-out* -old-pot-convictions-angelenos-will-have-to-be-proactive-in-clearing-records (describing different policies among California district attorneys on expungement of marijuana offenses); cf. Civil Rights Div., U.S. Dep't of Justice, Investigation of the Ferguson Police Department 10-15 (2015), *https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf* (describing prosecution policies motivated by revenue-generating goals).

212 The alternative of administrative review within the Crown Prosecution Service relies on whatever independence is sustained by the bureaucratic hierarchy, administrative regulations, and professional norms. See supra note 111 and accompanying text.

HOUSE_OVERSIGHT_016548

not unique hybrid: it provides independent review removed from local electoral politics, yet power remains in the hands of

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[213] U.S. Attorneys and the U.S. Attorney General are political appointees, U.S. Const. art. II, § 2 (Appointments Clause); ***28 U.S.C. § 541*** (2012) ("The President shall appoint … a United States attorney for each judicial district."), although much of the Justice Department staff are nonpolitical, civil service appointees. See Government Ethics Outline, U.S. Dep't Just., https://www .justice.gov/jmd/government-ethics-outline (last updated July 5, 2017) (explaining ethics rules for "non-career" political appointees and for career employees).

[214] See Sanford C. Gordon, Assessing Partisan Bias in Federal Public Corruption Prosecutions, 103 Am. Pol. Sci. Rev. 534, 549 (2009) (finding evidence of political party bias among federal prosecutors).

[215] The clearest historical example would be the post-Reconstruction decades, starting roughly after 1876, when the federal government retreated from civil rights enforcement in the former Confederate states, including from prosecutions for criminal rights violations and offenses that states declined to charge, including for homicides. See generally Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 524-86 (2014) (describing declining enthusiasm for civil rights enforcement and waning Republican political influence in the South); William Gillette, Retreat from Reconstruction, 1869-1879, at 190-200 (1979) (describing Southern Democrats efforts to resist civil rights enforcement); George Rutherglen, Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866, at 95-100 (2013) (describing Supreme Court decisions limiting the enforcement of the Civil Rights Act of 1866).

[216] Alaska, Connecticut, and New Jersey do not elect prosecutors. Perry, supra note 122, at 2. Delaware and Rhode Island elect state attorneys general, whose appointed staff handle all prosecutions. Id. at 11. Except in these jurisdictions, state attorneys general and justice departments generally have little authority over local prosecutors' offices. Cf. Michael J. Ellis, The Origins of the Elected Prosecutor, *121 Yale L.J. 1528, 1528 n.1 (2012)* (noting that elected prosecutors are unique to the United States).

[217] A classic account of prosecutors' political influence is William J. Stuntz, The Pathological Politics of Criminal Law, *100 Mich. L. Rev. 505, 546-57 (2001).* For an insightful account of federal prosecutors successfully convincing Congress to expand their discretion at the expense of judges' sentencing authority, see *United States v. Kupa, 976 F. Supp. 2d 417, 419-27 (E.D.N.Y. 2013)* (describing the legislative history and Justice Department lobbying related to federal drug statutes, notably ***21 U.S.C. § 841*** (2012)).

[218] See, e.g., *Milliken v. Stone, 7 F.2d 397, 399 (S.D.N.Y. 1925),* aff'd *16 F.2d 981 (2d Cir. 1927)* ("The remedy for [dereliction of the prosecutor's duty] is with the executive and ultimately with the people."); *In re Hickson, 2000 PA Super 402, P 36* ("The prosecutor is elected to run her office using her broad discretion fairly and honestly. If she fails to do so, … the remedy lies in the power of the electorate to vote her out of office."); *In re Padget, 678 P.2d 870, 873-74 (Wyo. 1984)* ("District and county attorneys hold elective offices; if their constituents are unsatisfied, they are free to express their feelings at the voting polls."); cf. *Cheney v. U.S. Dist. Court, 542 U.S. 367, 386 (2004)* ("The decision to prosecute a criminal case … is made by a publicly accountable prosecutor."). For discussion of this point, see Brown, supra note 126, at 33-41.

[219] See Adam M. Gershowitz, 12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases, *2011 U. Ill. L. Rev. 961, 966-69, 984-87 (2011).*

[220] Emily J. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, *2004 Wis. L. Rev. 1657, 1689-90 (2004).*

[221] Police departments also widely adopted mandatory arrest policies, especially for domestic violence offenses. For discussions and examples of both police and prosecution policies on domestic violence and sexual assault, see Aya Gruber, The Feminist War on Crime, *92 Iowa L. Rev. 741, 760 & n.90 (2007);* Sack, supra note 220. Note how this resembles the mandatory prosecution duty familiar in European systems, although it is an internal policy rather than statutory mandate. See supra Part II.B.1.

[222] See supra note 186 and accompanying text.

[223] Id.

[224] See, e.g., *Fla. Stat. § 741.2901(1)*-(2) (2018) ("Each state attorney shall develop special units or assign prosecutors to specialize in the prosecution of domestic violence cases … [who] shall receive training in domestic violence issues… . The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence … ."); *Wis. Stat. § 968.075(7)* (2018) ("Each district attorney's office shall develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses.").

[225] Some state legislatures enact voluntary charging criteria in statutes that affirm prosecutorial discretion. See, e.g., *Wash. Rev. Code § 9.94A.411* (2018) ("A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists," and providing a "Guideline/Commentary" for such decisions).

HOUSE_OVERSIGHT_016549

[226] See supra note 224 (citing state statutes in Florida and Wisconsin that encourage or mandate local prosecutors to adopt policies that improve enforcement).

[227] Gershowitz, supra note 219.

[228] On domestic violence and rape offenses, see Gruber, supra note 221, at 752-63 (recounting the feminist movement's efforts to reform domestic violence and rape prosecution law and policies); id. at 760 & n.90 (citing statutes that require prosecutors to adopt "pro-prosecution" policies for domestic violence); id. at 763-74 (describing the history of victim rights' movement); Sack, supra note 220, at 1666, 1689-90 (2004) (describing the women's movement as focused on domestic violence since the 1960s and arguing that mandatory prosecution policies are necessary for police and prosecutors to make the "right choices"); Christine O'Connor, Note, Domestic Violence No-Contact Orders and the Autonomy Rights of Victims, *40 B.C. L. Rev. 937, 942-43 (1999)* (arguing that prosecutors' view of domestic violence as a private problem contributed to reluctance to prosecute). On drunk-driving law and policy, see Gershowitz, supra note 219 (describing efforts by MADD and other groups to toughen laws and enforcement efforts against drunk driving and summarizing subsequent law reform).

[229] See supra note 228.

[230] Cf. Long & Wilkinson, supra note 186, at 1 (explaining that specialized prosecution units provide prosecutors with the opportunity to work with "community partners").

[231] See, e.g., Jeffrey Ulmer & Christopher Bader, Do Moral Communities Play a Role in Criminal Sentencing? Evidence from Pennsylvania, 49 Soc. Q. 737, 753, 757 (2008) (finding in county-level data that "Christian religious homogeneity" increases the likelihood of incarceration, especially when Christian denominations are civically engaged, partially through the effect of local Republican Party dominance via the election of judges and prosecutors).

[232] Gershowitz, supra note 219.

[233] See generally Richard Perez-Pena & Timothy Williams, Glare of Video Is Shifting Public's View of Police, N.Y. Times, July 31, 2015, at A1 (describing survey data on public views about police and apparent effects of video evidence on public opinion); Santo, supra note 186 (describing enforcement challenges for crimes against prison inmates).

[234] Ian Lovett, Los Angeles Joins Debate on Force After Police Killing of a Homeless Man, N.Y. Times, April 17, 2016, at A12 (describing the "pressure that prosecutors now face to move aggressively against officers who kill civilians" and quoting an activist who says that the Los Angeles prosecutor's failure to indict in one case would be "political suicide").

[235] See Carlos Berdejo & Noam Yuchtman, Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing, 95 Rev. Econ. Stat. 741, 754-55 (2013) (finding that elected judges in Washington state assign longer sentences in years closest to elections); Sanford C. Gordon & Gregory A. Huber, The Effect of Electoral Competitiveness on Incumbent Behavior, 2 Q.J. Pol. Sci. 107, 133 (2007) (comparing partisan and nonpartisan judicial elections in Kansas and finding strong effects on sentencing when judges in partisan elections expect or face challengers). See generally, Jed Handelsman Shugerman, The People's Courts (2012) (providing a history of elected judges).

[236] For a knowledgeable account of the U.S. Justice Department's traditions of professionalism that mostly minimize political influence in charging decisions, see generally Samuel W. Buell, Capital Offenses: Business Crime and Punishment in America's Corporate Age (2016). But see Gordon, supra note 214; cf. Scott Ashworth, Electoral Accountability: Recent Theoretical and Empirical Work, 15 Ann. Rev. Pol. Sci. 183, 183-201 (2012) (surveying theoretical and empirical research into the connection between political accountability and policy decisions).

[237] See, e.g., *In re Hickson, 2000 PA Super 402, P 41* (finding that private prosecutions "constitute[] a recognition by the legislature that the office of the district attorney should be subject to a system of checks and balances"); *In re Piscanio, 344 A.2d 658, 660-61 (Pa. Super. Ct. 1975)* ("The judge's independent review of the complaint checks and balances the district attorney's decision and further hedges against possibility of error.").

[238] Outside the United States, prosecution agencies are commonly under a politically accountable justice minister or attorney general, whose political judgment, in principle, operates only at the level of broad policy and should not interfere with specific case decisions. See, e.g., Prosecution of Offences Act 1974, § 2(5) (Act No. 22/1974) (Ir.) http://www.irishstatutebook.ie/eli/1974/act/22/section/2/enacted/en/index.html ("The Director [of Public Prosecutions] shall be independent in the performance of his functions."). Australia's Office of the Commonwealth Director of Public Prosecutions, whose director is appointed for a seven-year term, is an independent prosecution service within the Commonwealth Attorney-General's portfolio, but functions independently of the Attorney-General and the political process. Director of Public Prosecutions Act 1983 (Cth) (Austl.) (as amended 2012); About Us, Commonwealth Dir. Pub. Prosecutions, http://www.cdpp.gov.au/AboutUs (last visited Oct. 30, 2018); see also Mark Findlay et al., Australian Criminal Justice 125-26 (1994) (describing "the development of prosecutorial independence from the executive"). Canada's Public

HOUSE_OVERSIGHT_016550

professional, rival, and politically accountable executive branch officials.

The insight of the U.S. approach is that, for many types of **[*914]** underenforcement, federal oversight combined with democratically responsive local prosecutors can perform the same function as judicial review and private prosecution of correcting bad declination decisions driven by institutional allegiances, cultural biases, and favoritism. Politically responsive criminal justice sometimes works relatively well at changing prosecution practices to serve victim interests that majorities or strong interest groups embrace. Politics has brought meaningful reforms to prosecution for drunk driving, for example, and it has led to improvements, if still insufficient ones, regarding domestic violence and sexual assault crimes. But political accountability has not worked as well to remedy underenforcement when key victim groups have less public sympathy, or key defendant groups, such as police, have a lot. Redundant prosecution authority, in the form of federal oversight, has a similarly mixed track record. Federal law has done much to compensate for state underenforcement of public corruption offenses. It has made significant but less ambitious and successful commitments in the context of police violence. And federal authorities so far have attempted to reinforce state sexual assault enforcement only at the margins.

The track record of the U.S. responses to underenforcement, then, is mixed. But it is not clear that the alternative safeguards that predominate elsewhere are, on their own, clearly superior. Private prosecution is little use for victims with few financial resources or who are legally unsophisticated. Judicial review of declination can be exceedingly deferential, especially if statutes and regulations do not provide courts with clear criteria against which to assess prosecutorial decision making. Jurisdictions strongly committed to reducing unjustified declinations would combine most or all of these mechanisms. U.S. jurisdictions arguably have a history that should have made them especially likely to do so. States once permitted and relied on private prosecutions; judicial authority to review executive action, outside of prosecutor charging, is at least as robust here as in England; the movement for crime victim rights was as effective here as anywhere. The failure to devise more comprehensive safeguards suggests that certain specific pockets of underenforcement - involving police, marginalized victim groups, and sexual assaults - are especially hard to remedy, regardless of readily available solutions.

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Prosecution Service describes itself as "an independent prosecution authority." See About the Public Prosecution Service of Canada, Pub. Prosecution Serv. Can., *http://www.ppsc-sppc.gc.ca/eng/bas/dpp-dpp.html* (last updated Apr. 4, 2018). The Canadian Supreme Court affirms the prosecutor's wide discretion with reference to his political independence. See Krieger v. Law Society of Alta., [2002] 3 S.C.R. 372, para. 32 (Can.) ("The independence of the Attorney-General, in deciding fairly who should be prosecuted, is … a hallmark of a free society." (quoting In re Hoem v. Law Soc'y of B.C. (1985), 63 B.C.L.R. 36 (Can. B.C. C.A.))).

[239] For a sample of longstanding criticisms of unregulated prosecutorial discretion, see Davis, supra note 123; Roscoe Pound, Criminal Justice in America 183 (1930) (criticizing the "intimate connection of the prosecutor's office with politics."); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1554-60 (1981) (arguing that the scope of prosecutorial discretion is too broad). See generally Raymond Moley, Politics and Criminal Prosecution (1929) (criticizing political influence over prosecution).

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From: CN=Anne Boyles/O=PalmBeach
To: Cheryl Kleen
Subject: Items for August 11 Town Council Meeting.
Date: Thursday, July 24, 2008 11:51:14 AM

FYI

----- Forwarded by Anne Boyles/PalmBeach on 07/24/2008 11:51 AM -----

From: Kathleen Ruderman/PalmBeach
To: Anne Boyles/PalmBeach@PalmBeach
Date: 07/24/2008 11:49 AM
Subject: Re: Items for August 11 Town Council Meeting.

Anne,

I have approved SPR 14-2007 and 5-2008. The Larkin item is OK. The appeal by Brindell re 144 Wells Road should not be on the agenda. The sod/seed item is an item that Tim Frank is working on but I don't think it's an agenda item. We need to check with Peter on that one. The infrastructure of large homes is not an agenda item. Neither is the Trump appeal for 515 North County Road.

Two things that will be added though are: EAR Amendments and Zoning Study Items.

TOWN OF PALM BEACH

POLICE DEPARTMENT

A NATIONAL AND STATE ACCREDITED LAW ENFORCEMENT AGENCY

CODE ENFORCEMENT BOARD MINUTES
2:00 P.M. THURSDAY, JULY 17, 2008
AT THE TOWN COUNCIL CHAMBERS, 360 S. COUNTY ROAD

I. **Call to Order**: The meeting was called to order at 2:00 p.m. by Chairman Timothy Hoffman.

II. **Roll Call:**

Present:
Timothy Hoffman, Chairman
Harris Fried, Vice Chairman
Larry Ochstein, Member
Catherine M. Duemler, Member
Madelyn Greenberg, Member
Cynthia Van Buren, Member
James M. Ballentine, Jr., First Alternate
William P. Vanneck, Second Alternate

Absent:
Joel P. Koeppel, Member

Staff:
John Randolph, Town Attorney
Captain Kirk Blouin, Support Services
Rob Walton, Lead Code Enforcement Officer
Nick Gerry, Code Enforcement Officer
Bryant Weymer, Code Enforcement Officer
Raychel Houston, Recording Secretary

III. **Approval of the Minutes of June 19, 2008:**

MOTION BY MS. DUEMLER FOR APPROVAL OF THE JUNE 19, 2008 MINUTES
MOTION SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

IV. **Administration of the Oath to all persons who wish to testify:**

Let the record show that all persons wishing to testify were sworn in at this time by Recording Secretary Raychel Houston.

V. Public Hearings:

A. Case # 08-2431, 434 Seaspray Ave., Christopher Kaufman
Violation of Chapter 18, Section 18-242, Subsection 1 (104.1.1) of the Town of Palm Beach Code of Ordinances, building permits required to construct, install, repair or alter any building or building system.

Lead Code Enforcement Walton requested the case be postponed until a date certain of September 18, 2008 as Mr. Kaufman has a hearing before the Town Council.

MOTION BY MS GREENBERG TO POSTPONE THE CASE UNTIL SEPTEMBER 18, 2008
SECONDED BY MR. OCHSTEIN
MOTION PASSED UNANIMOUSLY

B. Case # 08-2511, 114 N. County Rd., Palm Beach Affair
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry requested the case be dismissed as the fees were paid and it came into compliance.

MOTION BY MR. FRIED TO DISMISS THE CASE
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

C. Case # 08-2512, 235 Sunrise Ave., Suite C8, Palm Beach Resorts International
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said the Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties by July 21, 2008. Mr. Hoffman inquired about the late penalties and Mr. Gerry said they were based on a monthly penalty of 10% per month. In response to Mr. Ochstein's question, Mr. Gerry explained that both the business and the property owner were cited. Mr. Fried inquired about service and Mr. Gerry said it was sent by certified mail. Mr. Ballentine asked if any attempts, other than by mail, were made to get in touch with someone at the business. Mr. Gerry said he went to the business, was told the owner was difficult to reach and left his business card but had not received any response.

HOUSE_OVERSIGHT_016555

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY JULY 21, 2008.
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

D. Case # 08-2513, 329 Worth Ave., Dunville L'Antiquaire, LTD
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said he followed up after the certified letters were sent but the business could not be contacted. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties by July 21, 2008.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY JULY 21, 2008.
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

E. Case # 08-2514, 235 Sunrise Ave., C8, C.J.'s Simply Gourmet, Inc.
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and recommended a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties by July 21, 2008. Mr. Gerry said he also tried, with negative results, to make contact with the owner of this business as it is the same owner as the other case at this location. Mr. Ochstein remarked that this was the same business which had been before the Board previously and had even "bounced a check" to the Town and wanted to know if there was something more that could be done other than the standard $150.00 costs. Mr. Gerry said he could review the case further to see if it could be brought back for additional fines. Mr. Hoffman asked if these cases were brought to Code Enforcement by the Finance Department and Mr. Gerry said they came from the Fire Prevention Bureau who handles their own billing and explained the procedure for that. Mr. Hoffman said it seemed like a year was a long time for these cases to be in arrears. Mr. Gerry said the cases were coming over quicker now from Fire Prevention and he thought it would improve in the future.

HOUSE_OVERSIGHT_016556

MOTION BY MR. OCHSTEIN TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY JULY 21, 2008.
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

F. Case # 08-2515, 140 N. County Rd., Bank of America
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said he had spoken with Robin Gert who advised him the bill had been mishandled and gotten lost in their system. He said he spoke to her yesterday and was told the payment was still in process. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fine inspection fee in addition to all late penalties and costs by August 4, 2008.

MOTION MADE BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY AUGUST 4, 2008.
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

G. Case # 08-2516, 313 ½ Worth Ave., # B2, David Clark
Violation of Chapter 114, Section 114-32 of the Town of Palm Beach Code of Ordinances, business tax receipt required

Code Enforcement Officer Gerry presented the facts of the case and said Mr. Clark had submitted his paperwork and paid the fee but there was a zoning issue still in question. The Zoning Administrator is out of the office this week on jury duty and based on the inability to get the issue resolved, the Town recommends the case be postponed until the August 21, 2008 hearing date.

Mr. Fried questioned what the zoning issue had to do with a business tax receipt and Mr. Gerry said the Town records do not show this particular suite existing at this address but Mr. Clark has documents showing it there.

Mr. Gerry said zoning is tied into business tax receipts because zoning requirements do not allow certain businesses in some districts. There is also the

HOUSE_OVERSIGHT_016557

question of whether the space is legitimate because people will subdivide suites and make two spaces where there should only be one. Mr. Gerry said it looked like a legal space from the documentation Mr. Clark provided but the Zoning Administrator needed to approve it.

MOTION BY MR. FRIED TO POSTPONE THE CASE UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

H. Case # 08-2517, 2270 E. Ibis Isle Road, Mark Remson Trust
REPEAT Violation of Chapter 42, Section 42-86 of the Town of Palm Beach Code of Ordinances, Environment, properties to be maintained in a good condition.

Code Enforcement Officer Weymer presented the facts of the case and said the violation was discovered from routine patrol in the area but shortly after the notice of repeat violation was sent out, a citizen complaint was received as well. Mr. Weymer said there had been at least seven previous letters to this property owner regarding lack of maintenance on the property. A repeat notice of code violation was mailed out on June 24, 2008 with a mandatory hearing date. The lot was cut on or around July 2, 2008. This particular violation is a Class II violation under the fine schedule which calls for a fine of $400.00, however, by law, the Board has the ability to impose a fine of up to $500.00 because it is a repeat violation. Mr. Weymer said he believes it is important to look at the track record of this property in considering the fine. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and a fine of $500.00, which is the maximum fine for a repeat violation.

Mr. Hoffman said it seemed that every time the property owner gets notified he comes into compliance but he has to be notified. Mr. Weymer says there are times when he comes into compliance but on at least two other occasions, he has been before the Board because he has not complied by the time set. Mr. Ochstein asked if he has been fined in the past and Mr. Weymer said there are two outstanding fines for which liens have been placed on the property.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND A FINE OF $500.00
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

I. Case # 08-2518, 230 Esplanade Way, Kenneth J. Horton

HOUSE_OVERSIGHT_016558

Violation of Chapter 42, Section 42-86 (19) of the Town of Palm Beach Code of Ordinances, cleared land must be re-sodded or replanted to prevent the creation of windblown dust or dirt and Chapter 42, Section 42-86, unsightly, unsafe or unsanitary conditions not permitted and properties to be maintained in good condition.

Code Enforcement Officer Weymer presented the facts of the case and said the violation was discovered on routine patrol. Mr. Weymer has been in contact with a property representative, Louis Pascerelli who said Mr. Horton had not been in Town to receive his mail. Mr. Weymer said Mr. Pascerelli had proposals from Hansen Landscape for the clean up and re-sod of the lot and a weekly maintenance contract to assure this does not happen again. Tropical Irrigation has also been contacted to put in a new irrigation system. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and the property owner be given until August 18, 2008 to come into compliance. Mr. Fried said he believed a fine of some sort should be imposed. Mr. Ballentine asked how long Mr. Horton had been out of compliance. Mr. Weymer said the original warning was sent on June 5, 2008 and a notice of violation and hearing was sent on June 20, 2008. Mr. Weymer said the first contact with the property owner was July 7, 2008. Mr. Ballentine asked if the August compliance date was reasonable and Mr. Weymer said Jim Hansen of Hansen Landscape thought the work would be done before that date but wanted more time in case he ran into any problems.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND GIVE HIM UNTIL AUGUST 18, 2008 TO COME INTO COMPLIANCE.
SECONDED BY MR. OCHSTEIN
MOTION PASSED UNANIMOUSLY

J. Case # 08-2519, 206 Dunbar Road, AMF Estate Management
Violation of Chapter 42, Section 42-230 of the Town of Palm Beach Code of Ordinances, leaf blower over 65dBA at 50 ft.

Code Enforcement Officer Weymer presented the facts of the case and said he witnessed the violation on June 26, 2008. AMF had previously been warned on February 19, 2008 for using a leaf blower over 65dBA. Mr. Weymer performed a decibel test for this violation and the reading was 79.6 dBA at 50 feet. This is a class II violation under the fine schedule which has a $125.00 fine for the first offense. The violation was issued on site to a superintendant for AMF and has not been paid. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the $125.00 fine.

Mr. Hoffman asked whether this company had participated in the leaf blower testing being offered by Code Enforcement. Mr. Weymer said AMF had participated in the testing program and had several leaf blowers certified. He said

HOUSE_OVERSIGHT_016559

the truck he was out with had 2 other leaf blowers on the truck that he could identify as being over 65dBA but he only tested the one they were using and wrote a violation for that one. Ms. Van Buren asked about the testing method and Mr. Weymer explained how it was done.

MOTION BY MR. OCHSTEIN TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER HIM TO PAY THE $125.00 FINE
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

K. Case # 08-2520, 165 Brazilian Ave., Richard Lynn
Violation of Chapter 10, Section 10-45 (i) of the Town of Palm Beach Code of Ordinances, if any dog attacks and causes severe injury or death to any human or domestic animal more than once, the owner shall be required to have said dog removed from the Town or humanely euthanized at his/her sole expense and violation of Chapter 10, Section 10-6 of the Code which prohibits animals from creating nuisances which are detrimental to the public safety and welfare.

(Mr. Ochstein recused himself, stating that he has a relative who has a business relationship with Dr. Lynn and Mr. Hoffman advised Mr. Vanneck would be a voting member in this case)

Sgt. Curtis Krauel said this case was brought to Code Enforcement through a culmination of events spanning back over a period of 4 years. Sgt. Krauel explained Section 10-6 of the Code and said he was going to be showing some graphic photographs. Sgt. Krauel presented the facts of each of the documented cases involving attacks by Duke from March 17, 2004 until May 11, 2008.

Mr. Hoffman questioned how the Code Enforcement Board came into this procedure since the Town Council had already said Duke is a dangerous dog. Mr. Randolph explained that Town Council does not have the authority to fine. Originally, the police department did not issue a code enforcement board citation but ordered the dog be removed from the Town or humanely euthanized which was appealed to Town Council. Town Council denied the appeal. Since that time, Dr. Lynn has refused to comply with the order of the Town Council so a citation was issued by Code Enforcement to bring the matter before the Board to determine whether there should be a finding of violation and at a later time, whether a fine should be imposed. Mr. Randolph said it was now the jurisdiction of the Code Enforcement Board and not the Town Council. Mr. Hoffman questioned whether or not the Board had to determine if the dog was going to be euthanized or removed from the Town and Mr. Randolph explained that this was not the Board's determination. The Board was only to determine whether or not there had been a violation of the Town Code.

HOUSE_OVERSIGHT_016560

Sgt. Krauel continued his presentation remarking that once Duke had been found "potentially dangerous" by Animal Care and Control, there had been another attack but due to an administrative error by Animal Care and Control in failing to document their records appropriately, Duke was classified as "potentially dangerous" again. This is an error that Animal Care and Control completely acknowledges.

After the last attack on May 11, 2008, Duke was taken into custody by Animal Care and Control and after a hearing, was classified as "dangerous". Sgt. Krauel noted that the hearing before Special Magistrate Earl Mallory did not classify Duke as vicious because Duke had no documented cases of attacks on humans. After this last case was reviewed by Code Enforcement, sufficient evidence was also found by the Town to classify Duke as dangerous and Dr. Lynn was notified by registered mail. Dr. Lynn appealed to Town Council and that appeal was denied by Town Council by a 5-0 vote. The Town recommends a finding of non-compliance with Chapter 10, Section 10-6 as the Town has the two required affidavits of residents of the Town occupying separate households. The Board was provided with copies of four (4) affidavits.

Sgt. Krauel then proceeded with an explanation of Chapter 10, Section 10-45 and said the Town was requesting a separate motion for a finding of non-compliance of Chapter 10, Section 10-45 (i) and that Dr. Lynn be given until July 18, 2008 to come into compliance by either removing the dog from the Town or having it humanely euthanized. If compliance is not achieved, the Town recommends a daily fine of $250.00 a day commence on July 19, 2008 and continue until compliance is achieved.

Mr. Randolph requested the Board treat these two sections of the Code separate and apart. He said the first evidence heard related to Section 10-6 (3) and involved the affidavits from the residents of the Town. Because of the dispute Dr. Lynn's attorney has with regard to the manner that Section 10-45 was applied, Mr. Randolph recommended the two Code sections not be mixed up. Mr. Randolph said he would like for the Board to first consider whether there had been a violation of 10-6 and to make a motion one way or the other with regard to the Staff's recommendation. He then requested that Section 10-45 be entertained separately after Dr. Lynn's attorney and anyone else who wanted to speak had an opportunity to do so.

Vivian Dorris, 155 Brazilian Ave., said her beagle/bassett, Charlie, was viciously attacked by Dr. Lynn's dog, Duke and she has sustained approximately $8500 in vet's bills. She said her dog will never walk properly again because of severe nerve damage. She does not feel there are enough precautions being taken for the safety of residents on Brazilian Ave. She asked that the Board take this into consideration and thanked them for their service.

Wayne Gerl, 149 Brazilian Ave., said he has two dogs and every time he exits his driveway or front yard, he has to stop and peek around and make sure the other

HOUSE_OVERSIGHT_016561

dogs are not in the area. He said he was bitten by Duke a couple of years ago. He was talking with Dr. Lynn and the dog just reached out and bit him, tearing his pants and breaking the skin. He said he has been friends with Dr. Lynn and Margrit for many years but it was just unsafe for anybody and any animals in the area.

Bobby Goodnough said he was jogging in the area and the dog lunged at him, causing him to have to dive through a 12 foot hedge to get away from it. He said he just thought it was a matter of time before the dog got a person or a child. Sgt. Krauel asked if Mr. Goodnough had reported the incident to the police department or had a time frame of occurrence. Mr. Goodnough said he had not made a police report but it occurred about 2 years ago.

Laura Klein, 130 Seaspray Ave., said she had lived here for 12 years, having moved from Washington, D.C. for a sense of security. She said she was now in the process of installing surveillance cameras. She said she could no longer walk her dog without constantly looking around, worrying if Duke had once again escaped from the open gates. She said it is a privilege to own a dog and dog ownership and responsibility should go hand in hand. She said Dr. Lynn was issued a citation in August of 2002 for locking his dog in a car with the windows rolled up. She said she mentioned this to prove his irresponsibility. She said his voluminous file from Animal Care and Control would attest to this. She said no one was safe while Duke is in Palm Beach.

James Merola was present on behalf of Dr. Lynn and said he was present on a revised Notice of Code Violation and Hearing dated July 15, 2008. He said he was not denying there were incidents with Duke. Palm Beach County had the dog taken into custody and the hearing was held June 5, 2008. At that hearing, it was agreed upon by the County and Dr. Lynn that the dog would be classified as dangerous. The dog was classified as dangerous which required certain restrictions on the dog which Dr. Lynn complied with and the dog was returned to him. In the event Duke has another incident, pursuant to state and county law, but some reason not Town law, the dog would be taken into custody and euthanized. Mr. Merola said Dr. Lynn feels very badly about the situation and agreed with the County to do what they required. Mr. Merola said Dr. Lynn then received a letter, dated June 16, 2008 from the police department, mentioning the order of the County and stating for the first time that the Town was declaring the dog dangerous and giving him ten (10) days to appeal, which he did not. On June 20, 2008, 4 days after the dog was declared dangerous by the Town, the police department sent a second letter, citing 10-45 (i), advising that since the dog already had two incidents, they wanted it removed or euthanized. The dog had not done anything since being declared dangerous. This letter did not mention an appeal, but he sent a letter anyway, stating they did not agree with that. He said the dog was declared dangerous on June 16th, requirements were imposed and they complied with those, including the filing of a $1000 bond and they did not agree the dog should now be removed. There was a Town Council hearing on August 8th and the Council said they needed to have the dog removed or euthanized. Mr.

HOUSE_OVERSIGHT_016562

Merola went into detail about the requirements of 10-45 and said Dr. Lynn had complied with all of those. Then the letter of June 20th came, requiring Dr. Lynn to remove the dog or euthanize it. Mr. Merola read subsection (h) into the record and said the Code Enforcement Board did not have any jurisdiction over subsection (i) as subsection (h) just mentioned (d) through (g). The Town filed a lawsuit and he and Mr. Randolph were before Judge Hoy this morning. The Town is asking to have the dog removed or euthanized and asking for a permanent injunction, stating an emergency situation. Judge Hoy gave them a hearing at 1:30 p.m. on Tuesday where it will be determined whether the dog is a nuisance, whether 10-45 (i) even applies to the situation and if the Board has authority over 10-45 (i). If the Judge says the dog has to go, they are not going to argue with the Court but he believes they have a right to present their case. He does not believe the Town's position that the fine should start tomorrow is correct. He believes the Board can only find violations of subsections (d) through (g) of 10-45. There have been no allegations that Dr. Lynn has violated subsections (d) through (g). Mr. Merola believes it is clear that the Code Enforcement Board has no authority under (i). Mr. Merola then addressed 10-6 and said he believed that since all precautions have been taken under 10-45, the dog does not constitute a nuisance. Mr. Merola said he has an injunction relief request before the Judge to stop the Board from making this decision. Mr. Merola said Mr. Randolph has asked them to determine these two (2) ordinances separately and he does not believe 10-45 (i) is in the Board's purview, and as to the nuisance, the dog has to be a nuisance now and it is not. This is all going to be determined Tuesday and he is asking the Board to either deny the Town's recommendation because the Town cannot prove the dog is a nuisance now or reset this case until next month's hearing.

Sgt. Krauel advised he wanted to make a rebuttal to some of Mr. Merola's comments. The service of notice Mr. Merola referred to in declaring the dog dangerous was when the police department spoke with Dr. Lynn on June 12, 2008 and was told Duke was being housed at a kennel in Palm Beach County. A notice could not be served to Dr. Lynn to have him come into compliance with something he was already in compliance with. The dog was not in the Town. The police department did not find out the dog was in Town until June 20th when Laura Klein reported the dog attempted to break free of Dr. Lynn to attack her and this is when the letter was sent out requesting compliance with Section 10-45. Dr. Lynn was given the entire ordinance on June 10th, not just sections or specific acts that he needed to comply with. Duke was not on the property at that time and no notification to remove the dog from the property could be served then because the dog was not there. As far as the police department was concerned, Dr. Lynn was in compliance with the ordinance. Sgt. Krauel pointed out that the Town does not abide by the state and the county ordinances, that the Town has the ability to enforce more stringent and strict ordinances and that is what we have done here.

Sgt. Krauel said he was prepared, based on Counsel's recommendation, to recommend a motion to find Dr. Lynn in non-compliance with Section 10-6 and move to postpone 10-45 (i) until after further consideration by the Circuit Court on Tuesday. The Town recommends administrative costs in the amount of

HOUSE_OVERSIGHT_016563

$150.00 and a fine of $250.00 a day to start on June 19, 2008 if compliance is not achieved by June 18, 2008.

Mr. Ballentine asked for clarification on the motion and was advised by Mr. Randolph that it would be a finding of non-compliance of Chapter 10, Section 10-6, administrative costs of $150.00 and a compliance date of July 18, 2008 with a fine to be considered at the next meeting if compliance was not achieved.

Ms. Duemler said she believed that the dog, besides being a nuisance, is a threat to society and she hoped that by Tuesday the dog did not break loose from Dr. Lynn and maul some child, that she believed it is a disgrace and she supports the Town.

(*applause from the audience)*

MOTION BY MR. FRIED TO FIND DR. LYNN IN VIOLATION OF CHAPTER 10, SECTION 10-6, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND REQUIRE HIM TO COME INTO COMPLIANCE BY JULY 18, 2008
MOTION SECONDED BY MR. BALLENTINE
MOTION PASSED UNANIMOUSLY

Mr. Randolph asked if a motion could be made to defer the consideration of violation of Chapter 10, Section 10-45 (i) until the August 21, 2008 meeting and Ms. Greenberg advised she would make that motion. Mr. Fried asked Mr. Randolph if he would explain the reason for this. Mr. Randolph said the argument had been made that 10-45 should not apply because the dog has already been deemed dangerous by the County and pursuant to the Town's Code. Mr. Randolph said he believed the argument was going to be made in court on Tuesday that it is not appropriate for the Town to move forward with regard to 10-45 (i) because that only applies to any incident that occurs after the dog has been declared dangerous. The argument has been made that Dr. Lynn has done everything he is required to do. Mr. Randolph said he hesitated to explain further if the matter was going to be deferred. Mr. Randolph said the position of Staff is that item (i) stands on its own merits, that it is not connected to 10-45 (a) through (h). It is also the position of Staff that it is appropriate to bring a violation of (i) to the Code Enforcement Board even though it does not specifically state that in 10-45 because Section 2-439, which is the citation fine schedule, sets forth all of the sections of the Code of Ordinances which can be brought before the Code Enforcement Board and 10-45 is listed. Code Enforcement has the right to bring a violation directly to the Code Enforcement Board instead of issuing the fine set forth in the fine schedule. Mr. Randolph said the Board could move forward in considering 10-45 instead of deferring it to the next meeting.

Mr. Fried commented that based on the egregious nature of what they had been presented with, he believed the Board should do everything they could to put pressure on Dr. Lynn to comply. Mr. Randolph questioned whether the Town

HOUSE_OVERSIGHT_016564

would be requesting a separate fine of $250.00 a day for non-compliance and Sgt. Krauel said that was his recommendation, that there would be two concurrent fines running. Mr. Hoffman asked about the administrative costs and Sgt. Krauel said the Town was only asking for one.

MOTION BY MR. FRIED TO FIND DR. LYNN IN VIOLATION OF CHAPTER 10, SECTION 10-45 (i) AND REQUIRE HIM TO COME INTO COMPLIANCE BY JULY 18, 2008
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

Mr. Merola questioned what the order was with regard to 10-6, if it was to have the dog removed or euthanized by Friday or just to abate the nuisance. He said he needed to know what to tell Dr. Lynn what had to be done by Friday to avoid the potential fine. Mr. Hoffman said Dr. Lynn needed to either remove the dog or have it euthanized and Mr. Fried said that was his intention in making the motion.

VI. Old Business:

A. Case # 08-2484, 515 N. County Road, Trump Properties, LLC
Violation of Chapter 18, Section 18-205 of the Town of Palm Beach Code of Ordinances, the Architectural Commission may attach conditions to any approval it grants.

Lead Code Enforcement Officer Walton advised this case would be heard at Town Council on August 11, 2008 and requested the case be postponed until the August 21, 2008 hearing date. Mr. Trump's attorney and the attorney for the new purchaser were both present.

Robert Brody said he was the attorney for County Road Property LLC, who had just purchased the property two days ago. He said it was the intent of his client to comply with the Town and also to work with the Town. There is an appeal pending and Mr. Brody said it was his client's intent to work everything out with ARCOM prior to that appeal. He said he had recommended to his client that he withdraw the appeal. Mr. Brody said his client had hired the Lawrence Group and Gene Lawrence planned to work with ARCOM.

MOTION BY MS. DUEMLER TO POSTPONE THE CASE UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

VII. Fine Consideration:

HOUSE_OVERSIGHT_016565

A. Case # 08-2432, Beachfront Vista Property, Nightingale Beach Club Association
Violation of Chapter 134, Section 134-1472 (3) of the Town of Palm Beach Code of Ordinances, no additional walls, fences, hedges or other structures or growth shall be erected or be grown eastwardly of Ocean Boulevard to a height greater than four (4) feet above the surface of the Ocean Boulevard.

(Ms. Duemler recused herself as part of a previously declared conflict and Mr. Hoffman advised Mr. Vanneck would be a voting member in this case)

Lead Code Enforcement Officer Walton said Nightingale Beach Club had previously been found in violation and was given time to obtain a permit. A permit was obtained but there were some conditions attached to it. There have been two inspections with the Florida Wildlife Commission and an agreement was reached to not require the vegetation to be trimmed until after turtle season. Since they have already been found in non-compliance, the Town recommends the time for compliance be extended to November 7, 2008 and if compliance is not achieved by that date, a fine of $250.00 a day be imposed.

Jack Maxey, 244 Nightingale Trail, presented some documents to the Board and advised he was president of the Nightingale Trail Beach Club Association. He said one of the documents was his application under duress for the permit. Mr. Maxey advised he had not been sworn in and was administered the oath of office by Recording Secretary Houston.

Mr. Maxey said he has had a long correspondence with the legal department of the Department of Environmental Protection and he believes on an emotional level, they do not believe the trees should come down but they told him they could not find any statutory way to force the Town not to enforce the permit. They told him it should be the jurisdiction of a court, not the DEP. Mr. Maxey said the Town was cutting down its own sea grapes in violation of the permitting process. Mr. Maxey said there were all kinds of burdens in this permit he needed to comply with, one of which was replacement of the whole plant if anything over 6 feet tall which was larger than 3 inches in diameter was cut down. He said he was supposed to provide a signature on the document putting himself at risk of a $10,000 a day fine if he did not comply with the requirements of the permit. Mr. Maxey said Jean Higgins, a biologist for the State Fish & Wildlife, recommended sea grapes should not be trimmed because they are the best source of protection against the lighting. Ms. Higgins made some suggestions such as changing light fixtures and extinguishing lights during turtle season and maintaining a substantial healthy vegetation light blocking buffer.

Mr. Maxey said an approximate 24 inch piece of aluminum is hanging from the light on Nightingale Trail and it seemed highly unusual that a shield of that nature would only be necessary on that light when the recommendations given by Fish & Wildlife are recommendations with broad reaching impact for the entire island. He

HOUSE_OVERSIGHT_016566

noted that the street lights in Palm Beach do not go off during turtle nesting season. He said a field permit for trimming of the sea grapes at the Nightingale Beach Club Association was not recommended during the nesting season. He said the indifference to materials he had brought forth more than a year ago that had now been brought forth officially by the DEP were offensive to him and that is one of the reasons he had continued to "hammer" this. He said he believed the Board should recommend to the Town Council that they remove this section of the Code, given the current environmental regime, especially when one considers the public relations downside of fighting him on this issue and spending $2,000,000 to fight Lake Worth on the other side. Mr. Maxey said this was probably not a win-win situation and that NOAA had not even been brought into the fold yet.

Mr. Ochstein wanted to know if the Board was precluded from enforcing the ordinance now. Mr. Walton said it should not be enforced now, that in speaking with Mr. Wettstein from DEP and Ms. Higgins from FWC, an agreement had been reached to wait until the end of turtle season to require the trimming. The Town recommends granting the Nightingale Beach Club until November 7, 2008 to come into compliance. The permit is good until that date. In response to Mr. Hoffman's question, Mr. Walton said the permit was issued on June 16, 2008. Mr. Maxey said he applied on March 19, 2008. Mr. Balletine inquired as to whether 7 days was sufficient for compliance after the end of turtle season and Mr. Walton said it was not a large area and he believed it was. Mr. Maxey said he did not believe it was sufficient, that it would be an economic hardship if he had to replace every tree that is over 3 inches in diameter in order to get it below 6 feet and he brought up other issues involved with the trimming. Mr. Balletine told Mr. Maxey he just wanted to know, without going into a lot of detail, whether he could comply in a 7 day period.. Mr. Maxey said that before he could remove any native plant, he had to first remove every single non-native one from the property and he had some questions whether or not he could comply within that time period. He also said he had some real questions about whether the law, both at the State and the local level, had been equally applied within the Town. Mr. Maxey said he is in consultation with an attorney to find out what measures he can take. The Town did not apply for a permit to cut its own sea grapes and judging from the guidelines he has in his permit, the Town would be in violation of almost everyone of those guidelines. The DEP counsel's office asked him to provide photographs of the Town's illegal cutting back in February.

Mr. Vanneck said there should be more research as to what should and should not be cut. He believes the Town code may have gone too far.

Mr. Hoffman said the Board did not have the authority to modify the Code and could only enforce the Codes as they had been written.

MOTION BY MR. OCHSTEIN TO GRANT THE VIOLATOR UNTIL NOVEMBER 7, 2008 TO COME INTO COMPLIANCE AND IF COMPLIANCE IS NOT ACHIEVED BY THAT DATE, TO ASSESS A FINE IN THE AMOUNT OF $250.00 A DAY UNTIL COMPLIANCE IS ACHIEVED SECONDED BY MR. BALLENTINE

HOUSE_OVERSIGHT_016567

Mr. Vanneck asked for clarification on what the motion was and Mr. Walton advised the motion was that the sea grapes must be cut after turtle season, by November 7, 2008 and if they were not cut by that date, a $250.00 a day fine would commence on November 8, 2008 and continue until compliance was achieved.

Mr. Fried asked who the fine would apply to and Mr. Walton said it would be to the Nightingale Trail Beach Club Association. Mr. Fried asked if this was a legally constituted body and Mr. Maxey said it was an informal body, that on the deeds, everyone owns this piece of property in common. There was some additional discussion on the ordinance. Ms. Van Buren asked if every single property owner on the street was a member of the association and Mr. Maxey said every property owner on Nightingale Trail was and there were one or two houses on North Ocean and North Lake as well. Mr. Maxey said there were 23 separate memberships. Ms. Van Buren asked about the finances and Mr. Maxey said there were annual dues of $75.00 a year and a common bank account of $3500 or $3600. Mr. Maxey said that if a fine was incurred, that is probably where the money would come from but he did not believe, because of his fiduciary responsibility to the group, he could fight the decision with any of those monies. Mr. Ochstein asked if he was an elected officer and Mr. Maxey said he was president and that he keeps the books and makes sure the place is in good condition.

MOTION BY MR. OCHSTEIN TO GRANT THE VIOLATOR UNTIL NOVEMBER 7, 2008 TO COME INTO COMPLIANCE AND IF COMPLIANCE IS NOT ACHIEVED BY THAT DATE, TO ASSESS A FINE IN THE AMOUNT OF $250.00 A DAY UNTIL COMPLIANCE IS ACHIEVED
SECONDED BY MR. BALLENTINE
MOTION OPPOSED

ROLL CALL VOTE:

MR. OCHSTEIN	**YES**
MR. BALLENTINE	**YES**
MR. FRIED	**YES**
MS. GREENBERG	**YES**
MS. VAN BUREN	**YES**
MR. VANNECK	**NO**
MR. HOFFMAN	**YES**
MOTION PASSES	**6-1**

Mr. Fried advised Mr. Maxey that the Code Enforcement Board's position was to enforce the Code and said that he had always found the Town Council members to be very receptive, individually and as a group. Mr. Fried said it was not beyond

HOUSE_OVERSIGHT_016568

the Town Council's power and authority, if persuaded, to look into an ordinance and suggested Mr. Maxey address it with them.

B. Case # 08-2508, 227 Brazilian Ave., 2F, Hillen J. Smith
Violation of Chapter 18, Section 18-241 of the Town of Palm Beach Code of Ordinances, building permits required to construct, install, repair or alter any building or building system

Lead Code Enforcement Officer said Mr. Smith was found in violation, assessed $150.00 in administrative costs and given until July 16, 2008 to come into compliance. Compliance has not been achieved so this is the time a fine would be assessed. Mr. Walton said the contractor was present to speak.

Steve Pappanelli said he was hired by Mr. Smith after Mr. Smith had been cited and he was 90% complete with the job. He was just waiting on his final inspection and he should have it by next week but the building is closed to all construction inspections for two (2) weeks. Mr. Pappanelli said he was present on Mr. Smith's behalf to request a three (3) week extension. Mr. Walton said the Town did not oppose the extension of time. Mr. Walton said the three weeks was necessary because the building would not let inspections be done while their maintenance man was on vacation. Mr. Walton said if compliance was not achieved by August 7, 2008 then he would ask for a $250.00 a day fine to commence on August 8, 2008.

Ms. Greenberg asked some questions about the type of permits and remarked that it is unfortunate in multi-family dwellings that this type of situation would exist to begin with because electrical and plumbing can have catastrophic effects on other owners. She said it is unfortunate the people do not do the right thing until they get caught. Mr. Pappanelli said he was not the contractor working without permits.

MOTION BY MR. OCHSTEIN TO GRANT AN EXTENSION OF TIME UNTIL AUGUST 8, 2008 TO COME INTO COMPLIANCE AND TO ASSESS A FINE OF $250.00, RETROACTIVE TO JULY 17, 2008 IF COMPLIANCE WAS NOT ACHIEVED
SECONDED BY MS. GREENBERG

During discussion on the motion, Ms. Duemler stated she believed the retroactive fine was a little harsh. Mr. Ballentine said he agreed and asked the reason for the retroactive fine. Mr. Ochstein said there are so many people who do work without a permit and they know they need a permit. That is a very dangerous thing in a multi-family dwelling and it should be egregious.

MOTION BY MR. OCHSTEIN TO GRANT AN EXTENSION OF TIME UNTIL AUGUST 8, 2008 TO COME INTO COMPLIANCE AND TO

HOUSE_OVERSIGHT_016569

ASSESS A FINE OF $250.00, RETROACTIVE TO JULY 17, 2008 IF COMPLIANCE WAS NOT ACHIEVED
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

VIII. Fine Reduction:

A. Case # 08-2301, 167 E. Inlet Drive, The Landfall Group,
Violation of Chapter 18, Section 18-242, Subsection 104.5.1.6, medium projects, all new or remodel construction projects 4000 sq. ft, to 8,999 sq. ft. under roof be allowed 22 months

Lead Code Enforcement Officer Walton said in October, 2007, Ajax Equity LLC was found in violation of going over the construction time limits. On November 15, 2008 they still were not in compliance and a daily fine of $250.00 started running. The final inspection was obtained in March, 2008. The fine ran for 137 days prior to compliance being achieved and the accumulated fine due is $34,250.00 and the $150.00 hearing costs have not been paid.

Frank Lynch advised he was the attorney for both The Landfall Group and Ajax. He said when they appeared before the Board in October, Lazslo Wagner, the principal of The Landfall Group, who has built homes throughout the Town of Palm Beach for 26 years acknowledged he was unaware of this particular code provision. Had he been, they would have applied for an extension of time to complete the construction. At the hearing, Mr. Koeppel made a motion to allow them an additional sixty (60) days to complete the construction, find them in non-compliance and assess the $150 costs. After a significant amount of discussion, that motion went to a vote and failed 4-3. A second motion was made and Ms. Duemler thought the $250.00 fee was significant and believed the fine should be $125.00 a day. Mr. Lynch gave Mr. Walton a copy of that transcript to put in the record. As part of their request, they are asking the Board to consider what Ms. Duemler suggested at the meeting. At the same time, Mr. Lynch said he would like them to consider that The Landfall Group is a good corporate citizen and made a legitimate mistake. As a result, a fine was incurred and they are willing to accept some level of fine, some level of responsibility for what they did. The construction was continually on going, there were no delays other than the construction process itself. This was not someone's house, it was a speculative venture. There had been some concerns with the shell contractor and the finish items themselves were significant enough that there were substantial delays. At that same hearing, Code Enforcement Officer Gerry said it was the position of Code Enforcement to get more assertive at the suggestion of Town Council and that these projects were to be more aggressively pursued. Under the new ordinance, for a house of approximately 5,000 sq. feet, they would be entitled to 24 months. This would

HOUSE_OVERSIGHT_016570

have brought them to November 2007 and they would have gotten additional time for Hurricane Wilma which would have brought them to December. If they were under the new Code, they would not be before the Board today and may not have a fine at all. He realizes a mistake was made, he realizes something has to be paid but he thinks $35,000 is a significant fine. The Board has gotten their attention and they would ask for a significant reduction in the fine.

Mr. Fried asked how long it took to get the final inspection after the 22 months had run. Mr. Walton said they had been given 23 months due to the hurricanes and they were 5 months and 9 days beyond that. Mr. Ballentine asked how far out they would be under the new rules. Mr. Walton said they would be given 24 months which with the hurricane would be 25 months. Mr. Lynch said that at the end of that 24 month period, if they had not sought an extension of time within the required time period, no earlier than 6 months and no later than 45 days, before the expiration of that 24 months, their project would have been shut down. Mr. Wagner's lack of knowledge of this particular situation would have become irrelevant because they would have been red tagged on the next day after the 24 month period. Mr. Lynch said Mr. Wagner did not know because he has been a good corporate citizen and had never been before the Board except on one occasion which was beyond his control; it was a maintenance item on the Glazer house. Mr. Walton said that situation was not due to Mr. Wagner's fault, that he was just representing the owner.

Mr. Ballentine asked how Mr. Wagner did not know the Code requirement if he had built so many homes in the area and said he had difficulty with the ignorance of that.

Mr. Fried said he agreed with Mr. Ballentine and found it hard to believe that Mr. Wagner did not know the time limits. He said some reduction should be considered but he was not sure on what basis.

Mr. Ochstein remarked that the fine was around $35,000 and the house was on the market for $10.6 million dollars so he did not see the hardship. Mr. Lynch said he did not know the price but he would accept Mr. Ochstein's statement on that. Mr. Lynch said the hardship was in the imposition of the fine itself, there were mistakes made and he believed that Council would have given them a significant extension of time if Mr. Wagner had been aware of the situation and filed the proper notice with Town Council.

Mr. Lynch said if some sort of arrangement could be reached today, his client would be in a position to pay within the next two weeks. Mr. Hoffman said he was concerned because he believed that when the case was originally heard, they had the option of fining $250.00 a day and they gave them a fine reduction at the time they initiated the fine of $125.00 a day. Mr. Walton corrected Mr. Hoffman, advising there was a motion for a fine of $125.00 a day which failed and the fine that was in effect was $250.00 a day. Mr. Lynch said he believed the record reflects something different than that. Mr. Walton said his records reflect $250.00

HOUSE_OVERSIGHT_016571

a day but he would review it. Mr. Walton reviewed the transcript and noted that it showed $125.00 a day but the Board order specified $250.00 a day and he would have to do further research.
Mr. Fried advised he could make a motion to postpone the matter to the next meeting and have Mr. Walton bring back the correct information. There was additional discussion about the amount of the fine and Mr. Lynch said he was seeking a reduction of the $17,125.00 which would be the amount of the fine if it was $125.00 a day. Mr. Hoffman said he would find that hard to accept. Mr. Hoffman read from the minutes that a motion was made by Mr. Fried that the defendant was found in non-compliance, ordered to pay an administrative fee in the amount of $150.00, obtain a final building inspection by October 25, 2008 and a fine of $125.00 to commence on October 26, 2007. He said that motion passed 4-3. Mr. Walton said he could not dispute that but he would have to do some research. Mr. Hoffman said he would not be in favor of reducing the $17, 125.00 any further.

Mr. Ochstein said he was hesitant to do anything until they know what the number is. Mr. Walton suggesting postponing the case until next month.

MOTION BY MR. OCHSTEIN TO POSTPONE THE FINE REDUCTION HEARING UNTIL AUGUST 21, 2008
SECONDED BY MR. FRIED
MOTION OPPOSED

ROLL CALL VOTE:

MR. OCHSTEIN	**YES**
MR. FRIED	**YES**
MS. DUEMLER	**YES**
MS. GREENBERG	**NO**
MS. VAN BUREN	**NO**
MR. BALLENTINE	**YES**
MR. HOFFMAN	**NO**
MOTION PASSES	**4-3**

B. Case # 08-2302, 9 Via Vizcaya, Macari Building & Design, Casa Picchio, LLC
Violation of Chapter 18, Section 18-242, Subsection 104.5.1.6, medium projects, all new or remodel construction projects 4000 sq. ft, to 8,999 sq. ft. under roof be allowed 22 months

Lead Code Enforcement said the property was found in non-compliance and they requested a fine reduction hearing. The owner of the property was called out of town and they requested a postponement until the August hearing.

HOUSE_OVERSIGHT_016572

MOTION BY MS. GREENBERG TO POSTPONE THE FINE REDUCTION HEARING UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

IX. Comments:

Ms. Greenberg said that the presentation using the "slides" made it too dark in the room. She wanted to know if there was anything they could do as a Board in making a suggestion to the Council about an ordinance that could address people not pulling permits because of the safety issues in terms of multi-family dwellings. Capt. Blouin said there was a provision in place. If work is done without a permit, there is a penalty involved. There was an ordinance drafted last year that requires them to pay four times the permit fee.

Mr. Fried asked Mr. Randolph if he had spoken to Mr. Elwell about the foreclosure action being brought to the Board's area of responsibility as opposed to the Town Council. Mr. Randolph said he had but did not have an answer yet and would try to get one. Mr. Fried asked Ms. Houston about progress on the fines and she said the Town was now inputting fines into the computer system and if someone had outstanding fines they could not get any permits. People are contacting Code Enforcement because they cannot get permits and are either paying or asking to come back to the Board for a fine reduction.

Capt. Blouin advised that with regard to any foreclosure action, the police department is scrutinizing each and every one of them as some of these cases we have liens on were pre-existing prior to coming to the police department. We do not want to bring a case to the board that can be handled in a different manner.

Mr. Walton remarked that it was a good thing that there are a number of working without permit cases being brought to the Board, that it means Staff is doing their job.

X. Adjournment:

The meeting was adjourned without benefit of a motion.

HOUSE_OVERSIGHT_016573

TOWN OF PALM BEACH

POLICE DEPARTMENT

A NATIONAL AND STATE ACCREDITED LAW ENFORCEMENT AGENCY

CODE ENFORCEMENT BOARD MINUTES
2:00 P.M. THURSDAY, JULY 17, 2008
AT THE TOWN COUNCIL CHAMBERS, 360 S. COUNTY ROAD

I. **Call to Order**: The meeting was called to order at 2:00 p.m. by Chairman Timothy Hoffman.

II. **Roll Call:**

Present:
Timothy Hoffman, Chairman
Harris Fried, Vice Chairman
Larry Ochstein, Member
Catherine M. Duemler, Member
Madelyn Greenberg, Member
Cynthia Van Buren, Member
James M. Ballentine, Jr., First Alternate
William P. Vanneck, Second Alternate

Absent:
Joel P. Koeppel, Member

Staff:
John Randolph, Town Attorney
Captain Kirk Blouin, Support Services
Rob Walton, Lead Code Enforcement Officer
Nick Gerry, Code Enforcement Officer
Bryant Weymer, Code Enforcement Officer
Raychel Houston, Recording Secretary

III. **Approval of the Minutes of June 19, 2008:**

MOTION BY MS. DUEMLER FOR APPROVAL OF THE JUNE 19, 2008 MINUTES
MOTION SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

IV. **Administration of the Oath to all persons who wish to testify:**

Let the record show that all persons wishing to testify were sworn in at this time by Recording Secretary Raychel Houston.

V. Public Hearings:

A. Case # 08-2431, 434 Seaspray Ave., Christopher Kaufman
Violation of Chapter 18, Section 18-242, Subsection 1 (104.1.1) of the Town of Palm Beach Code of Ordinances, building permits required to construct, install, repair or alter any building or building system.

Lead Code Enforcement Walton requested the case be postponed until a date certain of September 18, 2008 as Mr. Kaufman has a hearing before the Town Council.

MOTION BY MS GREENBERG TO POSTPONE THE CASE UNTIL STEPTEMBER 18, 2008
SECONDED BY MR. OCHSTEIN
MOTION PASSED UNANIMOUSLY

B. Case # 08-2511, 114 N. County Rd., Palm Beach Affair
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry requested the case be dismissed as it had come into compliance and the fees had been paid.

MOTION BY MR. FRIED TO DISMISS THE CASE
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

C. Case # 08-2512, 235 Sunrise Ave., Suite C8, Palm Beach Resorts International
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said the Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties and costs by July 21, 2008. Mr. Hoffman inquired about the late penalties and Mr. Gerry said they were based on a monthly penalty of 10% per month. In response to Mr. Ochstein's question, Mr. Gerry explained that both the business and the property owner were cited. Mr. Fried inquired about service and Mr. Gerry said it was sent by certified mail. Mr. Ballentine asked if any attempts, other than by mail, were made to get in touch with someone at the business. Mr. Gerry said he went to the business, was told the owner was difficult to reach and left his business card but had not received any response.

HOUSE_OVERSIGHT_016575

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES AND COSTS BY JULY 21, 2008.
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

D. Case # 08-2513, 329 Worth Ave., Dunville L'Antiquaire, LTD
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said he followed up after the certified letters were sent but the business could not be contacted. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties and costs by July 21, 2008.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES AND COSTS BY JULY 21, 2008.
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

E. Case # 08-2514, 235 Sunrise Ave., C8, C.J.'s Simply Gourmet, Inc.
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and recommended a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties and costs by July 21, 2008. Mr. Gerry said he also tried to make contact with the owner of this business as it is the same owner as the other case at this location but was unable to make contact. Mr. Ochstein remarked this was the same business that had been before the Board before and had even "bounced a check" to the Town and wanted to know if there was something more that could be done other than the standard $150.00 costs. Mr. Gerry said he could review the case further to see if it could be brought back for additional fines. Mr. Hoffman asked if these cases were brought to Code Enforcement by the Finance Department and Mr. Gerry said they came from the Fire Prevention Bureau who handles their own billing and explained the procedure for that. Mr. Hoffman said it seemed like a year was a long time for these cases to be in arrears. Mr. Gerry said the cases were coming over quicker now from Fire Prevention and he thought it would improve in the future.

HOUSE_OVERSIGHT_016576

MOTION BY MR. OCHSTEIN TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES AND COSTS BY JULY 21, 2008.
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

F. Case # 08-2515, 140 N. County Rd., Bank of America
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said he had spoken with Robin Gert who advised him the bill had been mishandled and gotten lost in their system. He said he spoke to her yesterday and was told the payment was still in process. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fine inspection fee in addition to all late penalties and costs by August 4, 2008.

MOTION MADE BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES AND COSTS BY AUGUST 4, 2008.
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

G. Case # 08-2516, 313 ½ Worth Ave., # B2, David Clark
Violation of Chapter 114, Section 114-32 of the Town of Palm Beach Code of Ordinances, business tax receipt required

Code Enforcement Officer Gerry presented the facts of the case and said Mr. Clark had submitted his paperwork and paid the fee but there was a zoning issue still in question. The Zoning Administrator is out of the office this week on jury duty and based on the inability to get the issue resolved, the Town recommends the case be postponed until the August 21, 2008 hearing date.

Mr. Fried questioned what the zoning issue had to do with a business tax receipt and Mr. Gerry said the Town records do not show this particular suite existing at this address but Mr. Clark has documents showing it there.

HOUSE_OVERSIGHT_016577

Mr. Gerry said zoning is tied into business tax receipts because zoning requirements do not allow certain businesses in some districts. There is also the question of whether the space is legitimate because people will subdivide suites and make two spaces where there should only be one. Mr. Gerry said it looked like a legal space from the documentation Mr. Clark provided but the Zoning Administrator needed to approve it.

MOTION BY MR. FRIED TO POSTPONE THE CASE UNTIL THE AUGUST 21, 2008 HEARING DATE
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

H. Case # 08-2517, 2270 E. Ibis Isle Road, Mark Remson Trust
REPEAT Violation of Chapter 42, Section 42-86 of the Town of Palm Beach Code of Ordinances, Environment, properties to be maintained in a good condition.

Code Enforcement Officer Weymer presented the facts of the case and said the violation was discovered from routine patrol in the area but shortly after the notice of repeat violation was sent out, a citizen complaint was received as well. Mr. Weymer said there had been at least seven previous letters to this property owner regarding lack of maintenance on the property. A repeat notice of code violation was mailed out on June 24, 2008 with a mandatory hearing date. The lot was cut on or around July 2, 2008. This particular violation is a Class II violation under the fine schedule which calls for a fine of $400.00, however, by law, the Board has the ability to impose a fine of up to $500.00 because it is a repeat violation. Mr. Weymer said he believes it is important to look at the track record of this property in considering the fine. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and a fine of $500.00, which is the maximum fine for a repeat violation.

Mr. Hoffman said it seemed that every time the property owner gets notified he comes into compliance but he has to be notified. Mr. Weymer says there are times when he comes into compliance but on at least two other occasions, he has been before the Board because he has not complied by the time set. Mr. Ochstein asked if he has been fined in the past and Mr. Weymer said there are two outstanding fines for which liens have been placed on the property.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND A FINE OF $500.00
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

I. Case # 08-2518, 230 Esplanade Way, Kenneth J. Horton

HOUSE_OVERSIGHT_016578

Violation of Chapter 42, Section 42-86 (19) of the Town of Palm Beach Code of Ordinances, cleared land must be re-sodded or replanted to prevent the creation of windblown dust or dirt and Chapter 42, Section 42-86, unsightly, unsafe or unsanitary conditions not permitted and properties to be maintained in good condition.

Code Enforcement Officer Weymer presented the facts of the case and said the violation was discovered on routine patrol. Mr. Weymer has been in contact with a property representative, Louis Pascerelli who said Mr. Horton had not been in Town to receive his mail. Mr. Weymer said Mr. Pascerelli had proposals from Hansen Landscape for the clean up and re-sod of the lot and a weekly maintenance contract to assure this does not happen again. Tropical Irrigation has also been contacted to put in a new irrigation system. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and the property owner given until August 18, 2008 to come into compliance. Mr. Fried said he believed a fine of some sort should be imposed. Mr. Ballentine asked how long Mr. Horton had been out of compliance. Mr. Weymer said the original warning was sent out on June 5, 2008 and a notice of violation and hearing was sent out on June 20, 2008. Mr. Weymer said the first contact with him was July 7, 2008. Mr. Ballentine asked if the August compliance date was reasonable and Mr. Weymer said Jim Hansen of Hansen Landscape thought it would be done before that date but he wanted more time in case he ran into any problems.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND GIVE HIM UNTIL AUGUST 18, 2008 TO COME INTO COMPLIANCE.
SECONDED BY MR. OCHSTEIN
MOTION PASSED UNANIMOUSLY

J. Case # 08-2519, 206 Dunbar Road, AMF Estate Management
Violation of Chapter 42, Section 42-230 of the Town of Palm Beach Code of Ordinances, leaf blower over 65dBA at 50 ft.

Code Enforcement Officer Weymer presented the facts of the case and said he witnessed the violation on June 26, 2008. AMF had previously been warned on February 19, 2008 for using a leaf blower over 65dBA. Mr. Weymer performed a decibel test for this violation and the reading was 79.6 dBA at 50 feet. This is a class II violation under the fine schedule which has a $125.00 fine for the first offense. The violation was issued on site to a superintendant for AMF and has not been paid. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the $125.00 fine.

Mr. Hoffman asked whether this company had participated in the leaf blower testing being offered by Code Enforcement. Mr. Weymer said AMF had participated in the testing program and had several leaf blowers certified. He said

HOUSE_OVERSIGHT_016579

the truck he was out with had 2 other leaf blowers on the truck that he could identify as being over 65dBA but he only tested the one they were using and wrote a violation for that one. Ms. Van Buren asked about the testing method and Mr. Weymer explained how it was done.

MOTION BY MR. OCHSTEIN TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER HIM TO PAY THE $125.00 FINE
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

K. Case # 08-2520, 165 Brazilian Ave., Richard Lynn
Violation of Chapter 10, Section 10-45 (i) of the Town of Palm Beach Code of Ordinances, if any dog attacks and causes severe injury or death to any human or domestic animal more than once, the owner shall be required to have said dog removed from the Town or humanely euthanized at his/her sole expense and violation of Chapter 10, Section 10-6 of the Code which prohibits animals from creating nuisances which are detrimental to the public safety and welfare.

(Mr. Ochstein recused himself, stating that he has a relative who has a business relationship with Dr. Lynn and Mr. Hoffman advised Mr. Vanneck would be a voting member in this case)

Sgt. Curtis Krauel said this case was brought to Code Enforcement through a culmination of events spanning back over a period of 4 years. Sgt. Krauel explained Section 10-6 of the Code and said he was going to be showing some graphic photographs. Sgt. Krauel presented the facts of each of the documented cases involving attacks by Duke from March 17, 2004 until May 11, 2008.

Mr. Hoffman questioned how the Code Enforcement Board came into this procedure since the Town Council had already said Duke is a dangerous dog. Mr. Randolph explained that Town Council does not have the authority to fine. Originally, the police department did not issue a code enforcement board citation but ordered the dog be removed from the Town or humanely euthanized which was appealed to Town Council. Town Council denied the appeal. Since that time, Dr. Lynn has refused to comply with the order of the Town Council so a citation was issued by Code Enforcement to bring the matter before the Board to determine whether there should be a finding of violation and at a later time, whether a fine should be imposed. Mr. Randolph said it was now the jurisdiction of the Code Enforcement Board and not the Town Council. Mr. Hoffman questioned whether or not the Board had to determine if the dog was going to be euthanized or removed from the Town and Mr. Randolph explained that this was not the Board's determination. The Board was only to determine whether or not there had been a violation of the Town Code.

HOUSE_OVERSIGHT_016580

Sgt. Krauel continued his presentations remarking that once Duke had been found "potentially dangerous" by Animal Care and Control, there had been another attack but due to an administrative error by Animal Care and Control by failing to document their records appropriately, Duke was classified as "potentially dangerous" again. This is an error that Animal Care and Control completely acknowledges.

After the last attack on May 11, 2008, Duke was taken into custody by Animal Care and Control and after a hearing, was classified as "dangerous". Sgt. Krauel noted that the hearing before Special Magistrate Earl Mallory did not classify Duke as vicious because Duke had no documented cases of attacks on humans. After this last case was reviewed by Code Enforcement, sufficient evidence was also found to classify Duke as dangerous and Dr. Lynn was notified by registered mail. Dr. Lynn appealed to Town Council and that appeal was denied by Town Council by a 5-0 vote. The Town recommends a finding of non-compliance with Chapter 10, Section 10-6 as the Town has the two required affidavits of residents of the Town occupying separate households. The Board had been provided with copies of four (4) affidavits.

Sgt. Krauel then proceeded with an explanation of Chapter 10, Section 10-45 and said the Town was requesting a separate motion for a finding of non-compliance of Chapter 10, Section 10-45 (i) and that he be given until July 18, 2008 to come into compliance by either removing the dog from the Town or having it humanely euthanized. If compliance is not achieved, the Town recommends a daily fine of $250.00 a day commence on July 19, 2008 and continue until compliance is achieved.

Mr. Randolph requested that the Board treat these two sections of the Code separate and apart. He said the first evidence heard related to Section 10-6 (3) and involved the affidavits from the residents of the Town. Because of the dispute Dr. Lynn's attorney has with regard to the manner that Section 10-45 was applied, he recommended that the two Code sections not be mixed up. Mr. Randolph said he would like for the Board to first consider whether there had been a violation of 10-6 and to make a motion one way or the other with regard to the Staff's recommendation. He then requested that Section 10-45 be entertained separately after Dr. Lynn's attorney and anyone else who wanted to speak had an opportunity to do so.

Vivian Dorris, 155 Brazilian Ave. said her beagle/bassett, Charlie, was viciously attacked by Dr. Lynn's dog, Duke and she has sustained approximately $8500 in vet's bills. She said her dog will never walk properly again because of severe nerve damage. She does not feel there are enough precautions being taken for the safety of residents on Brazilian Ave. She asked that the Board take this into consideration and thanked them for their service.

Wayne Gerl, 149 Brazilian Ave. said he has two dogs and every time he exits his driveway or front yard, he has to stop and peek around and make sure the other

HOUSE_OVERSIGHT_016581

dogs are not in the area. He said he was bitten by Duke a couple of years ago. He was talking with Dr. Lynn and the dog just reached out and bit him, tore his pants and broke the skin. He said he had been friends with Dr. Lynn and Margrit for many years but it was just unsafe for anybody and any animals in the area.

Bobby Goodnough said he was jogging in the area and the dog lunged at him causing him to have to dive through a twelve (12) foot hedge to get away from it. He said he just thought it was a matter of time before the dog got a person or a child. Sgt. Krauel asked if Mr. Goodnough had reported the incident to the police department or had a time frame for when it occurred. Mr. Goodnough said he had not made a police report but it occurred about two (2) years ago.

Laura Klein, 130 Seaspray Ave., said she had lived here for 12 years, having moved here from Washington, D.C. for a sense of security. She said she was now in the process of installing surveillance cameras. She said she could no longer walk her dog without constantly looking around, worrying if Duke had once again escaped from the open gates. She said it is a privilege to own a dog and dog ownership and responsibility should go hand in hand. She said Dr. Lynn was issued a citation in August of 2002 for locking his dog in a car with the windows rolled up. She said she mentioned this to prove his irresponsibility. She said his voluminous file from Animal Care and Control would attest to this. She said no one was safe while Duke is in Palm Beach.

James Merola was present on behalf of Dr. Lynn and said he was present on a revised Notice of Code Violation and Hearing dated July 15, 2008. He said he was not denying there were incidents with Duke. Palm Beach County had the dog taken into custody and the hearing was held June 5, 2008. At that hearing, it was agreed upon by the County and Dr. Lynn that the dog would be classified as dangerous. The dog was classified as dangerous which required certain restrictions on the dog which Dr. Lynn complied with and the dog was returned to him. In the event Duke has another incident, pursuant to state and county law, but some reason not Town law, the dog would be taken into custody and euthanized. Mr. Merola said Dr. Lynn feels very badly about the situation and agreed with the County to do what they required. Mr. Merola said Dr. Lynn then received a letter, dated June 16, 2008 from the police department, mentioning the order of the County and stating for the first time, the Town was declaring the dog dangerous and giving him ten (10) days to appeal, which he did not. On June 20, 2008, four (4) days after the dog was declared dangerous by the Town, the police department sent a second letter, citing 10-45 (i), advising that since the dog already had two incidents, they wanted it removed or euthanized. The dog had not done anything since being declared dangerous. This letter did not mention an appeal, but he sent a letter anyway, stating that they did not agree with that. He said the dog was declared dangerous on the 16th, requirements were imposed and they complied with those, including the filing of a $1000 bond and they did not agree the dog should now be removed. There was a Town Council hearing on August 8th and the Council said they needed to have the dog removed or euthanized. Mr. Merola went into detail about the requirements of 10-45 and said

HOUSE_OVERSIGHT_016582

Dr. Lynn had complied with all of those. Then the letter of June 20th came, requiring Dr. Lynn to remove the dog or euthanize it. Mr. Merola read subsection (h) into the record and said the Code Enforcement Board did not have any jurisdiction over subsection (i) as subsection (h) just mentioned (d) through (g). The Town has filed a lawsuit and he and Mr. Randolph were before Judge Hoy this morning. The Town is asking to have the dog removed or euthanized and asking for a permanent injunction, stating an emergency situation. Judge Hoy gave them a hearing at 1:30 p.m. on Tuesday where it will be determined whether the dog is a nuisance, whether 10-45 (i) even applies to the situation and if the Board have authority over 10-45 (i). If the Judge says the dog has to go, they are not going to argue with the Court but he believes they have a right to present their case. He does not believe that the Town's position that the fine should start tomorrow is correct. He believes the Board can only find violations of subsections (d) through (g) of 10-45. There have been no allegations that Dr. Lynn has violated subsections (d) through (g). Mr. Merola believes it is clear that the Code Enforcement Board has no authority under (i). Mr. Merola then addressed 10-6 and said he believed that since all precautions have been taken under 10-45, the dog does not constitute a nuisance. Mr. Merola said that he has an injunction relief request before the Judge to stop the Board from making this decision. Mr. Merola said Mr. Randolph has asked them to determine these two (2) ordinances separately and he does not believe 10-45 (i) is in the Board's purview, and as to the nuisance, the dog has to be a nuisance now and it is not. This is all going to be determined Tuesday and he is asking the Board to either deny the Town's recommendation because the Town cannot prove the dog is a nuisance now or reset this case until next month's hearing.

Sgt. Krauel advised he wanted to make a rebuttal to some of Mr. Merola's comments. The service of notice Mr. Merola referred to in declaring the dog dangerous was when the police department spoke with Dr. Lynn on June 12, 2008 and had been told Duke was being housed at a kennel in Palm Beach County. A notice could not be served to Dr. Lynn to have him come into compliance with something he was already in compliance with. The dog was not in the Town. The police department did not find out the dog was in Town until June 20th when Laura Klein reported the dog attempted to break free of Dr. Lynn to attack her and this is when the letter was sent out requesting compliance with Section 10-45. Dr. Lynn was given the entire ordinance on June 10th, not just sections or specific acts that he needed to comply with. Duke was not on the property at that time and no notification to remove the dog from the property could be served at that time because the dog was not there. As far as the police department was concerned, Dr. Lynn was in compliance with the ordinance. Sgt. Krauel pointed out that the Town does not abide by the state and the county ordinances, that the Town has the ability to enforce more stringent and strict ordinances and that is what we have done here.

Sgt. Krauel said he was prepared, based on Counsel's recommendation, to recommend a motion to find Dr. Lynn in non-compliance with Section 10-6 and move to postpone 10-45 (i) until after further consideration by the Circuit Court

HOUSE_OVERSIGHT_016583

on Tuesday. The Town recommends administrative costs in the amount of $150.00 and a fine of $250.00 a day to start on June 19, 2008 if compliance is not achieved by tomorrow.

Mr. Ballentine asked for clarification on the motion and was advised by Mr. Randolph that it would be a finding of non-compliance of Chapter 10, Section 10-6, administrative costs of $150.00 and a compliance date of July 18, 2008 with a fine to be considered at the next meeting if compliance was not achieved.

Ms. Duemler said she believed that the dog, besides being a nuisance, is a threat to society and she hoped that by Tuesday the dog did not break loose from Dr. Lynn and maul some child, that she believed it is a disgrace and she supports the Town.

(*applause from the audience)*

MOTION BY MR. FRIED TO FIND DR. LYNN IN VIOLATION OF CHAPTER 10, SECTION 10-6, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND REQUIRE HIM TO COME INTO COMPLIANCE BY JULY 18, 2008
MOTION SECONDED BY MR. BALLENTINE
MOTION PASSED UNANIMOUSLY

Mr. Randolph asked if a motion could be made to defer the consideration of violation of Chapter 10, Section 10-45 (i) until the August 21, 2008 meeting and Ms. Greenberg advised she would make that motion. Mr. Fried asked Mr. Randolph if he would explain the reason for this. Mr. Randolph said the argument had been made that 10-45 should not apply because the dog has already been deemed dangerous by the County and pursuant to the Town's Code. Mr. Randolph said he believed the argument was going to be made in court on Tuesday that it is not appropriate for the Town to move forward with regard to 10-45 (i) because that only applies to any incident that occurs after the dog has been declared dangerous. The argument has been made that Dr. Lynn has done everything he is required to do. Mr. Randolph said he hesitated to explain further if the matter was going to be deferred. Mr. Randolph said the position of Staff is that item (i) stands on its own merits, that it is not connected to 10-45 (a) through (h). It is also the position of Staff that it is appropriate to bring a violation of (i) to the Code Enforcement Board even though it does not specifically state that in 10-45 because Section 2-439, which is the citation fine schedule, sets forth all of the sections of the Code of Ordinances which can be brought before the Code Enforcement Board and 10-45 is listed. Code Enforcement has the right to bring a violation directly to the Code Enforcement Board instead of issuing the fine set forth in the fine schedule. Mr. Randolph said the Board could move forward in considering 10-45 instead of deferring it to the next meeting.

Mr. Fried commented that based on the egregious nature of what they had been presented with, he believed the Board should do everything they could to put

HOUSE_OVERSIGHT_016584

pressure on Dr. Lynn to comply. Mr. Randolph questioned whether the Town would be requesting a separate fine of $250.00 a day for non-compliance and Sgt. Krauel said that was his recommendation, that there would be two concurrent fines running. Mr. Hoffman asked about the administrative costs and Sgt. Krauel said the Town was only asking for one.

MOTION BY MR. FRIED TO FIND DR. LYNN IN VIOLATION OF CHAPTER 10, SECTION 10-45 (i) AND REQUIRE HIM TO COME INTO COMPLIANCE BY JULY 18, 2008
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

Mr. Merola questioned what the order was with regard to 10-6, if it was to have the dog removed or euthanized by Friday or just to abate the nuisance. He said he needed to know what to tell Dr. Lynn what had to be done by Friday to avoid the potential fine. Mr. Hoffman said Dr. Lynn needed to either remove the dog or have it euthanized and Mr. Fried said that was his intention in making the motion.

VI. Old Business:

A. Case # 08-2484, 515 N. County Road, Trump Properties, LLC
Violation of Chapter 18, Section 18-205 of the Town of Palm Beach Code of Ordinances, the Architectural Commission may attach conditions to any approval it grants.

Lead Code Enforcement Officer Walton advised this case would be heard at Town Council on August 11, 2008 and requested this case be postponed until the August 21, 2008 hearing date. Mr. Trump's attorney and the attorney for the new purchaser were both present.

Robert Brody said he was the attorney for County Road Property LLC, who had just purchased the property two days ago. He said it was the intent of his client to comply with the Town and also to work with the Town. There is an appeal pending and Mr. Brody said it was his client's intent to work everything out with ARCOM prior to that appeal. He said he had recommended to his client that he withdraw the appeal. Mr. Brody said his client had hired the Lawrence Group and Gene Lawrence planned to work with ARCOM.

MOTION BY MS. DUEMLER TO POSTPONE THE CASE UNTIL THE AUGUST 21, 2008 MEETING
SECONDED BY MS. VAN BUREN

HOUSE_OVERSIGHT_016585

MOTION PASSED UNANIMOUSLY

VII. Fine Consideration:

A. Case # 08-2432, Beachfront Vista Property, Nightingale Beach Club Association
Violation of Chapter 134, Section 134-1472 (3) of the Town of Palm Beach Code of Ordinances, no additional walls, fences, hedges or other structures or growth shall be erected or be grown eastwardly of Ocean Boulevard to a height greater than four (4) feet above the surface of the Ocean Boulevard.

(Ms. Duemler recused herself as part of a previously declared conflict and Mr. Hoffman advised Mr. Vanneck would be a voting member in this case)

Lead Code Enforcement Officer Walton said Nightingale Beach Club had previously been found in violation and were given time to obtain a permit. A permit had been obtained but there were some conditions attached to it. There have been two (2) inspections with the Florida Wildlife Commission and an agreement was reached to not require the vegetation to be trimmed until after turtle season. Since they have already been found in non-compliance, the Town recommends the time fro compliance be extended to November 7, 2008 and if compliance is not achieved by that date, a fine of $250.00 a day be imposed.

Jack Maxey, 244 Nightingale Trail, presented some documents to the Board and advised he was president of the Nightingale Trail Beach Club Association. He said one of the documents was his application under duress for the permit. Mr. Maxey advised he had not been sworn in and was administered the oath of office by Recording Secretary Houston.

Mr. Maxey said he has had a long correspondence with the legal department of the Department of Environmental Protection and he believes on an emotional level, they do not believe the trees should come down but they told him they could not find any statutory way to force the Town not to enforce the permit. They told him it should be the jurisdiction of a court, not the DEP. Mr. Maxey said the Town was cutting down its own sea grapes in violation of the permitting process. Mr. Maxey said he had all kinds of burdens in this permit that he needed to comply with, one of which was replacement of the whole plant if anything over 6 feet which was larger than 3 inches in diameter was cut down. He said he was supposed to provide a signature on the document putting himself at risk of a $10,000 a day fine if he did not comply with the requirements of the permit. Mr. Maxey said Jean Higgins, a biologist for the State Fish & Wildlife, recommended sea grapes should not be trimmed because they are the best source of protection against the lighting. Ms. Higgins made some suggestions such as changing light fixtures and extinguishing lights during turtle season and maintaining a substantial healthy vegetation light blocking buffer.

HOUSE_OVERSIGHT_016586

Mr. Maxey said an approximate 24 inch piece of aluminum is hanging from the light on Nightingale Trail and it seemed highly unusual that a shield of that nature would only be necessary on that light when the recommendations given by Fish & Wildlife are recommendations with broad reaching impact for the entire island. He noted that the street lights in Palm Beach do not go off during turtle nesting season. He said a field permit for trimming of the sea grapes at the Nightingale Beach Club Association was not recommended during the nesting season. He said the indifference to materials he had brought forth more than a year ago that had now been brought forth officially by the DEP were offensive to him and that is one of the reasons he had continued to "hammer" this. He said he believed the Board should recommend to the Town Council that they remove that section of the Code, given the current environmental regime, especially when one considers the public relations downside of fighting him on this issue and spending $2,000,000 to fight Lake Worth on the other side. Mr. Maxey said this was probably not a win-win situation and that NOAA had not even been brought into the fold yet.

Mr. Ochstein wanted to know if the Board was precluded from enforcing the ordinance now. Mr. Walton said it should not be enforced now, that in speaking with Mr. Wettstein from DEP and Ms. Higgins from FWC, an agreement had been reached to wait until the end of turtle season to require the trimming. The Town recommends granting the Nightingale Beach Club until November 7, 2008 to come into compliance. The permit is good until that date. In response to Mr. Hoffman's question, Mr. Walton said the permit was issued on June 16, 2008. Mr. Maxey said he applied on March 19, 2008. Mr. Balletine inquired as to whether seven (7) days was sufficient for compliance after the end of turtle season and Mr. Walton said it was not a large area and he believed it was. Mr. Maxey said he did not believe it was sufficient, that it would be an economic hardship if he had to replace every tree that is over 3 inches in diameter in order to get it below 6 feet and he brought up other issues involved with the trimming. Mr. Balletine told Mr. Maxey he just wanted to know whether he could comply in a 7 day period without going into a lot of detail. Mr. Maxey said that before he could remove any native plant, he had to first remove every single non-native one from the property and he had some questions whether or not he could comply within the time period. He also said he had some real questions about whether the law, both at the State and the local level had been equally applied within the Town. Mr. Maxey said he is in consultation with an attorney to find out what measures he can take. The Town did not apply for a permit to cut its own sea grapes and judging from the guidelines he has in his permit, the Town would be in violation of almost everyone of those guidelines. The DEP counsel's office asked him to provide photographs of the Town's illegal cutting back in February.

Mr. Vanneck said there should be more research as to what should and should not be cut. He believes the Town code may have gone too far.

Mr. Hoffman said the Board did not have the authority to modify the Code and could only enforce the Codes as they had been written.

HOUSE_OVERSIGHT_016587

MOTION BY MR. OCHSTEIN TO GRANT THE VIOLATOR UNTIL NOVEMBER 7, 2008 TO COME INTO COMPLIANCE AND IF COMPLIANCE IS NOT ACHIEVED BY THAT DATE, TO ASSESS A FINE IN THE AMOUNT OF $250.00 A DAY UNTIL COMPLIANCE IS ACHIEVED SECONDED BY MR. BALLENTINE

Mr. Vanneck asked for clarification on what the motion was and Mr. Walton advised the motion was that the sea grapes must be cut after turtle season by November 7, 2008 and if they were not cut by that date, a $250.00 a day fine would commence on November 8, 2008 and continue until compliance is achieved.

Mr. Fried asked who the fine would apply to and Mr. Walton said it would be to the Nightingale Trail Beach Club Association. Mr. Fried asked if it was a legally constituted body and Mr. Maxey said it was an informal body, that on the deeds, everyone owns this piece of property in common. There was some additional discussion on the ordinance. Ms. Van Buren asked if every single property owner on the street was a member of the association and Mr. Maxey said every property owner on Nightingale was and there were one or two houses on North Ocean and North Lake as well. Mr. Maxey said there were 23 separate memberships. Ms. Van Buren asked about the finances and Mr. Maxey said there were annual dues of $75.00 a year and a common bank account of $3500 or $3600. Mr. Maxey said that if a fine was incurred, that is probably where it would come from but he did not believe, because of his fiduciary responsibility to the group, he could fight the decision with any of those monies. Mr. Ochstein asked if he was an elected officer and Mr. Maxey said he was president and that he keeps the books and makes sure the place is in good condition.

MOTION BY MR. OCHSTEIN TO GRANT THE VIOLATOR UNTIL NOVEMBER 7, 2008 TO COME INTO COMPLIANCE AND IF COMPLIANCE IS NOT ACHIEVED BY THAT DATE, TO ASSESS A FINE IN THE AMOUNT OF $250.00 A DAY UNTIL COMPLIANCE IS ACHIEVED
SECONDED BY MR. BALLENTINE
MOTION OPPOSED

ROLL CALL VOTE:

MR. OCHSTEIN	**YES**
MR. BALLENTINE	**YES**
MR. FRIED	**YES**
MS. GREENBERG	**YES**
MS. VAN BUREN	**YES**
MR. VANNECK	**NO**
MR. HOFFMAN	**YES**
MOTION PASSES	**6-1**

HOUSE_OVERSIGHT_016588

Mr. Fried advised Mr. Maxey that the Code Enforcement Board's position was to enforce the Code and said that he had always found the Town Council members to be very receptive, individually and as a group. Mr. Fried said it was not beyond the Town Council's power and authority, if persuaded, to look into an ordinance and suggested Mr. Maxey address it with them.

B. Case # 08-2508, 227 Brazilian Ave., 2F, Hillen J. Smith
Violation of Chapter 18, Section 18-241 of the Town of Palm Beach Code of Ordinances, building permits required to construct, install, repair or alter any building or building system

Lead Code Enforcement Officer said Mr. Smith was found in violation, assessed $150.00 in administrative costs and given until July 16, 2008 to come into compliance. Compliance has not been achieved so this is the time a fine would be assessed. Mr. Walton said the contractor was present to speak.

Steve Pappanelli said he was hired by Mr. Smith after Mr. Smith had been cited and he was 90% complete with the job. He was just waiting on his final inspections and he should have it by next week but the building is closed to all construction inspections for two (2) weeks. Mr. Pappanelli said he was present on Mr. Smith's behalf to request a three (3) week extension. Mr. Walton said the Town did not oppose the extension of time. Mr. Walton said the three weeks was necessary because the building would not let inspections be done while their maintenance man was on vacation. Mr. Walton said if compliance was not achieved by August 7, 2008 then he would ask for a $250.00 a day fine to commence on August 8, 2008.

Ms. Greenberg asked some questions about the type of permits and remarked that it is unfortunate in multi-family dwellings that this type of situation would exist to begin with because electrical and plumbing can have catastrophic effects on other owners. She said it is unfortunate the people do not do the right thing until they get caught. Mr. Pappanelli said he was not the contractor working without permits.

MOTION BY MR. OCHSTEIN TO GRANT AN EXTENSION OF TIME UNTIL AUGUST 8, 2008 TO COME INTO COMPLIANCE AND TO ASSESS A FINE OF $250.00, RETROACTIVE TO JULY 17, 2008 IF COMPLIANCE WAS NOT ACHIEVED
SECONDED BY MS. GREENBERG

During discussion on the motion, Ms. Duemler stated she believed the retroactive fine was a little harsh. Mr. Ballentine said he agreed and asked what the reason for the retroactive fine was. Mr. Ochstein said there are so many people who do work

HOUSE_OVERSIGHT_016589

without a permit and they know they need a permit. That is a very dangerous thing in a multi-family dwelling and it should be egregious.

MOTION BY MR. OCHSTEIN TO GRANT AN EXTENSION OF TIME UNTIL AUGUST 8, 2008 TO COME INTO COMPLIANCE AND TO ASSESS A FINE OF $250.00, RETROACTIVE TO JULY 17, 2008 IF COMPLIANCE WAS NOT ACHIEVED
SECONDED BY MS. GREENBERG

MOTION PASSED UNANIMOUSLY

VIII. Fine Reduction:

A. Case # 08-2301, 167 E. Inlet Drive, The Landfall Group,
Violation of Chapter 18, Section 18-242, Subsection 104.5.1.6, medium projects, all new or remodel construction projects 4000 sq. ft, to 8,999 sq. ft. under roof be allowed 22 months

Lead Code Enforcement Officer Walton said in October, 2007, Ajax Equity LLC was found in violation of going over the construction time limits. On November 15, 2008 they still were not in compliance and a daily fine of $250.00 started running. The final inspection was obtained in March, 2008. The fine ran for 137 days prior to compliance being achieved and the accumulated fine due is $34, 250.00 and the have $150.00 hearing costs have not been paid.

Frank Lynch advised he was the attorney for both The Landfall Group and Ajax. He said when they appeared before the Board in October, Lazslo Wagner, the principal of The Landfall Group, who has built homes throughout the Town of Palm Beach for 26 years acknowledged that he was unaware of this particular Code provision. Had he been, they would have applied for an extension of time to complete the construction. At the hearing, Mr. Koeppel made a motion to allow them an additional sixty (60) days to complete the construction, find them in non-compliance and assess the $150 fee. After a significant amount of discussion, that motion went to a vote and failed 4-3. A second motion was made and Ms. Duemler thought the $250.00 fee was significant and she believed the fine should be $125.00 a day. Mr. Lynch gave Mr. Walton a copy of that transcript to put in the record. As part of their request, they are asking the Board to consider what Ms. Duemler suggested at the meeting. At the same time, Mr. Lynch said he would like them to consider that The Landfall Group is a good corporate citizen and

HOUSE_OVERSIGHT_016590

made a legitimate mistake. As a result, a fine was incurred and they are willing to accept some level of fine, some level of responsibility for what they did. The construction was continually on going, there were no delays other than the construction process itself. This was not someone's house, it was a speculative venture. There had been some concerns with the shell contractor and the finish items themselves were significant enough that there were substantial delays. At that same hearing, Code Enforcement Officer Gerry said it was the position of Code Enforcement to get more assertive at the suggestion of Town Council and that these projects were to be more aggressively pursued. Under the new ordinance, for a house of approximately 5,000 sq. feet, they would be entitled to 24 months. This would have brought them to November 2007 and they would have gotten additional time for Hurricane Wilma which would have brought them to December. If they were under the new Code, they would not be before the Board today and may not have a fine at all. He realizes a mistake was made, he realizes something has to be paid but he thinks $35,000 is a significant fine. The Board has gotten their attention and they would ask for a significant reduction in the fine.

Mr. Fried asked how long it took to get the final inspection after the 22 months had run. Mr. Walton said they had been given 23 months due to the hurricanes and they were 5 months and 9 days beyond that. Mr. Ballentine asked how far out they would be under the new rules. Mr. Walton said they would be given 24 months which with the hurricane would be 25 months. Mr. Lynch said that at the end of that 24 month period, if they had not sought an extension of time prior to that within the required time period, no earlier than 6 months and no later than 45 days, before the expiration of that 24 months, their project would have been shut down. Mr. Wagner's lack of knowledge of this particular situation would have become irrelevant because they would have been red tagged on that next day after the 24 month period. Mr. Lynch said Mr. Wagner did not know because he has been a good corporate citizen, he had never been before the Board except on one occasion and that was beyond his control, it was a maintenance item on the Glazer house. Mr. Walton said that situation was not due to Mr. Wagner's fault, that he was just representing the owner.

Mr. Ballentine asked how Mr. Wagner did not know the Code requirement if he had built so many homes in the area and he said he had difficulty with the ignorance of that.

Mr. Fried said he agreed with Mr. Ballentine and he found it hard to believe that Mr. Wagner did not know the time limits. He said some reduction should be considered but he was not sure on what basis.

Mr. Ochstein remarked that the fine was around $35,000 and the house was on the market for $10.6 million dollars so he did not see the hardship. Mr. Lynch said he did not know the price but he would accept Mr. Ochstein's statement on that. Mr. Lynch said the hardship was in the imposition of the fine itself, there were mistakes made and he believed that Council would have given them a significant extension

HOUSE_OVERSIGHT_016591

of time if Mr. Wagner had been aware of the situation and filed the proper notice with Town Council.

Mr. Lynch said if some sort of arrangement could be reached today, his client would be in a position to pay within the next two weeks. Mr. Hoffman said he was concerned because he believed that when the case was originally heard, they had the option of fining $250.00 a day and they gave them a fine reduction at the time they initiated the fine of $125.00 a day. Mr. Walton corrected Mr. Hoffman, advising that there was a motion for a fine of $125.00 a day which failed and the fine that is in effect is $250.00 a day. Mr. Lynch said he believed the record reflects something different than that. Mr. Walton said his records reflect $250.00 a day but he would review it. Mr. Walton reviewed the transcript and noted that it showed $125.00 a day but the Board order specified $250.00 a day and he would have to do further research.
Mr. Fried advised he could make a motion to postpone the matter to the next meeting and have Mr. Walton bring back the correct information. There was additional discussion about the amount of the fine and Mr. Lynch said he was seeking a reduction of the $17,125.00 which would be the amount of the fine if it was $125.00 a day. Mr. Hoffman said he would find that hard to accept. Mr. Hoffman read from the minutes that a motion was made by Mr. Fried that the defendant was found in non-compliance, ordered to pay an administrative fee in the amount of $150.00, obtain a final building inspection by October 25, 2008 and a fine of $125.00 to commence on October 26, 2007. He said that motion passed 4-3. Mr. Walton said he could not dispute that but he would have to do some research. Mr. Hoffman said he would not be in favor of reducing the $17, 125.00 any further.

Mr. Ochstein said he was hesitant to do anything until they know what the number is. Mr. Walton suggesting postponing the case until the next month.

MOTION BY MR. OCHSTEIN TO POSTPONE THE FINE REDUCTION HEARING UNTIL AUGUST 21, 2008
SECONDED BY MR. FRIED
MOTION OPPOSED

ROLL CALL VOTE:

MR. OCHSTEIN	**YES**
MR. FRIED	**YES**
MS. DUEMLER	**YES**
MS. GREENBERG	**NO**
MS. VAN BUREN	**NO**
MR. BALLENTINE	**YES**
MR. HOFFMAN	**NO**

HOUSE_OVERSIGHT_016592

MOTION PASSES 4-3

B. Case # 08-2302, 9 Via Vizcaya, Macari Building & Design, Casa Picchio, LLC
Violation of Chapter 18, Section 18-242, Subsection 104.5.1.6, medium projects, all new or remodel construction projects 4000 sq. ft, to 8,999 sq. ft. under roof be allowed 22 months

Lead Code Enforcement said the property was found in non-compliance and they requested a fine reduction hearing. The owner of the property was called out of town and they requested a postponement until the August hearing.

MOTION BY MS. GREENBERG TO POSTPONE THE FINE REDUCTION HEARING UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

IX. Comments:

Ms. Greenberg said that the presentation using the "slides" made it too dark in the room. She wanted to know if there was anything they could do as a Board in making a suggestion to the Council about an ordinance that could address people not pulling permits because of the safety issues in terms of multi-family dwellings. Capt. Blouin said there was a provision in place. If work is done without a permit, there is a penalty involved. There was an ordinance drafted last year that requires them to pay four times the permit fee.

Mr. Fried asked Mr. Randolph if he had spoken to Mr. Elwell about the foreclosure action being brought to the Board's area of responsibility as opposed to the Town Council. Mr. Randolph said he had but did not have an answer yet and would try to get one. Mr. Fried asked Ms. Houston about progress on the fines and she said the Town was now inputting fines into the computer system and if someone had outstanding fines they could not get any permits. People are contacting Code Enforcement because they cannot get permits and are either paying or asking to come back to the Board for a fine reduction.

Capt. Blouin advised that with regard to any foreclosure action, the police department is scrutinizing each and every one of them as some of these cases we have liens on were pre-existing prior to coming to the police department. We do not want to bring a case to the board that can be handled in a different manner.

Mr. Walton remarked that it was a good thing that there are a number of working without permit cases being brought to the Board, that it means Staff is doing their job.

X. Adjournment:

HOUSE_OVERSIGHT_016593

The meeting was adjourned without benefit of a motion.

HOUSE_OVERSIGHT_016594

From: Kirk Blouin
To: John Page
Cc: Police Code Enforcement
Subject: Re: ARCOM
Date: Thursday, June 26, 2008 2:09:06 PM

JP,

Here is a copy of the minutes from the April CEB hearing. Each month thereafter the case was postponed because we were aware that it was being brought to ARCOM. Now that this matter has been resolved with ARCOM we will proceed with a code enforcement case until the property is in compliance (meaning they plant the shrubbery and hedges approved by the Town).

Sgt. Krauel or Rob Walton will be available on July 23rd as I will be attending a conference.

H. Case # 08-2484, 515 N. County Road, Trump Properties, LLC

Violation of Chapter 18, Section 18-205 of the Town of Palm Beach Code of Ordinances, the Architectural Commission may attach conditions to any approval it grants (Declaration of Use Agreement).

Lead Code Enforcement Walton presented the facts of the case and said the previous owner of the property, Abe Gosman, had been granted approval by the Architectural Commission to do some remodeling. One of the conditions of this approval was that the hedge along the front of the property be maintained in the condition it was in at the time the approval was granted. This agreement was a binding agreement, which passes on to any subsequent property owner. The agreement was made January 31, 1990. The subsequent buyer of this property was Mr. Trump, Trump Properties, LLC and some remodeling work was done, removing the previous hedge. A new hedge was planted to replace the original hedge and that one has now been removed. This is a violation of the agreement. A letter was received from Mr. Royce, representing Mr. Trump, asking for a postponement of today's hearing. The Town does not feel this matter should be postponed.

Mr. Randolph summarized the letter from Mr. Royce which indicated the ficus hedge keeps dying and they want to replace it with something different. They plan on hiring a landscape architect to go before the next Architectural Commission meeting to get approval to install a hedge in an attempt to meet the conditions of the declaration of use agreement. Mr. Randolph said he had discussions with Mr. Royce and Mr. Walton and Mr. Royce was told the Town could not recommend a postponement and the recommendation would be that they are found in violation, assessed the $150.00 in administrative costs and be given until June 18th, which is the day before the June Code Enforcement Board meeting, to comply. This would give them the opportunity to appear before the Architectural Commission to see if they can get approval to re-plant a hedge. The hedge has to be installed to the height which existed at the time of the agreement which Mr. Randolph said he believed was twenty-two (22) feet. Mr. Randolph said Mr. Royce was not present today because he had a planned vacation.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS OF $150.00 AND GIVE THEM UNTIL JUNE 18, 2008 TO COMPLY.

SECONDED BY MS. VAN BUREN

MOTION PASSED UNANIMOUSLY

From: John Page/PalmBeach
To: Kirk Blouin/PalmBeach@PalmBeach
Cc: Tim Frank/PalmBeach@PalmBeach
Date: 06/26/2008 09:00 AM
Subject: ARCOM

Kirk: We had our June monthly ARCOM meeting yesterday. You likely know that ARCOM is working with Mr. Trump to re-install a hedge on his North County Road property. I believe this case is now pending in front of Code Enforcement. In May, ARCOM approved a plan to replace the former hedge with silver buttonwood shrubbery, which would additionally be back-planted with silver buttonwood trees....the overall effect would be an eventual 20' high screen. The shrubs have been planted, but yesterday attorney Ray Royce asked for postponing the trees until the end of the Hurricane season. ARCOM said NO and directed the attorney and landscaper to get the trees in ASAP. Also, more shrubbery was required at the main entry (north side) to match the newly installed hedge on the south side.

As the meeting was ending, the Commissioners asked for one of two things. They asked that either 1) a quick written report from Code Enforcement be made available to them at their next meeting on July 23 (9:00 a.m.) about the enforcement status of the case, or 2) that someone from Code Enforcement attend their meeting to provide a verbal status report. Their patience is wearing thin with the whole hedge issue, and it has them naturally curious about what is happening with their counterparts on Code Enforcement.

Would you or the appropriate representative from Code Enforcement be available on July 23? That would be my preference because follow-up questions almost always pop up. If not, can you provide me with a brief summary of your enforcement history and pending status? Thanks, JP

PBE - TM
JSP - P2+B
UC - P2+B
PC - P2+B
Dayton - ARCOM
Kraul - C.F.
Frank - ARCOM

TRUMP PROPERTIES LLC
c/o The Mar-a-Lago Club
1100 South Ocean Boulevard
Palm Beach, Florida 33480

RECEIVED
JUL 7 2008
TOWN CLERK

July 3, 2008

Ms. Susan Eichhorn, Town Clerk
Town of Palm Beach
360 South County Road
Palm Beach, FL 33480

Re: Trump Properties LLC
515 North County Road, Palm Beach, Florida

Dear Ms. Eichhorn:

Pursuant to Section 18-177 of the Town of Palm Beach Code of Ordinances (the "Code"), Trump Properties LLC ("Trump" or "Appellant") hereby appeals to the Town Council a certain June 25, 2008 decision of the Architectural Review Commission ("ARCOM") regarding the residence at 515 North County Road, Palm Beach, Florida (the "Residence").

Statement of Facts

Trump purchased the Residence on January 6, 2005. The Residence was subject to an Agreement between the Town of Palm Beach and the prior owner, Abraham Gosman, dated January 31, 1990 and recorded in Official Records Book 6350, Page 1207, of the Public Records of Palm Beach County, Florida ("Agreement"). The Agreement provides that a hedge contiguous to North County Road will be maintained and that in the event the hedge is damaged or destroyed, it will be replaced. The Agreement refers to the "hedge" in 9 separate places on the first page of the Agreement. The Agreement nowhere refers to, or requires, any trees.

On April 7, 2008 the Town gave notice of a code violation alleging that the hedge had not been maintained or replaced. The original hedge had been destroyed by the hurricanes of 2005 and two subsequent replacement hedges had died due to salt spray. Therefore, Trump asked to replace the ficus hedge with silver buttonwood hedge material. The Town staff advised that such decision would have to be made by ARCOM. The Appellant appeared before ARCOM on May 28, 2008. ARCOM approved silver buttonwood hedge material. ARCOM also requested that trees be planted and requested a tree planting plan. Trump planted the hedge in accordance with the Agreement.

Trump returned to the Code Enforcement Board meeting on June 19, 2008. That Board deferred further consideration of the matter pending plantings requested by ARCOM.

Trump appeared before ARCOM on June 25, 2008 and (a) sought reconsideration of

the request for trees and (b) proved that the hedge that had been planted satisfactorily screened the house and complied with the terms of the Agreement.

Grounds for Appeal

The action of ARCOM was inconsistent with and not in conformity with the provisions of the Code and the Agreement which ARCOM and the Code Enforcement Board seek to enforce. The grounds for appeal include the following:

1. ARCOM erroneously interpreted the Agreement to require not only a hedge as specified by the Agreement, but to also require the planting of 20 trees behind the hedge. The Agreement does not require any planting of trees.

2. ARCOM denied the request by Trump to reconsider its position that trees must be planted.

3. ARCOM directed that the portion of the existing hedge which was undamaged, located north of the driveway into the property, be partially or fully destroyed and replaced with silver buttonwood hedge material for purposes of "symmetry". Such a requirement is not in conformity with the Agreement.

4. ARCOM abused its discretion in denying Appellant's request since it is unreasonable to require new and additional planting outside of the clearly limited requirements of the Agreement.

5. Any action by the Code Enforcement Board or ARCOM with regard to the Agreement is improper and inconsistent with the Town Code since the Code Enforcement Board can only enforce Code provisions and not contractual agreements, notwithstanding any language to the contrary in the Agreement.

Trump requests that this appeal be heard by the Town Council at the meeting on August 11, 2008.

TRUMP PROPERTIES LLC

By: _____
Bernard Diamond, Vice President

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TOWN OF PALM BEACH

POLICE DEPARTMENT

A NATIONAL AND STATE ACCREDITED LAW ENFORCEMENT AGENCY

CODE ENFORCEMENT BOARD MINUTES
2:00 P.M. THURSDAY, April 17, 2008
AT THE TOWN COUNCIL CHAMBERS, 360 S. COUNTY ROAD

I. **Call to Order**: The meeting was called to order at 2:00 p.m. by Chairman Timothy Hoffman.

II. **Roll Call:**

Present:
Timothy Hoffman, Chairman
Harris S. Fried, Vice-Chairman
Joel P. Koeppel, Member (*arrived late, missed roll call*)
Larry Ochstein, Member
Catherine M. Duemler, Member
Madelyn Greenberg, Member
Cynthia Van Buren, Member
James M. Ballentine, Jr., Alternate Member
William P. Vanneck, Alternate Member

Staff:
John Randolph, Town Attorney
Captain Kirk Blouin, Support Services
Sgt. Curtis Krauel, Code Enforcement
Rob Walton, Lead Code Enforcement Officer
Nick Gerry, Code Enforcement Officer
Bryant Weymer, Code Enforcement Officer
Raychel Houston, Recording Secretary

Mr. Hoffman extended his welcome to the new members of the Board, Mr. Ballentine and Mr. Vanneck and congratulated Ms. Greenberg, Ms. Van Buren and Mr. Koeppel on their re-appointment. He also acknowledged with appreciation the job that Captain Hess had done in assisting the Board through the transition from Planning, Building and Zoning to the Police Department and congratulated him on his promotion. Mr. Hoffman introduced Sgt. Curtis Krauel, who is assuming Captain Hess's duties and will be presenting the cases for the Town. Mr. Hoffman also acknowledged the presence of Councilman Kleid in the audience and thanked him for his interest.

Mr. Hoffman designated Mr. Ballentine to vote in the absence of Mr. Koeppel. He then requested Mr. Randolph assume control of the meeting for the purpose of election of officers.

III. Election of Officers

Mr. Randolph asked for nominations for the position of Chairman. Ms. Van Buren and Ms. Greenberg jointly nominated Mr. Hoffman for the position of Chairman. There were no other nominations. Mr. Randolph asked for a motion to declare a unanimous ballot in favor of Mr. Hoffman as Chairman.

MOTION BY MS. GREENBERG
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

(*Mr. Koeppel arrived at the meeting just after the vote for Chairman*)

Mr. Randolph opened the floor for nominations for Vice Chairman. Ms. Van Buren nominated Mr. Fried and the nomination was seconded by Ms. Greenberg. Mr. Ochstein nominated Mr. Koeppel. A ballot was passed around and Mr. Randolph asked that it be initialed by the voting member. Mr. Hoffman informed Mr. Ballentine that since Mr. Koeppel was now present, he would resume being an alternate for the remainder of the meeting.

Mr. Fried was voted in as Vice Chairman by member ballot and congratulated by Mr. Hoffman.

IV. Approval of the Minutes of March 20, 2008:

MOTION BY MS. DUEMLER FOR APPROVAL OF THE MARCH 20, 2008 MINUTES
MOTION SECONDED BY MR. KOEPPEL
MOTION PASSED UNANIMOUSLY

V. Administration of the Oath to all persons who wish to testify:

Let the record show that all persons wishing to testify were sworn in at this time by Recording Secretary Raychel Houston.

VI. Public Hearings:

A. Case # 08-2431, 434 Seaspray Ave., Christopher Kaufman
Violation of Chapter 42, Section 42-87 of the Town of Palm Beach Code of Ordinances, accumulation of discarded, unusable material on property.

Lead Code Enforcement Walton said this case had been postponed from a previous meeting and he was requesting a further postponement until the May 15, 2008 Code

HOUSE_OVERSIGHT_016603

Enforcement Board meeting because the homeowner had applied to ARCOM and was seeking Town Council approval. Those hearings will be in May.

MOTION BY MR. OCHSTEIN TO POSTPONE THIS CASE UNTIL May 15, 2008.
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

. B. Case # 08-2478, 151 Chilean Ave., E. Nordin Gilbertson
Violation of Chapter 134, Section 134-889 of the Town of Palm Beach Code of Ordinances, commercial use of land in the R-B low density residential district.

Code Enforcement Officer Gerry presented the facts of this case and said the complaint had been received from a tenant of an adjacent property owner. He said there had been no response from Mr. Gilbertson with the exception of a letter which was received today and was included in the packet of case information given to the Board members. The Board took a few minutes to review the letter.

(*While this review was taking place, Mr. Hoffman acknowledged the presence of Councilwoman Coniglio in the audience and expressed his appreciation for her attendance.)*

Mr. Gerry said the Town's recommendation was that the violator be found in non-compliance, administrative costs of $150.00 assessed and that the yard be restored, the brick pavers removed and parking of vehicles from a commercial zoned property no longer be allowed at this location. Mr. Gerry said Mr. Gilbertson could obtain zoning approval and building permits for the brick pavers but it would have to be related to residentially permitted uses allowed for that particular property. He requested compliance by May 1, 2008. Ms. Van Buren said she did not see anything in Mr. Gilbertson's letter that addressed this particular violation. She then asked Mr. Randolph if prior outstanding fines could be discussed and Mr. Randolph said only if it related to this particular violation. He said this violation should be considered on its own merit. Mr. Gerry said there was an existing fine still running on the property for other violations that were still not in compliance. Ms. Duemler asked if there was a lien against the property and Mr. Randolph advised that if the previous Board order had been recorded, there was a lien against the property. It was confirmed the previous Board order had been recorded and there was an existing lien on the property. Mr. Randolph questioned whether the property was homesteaded and said if it was, foreclosure would not be an option. Mr. Gerry said the property was homesteaded.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS OF $150.00 AND GIVE

THE VIOLATOR UNTIL MAY 1, 2008 TO COMPLY.

HOUSE_OVERSIGHT_016604

SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

C. Case # 08-2479, 2299 E. Ibis Isle Road, 2299 E. Ibis Isle Road LLC
Violation of Chapter 42, Section 42-86 of the Town of Palm Beach Code of Ordinances, unsightly, unsafe or unsanitary conditions not allowed and properties to be maintained in good condition.

Code Enforcement Officer Gerry also presented the facts of this case and said the violation had been discovered in his normal routine patrol of the area. The property owner was cited and given until April 10, 2008 to come into compliance. He said the property owner had been cited previously on March 23, 2006, October 30, 2007 and November 14, 2007 but had not been brought before the Code Enforcement Board because the owner would come into compliance prior to the date given. He said the Town's recommendation is a finding of non-compliance, administrative costs of $150.00 and the violator given until April 19, 2008 to come into compliance.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS OF $150.00 AND GIVE THEM UNTIL APRIL 19, 2008 TO COME INTO COMPLIANCE.
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

D. Case # 08-2480, 1089 S. Ocean Blvd., Leonard Schneider
Violation of Chapter 122, Section 122-53 of the Town of Palm Beach Code of Ordinances: the Town Council authorizes the Director of Public Works to order curtailment of the use of water for certain nonessential purposes including specifying certain days and hours when lawns and shrubbery may be watered.

Code Enforcement Officer Weymer said this case concerned a water violation. A written warning had been issued for a violation which occurred on March 15, 2008. A second violation then occurred on March 29, 2008 at 11:33 a.m. and the notice was issued by certified mail. The fine had been paid this morning so the Town recommends a finding of non-compliance, acceptance of the payment of the fine and no further action be taken.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ACCEPTANCE OF THE PAYMENT OF THE FINE AND NO FURTHER ACTION TAKEN.
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

E. Case # 08-2481, 247 Chilean Ave., Frederick W. Hoberg

HOUSE_OVERSIGHT_016605

Violation of Chapter 42, Section 42-87 of the Town of Palm Beach Code of Ordinances, all exterior walls, gates and fences shall be kept in a safe and good state of repair.

Code Enforcement Officer Weymer presented the facts of the case and said he had received a complaint of a brick wall in disrepair. He investigated and confirmed there was a violation on the property. There was no response from the notice of code violation and hearing letter so the property was posted. The following day, Mr. Weymer received a call from the caretaker of the property who said Mr. Hoberg was out of the country and would not have been aware of any mail concerning the violation. The caretaker said he had contracted Tropical Concrete and Restoration to get the work done and the prep work had been started today. He said the Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and the violator given until May 12, 2008 to achieve compliance.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS OF $150.00 AND GIVE THEM UNTIL MAY 12, 2008 TO COME INTO COMPLIANCE.
SECONDED BY MR. KOEPPEL
MOTION PASSED UNANIMOUSLY

F. Case # 08-2482, 257 Sandpiper Dr., Xcel Texas Inc.
Violation of Chapter 106, Section 106-159 (b) of the Town of Palm Beach Code of Ordinances, a clearance of 18 feet, measured from the edges of the pavement and extending the full width of all streets vertically to be maintained for the unobstructed passage of vehicles.

Code Enforcement Officer Weymer said this violation regarded an overgrown hedge but full compliance had been achieved. The Town recommends the violation be dismissed with no further action taken.

MOTION MADE BY MS. DUEMLER TO DISMISS THIS CASE
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

G. Case # 08-2483, 231 Nightingale Trail, 231 Nightingale Trail LLC
Violation of Chapter 18, Section 18-242 [104.1.11] of the Town of Palm Beach Code of Ordinances, any site in which reconstruction does not commence within 15 days after demolition must be irrigated and sodded or seeded and Chapter 42, Section 42-86, debris shall not be allowed to accumulate on property.

Lead Code Enforcement Officer Walton presented the facts of the case and said a

HOUSE_OVERSIGHT_016606

demolition permit had been issued for this property on November 11, 2007 with a final inspection of February 15, 2008. There was a building permit initially issued on the site which stayed the requirement to seed and irrigate. The building permit had since been rescinded by the contractor which meant it was no longer a construction site and the lot had to be maintained. He had numerous meetings with the property owner and the property manager who was present to speak today if necessary. Mr. Walton said that as of yesterday, an irrigation system had been installed and the property had been hydro-seeded. They are now in compliance with the ordinance. The violation was not corrected prior to the time specified but was corrected prior to the hearing. The Town recommends the Board find the violation occurred but has been corrected, assess administrative costs in the amount of $150.00 and no further fines be imposed and the case closed.

MOTION BY MS. DUEMLER TO FIND THE VIOLATION OCCURRED BUT HAS BEEN CORRECTED AND ASSESS ADMINISTRATIVE COSTS OF $150.00
SECONDED BY MR. KOEPPEL
MOTION PASSED UNANIMOUSLY

H. Case # 08-2484, 515 N. County Road, Trump Properties, LLC
Violation of Chapter 18, Section 18-205 of the Town of Palm Beach Code of Ordinances, the Architectural Commission may attach conditions to any approval it grants (Declaration of Use Agreement).

Lead Code Enforcement Walton presented the facts of the case and said the previous owner of the property, Abe Gosman, had been granted approval by the Architectural Commission to do some remodeling. One of the conditions of this approval was that the hedge along the front of the property be maintained in the condition it was in at the time the approval was granted. This agreement was a binding agreement, which passes on to any subsequent property owner. The agreement was made January 31, 1990. The subsequent buyer of this property was Mr. Trump, Trump Properties, LLC and some remodeling work was done, removing the previous hedge. A new hedge was planted to replace the original hedge and that one has now been removed. This is a violation of the agreement. A letter was received from Mr. Royce, representing Mr. Trump, asking for a postponement of today's hearing. The Town does not feel this matter should be postponed.

Mr. Randolph summarized the letter from Mr. Royce which indicated the ficus hedge keeps dying and they want to replace it with something different. They plan on hiring a landscape architect to go before the next Architectural Commission meeting to get approval to install a hedge in an attempt to meet the conditions of the declaration of use agreement. Mr. Randolph said he had discussions with Mr. Royce and Mr. Walton and Mr. Royce was told the Town could not recommend a postponement and the recommendation would be that they are found in violation, assessed the $150.00

HOUSE_OVERSIGHT_016607

in administrative costs and be given until June 18th, which is the day before the June Code Enforcement Board meeting, to comply. This would give them the opportunity to appear before the Architectural Commission to see if they can get approval to re-plant a hedge. The hedge has to be installed to the height which existed at the time of the agreement which Mr. Randolph said he believed was twenty-two (22) feet. Mr. Randolph said Mr. Royce was not present today because he had a planned vacation.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS OF $150.00 AND GIVE THEM UNTIL JUNE 18, 2008 TO COMPLY.
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

I. Case # 08-2485, 137 Root Trail, T&P Pavers
Violation of Chapter 18, Section 18-242 of the Town of Palm Beach Code of Ordinances, working without a permit.

Lead Code Enforcement Officer Walton presented the facts of the case and said he had received a faxed letter today from T&P Pavers, advising they had spoken with the Acting Building Official, Jeff Taylor, who had reportedly told them a permit was not required because the job was so small. Mr. Walton said he had not been able to contact Mr. Taylor who was in a class all day so Mr. Walton requested this case be posted until the May 15, 2008 meeting.

MOTION BY MR. KOEPPEL TO POSTPONE THIS CASE UNTIL May 15, 2008.
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

J. Case # 08-2486, 1473 N. Ocean Blvd., Elias Management & Construction, Inc.
Violation of Chapter 42, Section 42-198 of the Town of Palm Beach Code of Ordinances, sandblasting during season.

Code Enforcement Officer Weymer presented the facts of the case and said the fine of $250.00 had been paid prior to today's meeting. He said the Town recommended a finding of non-compliance, acceptance of the payment of the fine and no further action be taken.

MOTION BY MS. DUEMLER THAT THE VIOLATION BE FOUND IN NON-COMPLIANCE, ACCEPTANCE OF THE PAYMENT OF THE FINE AND NO FURTHER ACTION TAKEN.
SECONDED BY MR. KOEPPEL
MOTION PASSED UNANIMOUSLY

K. Case # 08-2487, 1060 N. Ocean Blvd., George Brittain Land Design

HOUSE_OVERSIGHT_016608

Violation of Chapter 42, Section 42-230 of the Town of Palm Beach Code of Ordinances, leaf blower over 65 DBA.

Code Enforcement Officer Weymer presented the facts of the case and said the violation occurred on March 18, 2008 in front of 1060 N. Ocean Blvd. He said he had issued a previous written warning to the company on Feb. 22, 2008. The violation carries a fine of $125.00 for the first offense and the fine had been paid prior to the start of today's hearing. The Town recommends a finding of non-compliance, acceptance of the payment of the fine and no further action taken.

MOTION BY MR. KOEPPEL TO FIND THE VIOLATOR IN NON-COMPLIANCE, ACCEPT THE PAYMENT OF THE FINE AND NO FURTHER ACTION TAKEN.
SECONDED BY MS. GREENBEREG
MOTION PASSED UNANIMOUSLY

VII. Old Business:

A. Case # 06-2049, 1742 S. Ocean Blvd., Gunther E. Lehman
Violation of Chapter 42, Section 42-87 of the Town of Palm Beach Code of Ordinances, all exterior walls, gates and fences shall be kept in a good state of repair.

Lead Code Enforcement Officer Walton presented the facts of this case and said they are essentially the same as case # 06-2050. The Board had previously heard the cases which concerned a wall which split the property line between the two properties. Both properties were found in non-compliance and there was dissention about whose wall it was and who was responsible for the repairs. Each property owner has repaired the portion of the wall which belongs to them and the Town is requesting the cases be dismissed.

MOTION BY MR. KOEPPEL TO DISMISS THE CASE
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

B. Case # 06-2050, 1744 S. Ocean Blvd., Norman Traverse
Violation of Chapter 42, Section 42-87 of the Town of Palm Beach Code of Ordinances, all exterior walls, gates and fences shall be kept in a good state of repair.

MOTION BY MR. KOEPPEL TO DISMISS THE CASE
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

HOUSE_OVERSIGHT_016609

C. Case # 07-2097, 333 Sunset Ave., Royal Poinciana South
Violation of Chapter 134, Section 134-416 (d), Section 134-417 and Section 134-418 of the Town of Palm Beach Code of Ordinances, when any building or structure or part thereof which is nonconforming is altered, changed or replaced, the non-conforming building or structure or part thereof shall thereafter conform to the regulations of the district in which such building or structure is located and the terminated nonconformity shall not thereafter be resumed nor shall any additional nonconformity be permitted.

Lead Code Enforcement Officer Walton said this case had previously been heard and was remanded back to the Code Enforcement Board by the Circuit Court. The case has been previously postponed due to the attorneys for 333 Sunset Ave. being on vacation. Mr. Walton said the Town is asking that the case be postponed again because Mr. Castro, the Zoning Administrator, could not be present today.

MOTION BY MR. KOEPPEL TO RESCHEDULE THE CASE UNTIL MAY 15, 2008
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

Mr. Hoffman addressed a question to Sgt. Krauel or Lead Code Enforcement Officer Walton as to whether people were starting to pay more attention to Code Enforcement or perhaps fewer violators were found this month. Mr. Walton said the Town was getting better compliance and perhaps these agendas would be even shorter in the future. He said the word was out that not only were the Code Enforcement officers looking harder but the Board is not being as generous with the time but still being fair. Mr. Hoffman said he needed to compliment the Town Council on their efforts to make Code Enforcement an important part of making the community a more habitable place. He said he also wanted to compliment the Staff for doing that for the Town.

Captain Blouin said when Code Enforcement was first transferred to the Police Department, things were structured a little differently. In the past, it had been treated more leniently. The citizens did not take it seriously because they believed they were
going to keep getting more time. He said some of the earlier cases when the Police Department took over were more than a year old when they came before the Board. The police department changed it so the cases are before the Board more quickly. Many of the attorneys who were known to defend the code violation type of cases initially were very combative. That attitude has now changed and they are contacting the Police Department to see what they need to do to come into compliance. Captain Blouin said he wanted to thank the Board for their efforts in making this happen within the community because it is making code enforcement more efficient in the Town.

HOUSE_OVERSIGHT_016610

Mr. Fried complimented the Staff on the packets of photographs being put together for the Board, that it makes their analysis and discussion more effective and more efficient.

VIII. Fine Consideration:

A. Case # 08-2432, Beachfront Vista Property, Nightingale Beach Club Association
Violation of Chapter 134, Section 134-1472 (3) of the Town of Palm Beach Code of Ordinances, no additional walls, fences, hedges or other structures or growth shall be erected or be grown eastwardly of Ocean Boulevard to a height greater than four (4) feet above the surface of the Ocean Boulevard.

Lead Code Enforcement Officer Walton said this case had been postponed from a previous meeting as a permit had been applied for per the Board's order. He said he had received an e-mail yesterday from John Wettstein, who is with the State of Florida. Mr. Wettstein's e-mail said a permit must be issued or denied by the State by June 13, 2008. The case is still under review so Mr. Walton requested a postponement until June 19, 2008. Mr. Hoffman requested that date be June 18th, as the Code Enforcement Board hearing is June 19, 2008. Mr. Randolph said it is possible the permit could be issued by the May meeting. Mr. Walton revised his request to postpone to the May 15, 2008 meeting and said if there had been no decision at that time, he would ask for another postponement.

MOTION BY MR. KOEPPEL TO POSTPONE THE CASE UNTIL THE MAY 15, 2008 MEETING
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

B. Case # 08-2470, 2252 W. Ibis Isle Road, Walter Jackson
Violation of Chapter 42, Section 42-86, of the Town of Palm Beach Code of Ordinances, properties are required to be maintained in good condition and unsightly, unsafe or unsanitary conditions are not permitted and Chapter 42, Section 42-87, all exterior walls to be maintained in good repair and roofs to be maintained so as not to leak.

Lead Code Enforcement Officer Walton said the Board had issued an order at the last hearing that the violator was found in non-compliance, ordered to pay administrative costs of $150.00 and given until April 14, 2008 to comply. Mr. Jackson has tried to come into compliance and there have been major improvements in the property. There are a few outstanding items and Mr. Walton said Mr. Jackson's contractor is asking for a 7 day extension to come into compliance. Dennis Perkins, the contractor was present and told the Board he would be able to have the property in compliance by April 24, 2008.

HOUSE_OVERSIGHT_016611

MOTION BY MS. GREENBERG TO GIVE THE VIOLATOR AN EXTENSION OF TIME UNTIL APRIL 24, 2008 TO COMPLY
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

C. Case # 08-2471, 240 Park Avenue, Park Avenue Palm Beach LLC
Violation of Chapter 42, Section 42-86, of the Town of Palm Beach Code of Ordinances, properties are required to be maintained in good condition and unsightly, unsafe or unsanitary conditions are not permitted and Chapter 42, Section 42-87, all exterior walls to be maintained in good repair and interior walls and ceilings shall be structurally sound.

Lead Code Officer Walton advised this property had been found in non-compliance at the last hearing, assessed administrative costs in the amount of $150.00 and given one (1) day to comply. Compliance has not been achieved so the Town recommends a $250.00 a day fine. He said he has met with the Chief Financial Officer of the corporation that owns the property and that individual was present today to address the Board.

Dan Gorman was sworn in by Recording Secretary Houston and said he had become aware of this violation after the fact. He said they had been going back and forth with the Town about what to do with the property at 240 Park Ave. He said it was a disheveled rooming house when they took it over and they began to rebuild it to its old glory. As recently as three weeks ago, an associate of his met with the Town to discuss whether to continue to do the eighteen room hotel/boarding house or convert
it into a single family residence. As a result of that, the original permits lapsed. They then went to the Bahamas to work on another project and did not get the notices. They have a new group of contractors, Principal Design and Development Building, who are going to re-file the permits. He requested an extension of time as they have done everything they can without permits. Mr. Walton said the Town was requesting a fine of $250.00 a day to begin on March 22, 2008. In response to questions from Board members, Mr. Gorman said they had decided to continue with the rooming house zoning and they had consultants and financing in place. He anticipated the project, at least the exterior, would be completed within 30 days and the interior portion, three to four months after that.

Mr. Hoffman advised he was not in favor of granting any extensions in this case and Mr. Ochstein agreed.

MOTION BY MR. OCHSTEIN TO IMPOSE A FINE OF $250.00 A DAY, COMMENCING ON MARCH 22, 2008 AND CONTINUING UNTIL COMPLIANCE IS ACHIEVED.
SECONDED BY MS. DUEMLER

HOUSE_OVERSIGHT_016612

There was some discussion on the motion and Mr. Koeppel requested it be amended to include a reconsideration of the fine based on how much progress was made and how they proceeded in getting it completed. Mr. Ochstein did not object.

AMENDED MOTION BY MR. OCHSTEIN TO IMPOSE A FINE OF $250.00 A DAY, COMMENCING ON MARCH 22, 2008 AND CONTINUING UNTIL COMPLIANCE IS ACHIEVED, SUCH FINE TO BE RECONSIDERED BASED ON PROGRESS OF COMPLETION
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

D. Case # 08-2477, 215 Colonial Lane, Susan C. Lee Trust
Violation of Chapter 42, Section 42-87 of the Town of Palm Beach Code of Ordinances, swimming pools and gates to be kept in a good state of repair, roof maintained so as not to leak, exterior surfaces to be kept in a good state of repair, no conditions allowed which provides harborage for vermin and Chapter 18, Section 18-551, fences and gates for swimming pools to be not less than four (4) feet in height and gates to be self-closing and self-latching.

Lead Code Enforcement Officer Walton advised he had broken the seven (7) violations in this case down to two classifications, (A) which was violations 1,2 and
3, which concerned the pool and (B) which were violations 4, 5, 6 and 7. The violator was out of compliance four (4) days for (A), violations 1, 2 and 3 for which the Town was requesting a fine of $100.00 a day for each of the four days out of compliance. The violator had been given until April 14, 2008 to come into compliance for (B), violations 4, 5, 6 and 7 but these violations were still outstanding. The Town requests a fine of $250.00 a day commencing on April 15, 2008 and continuing until compliance is achieved.

Amy Fischer was present on behalf of the homeowner, along with Mr. Lawrence, an architect who she said was assisting them in trying to remedy the problems which had turned out to be more extensive than they had anticipated. She detailed the problems with obtaining the proper roofer and the time frame involved. Some of the issues involved code changes and whether or not the roof could be replaced with a similar system or whether it had to be upgraded to meet certain hurricane requirements. Some of the issues had been taken care of immediately but it was not feasible to remediate some of the problems in the time constraints the Town had afforded them. Ms. Fischer requested this matter be continued for forty-five (45) days or they be given a forty-five (45) day window to come into compliance. She said they had problems with contractors who had not done things in an expeditious, correct manner.

Mr. Lawrence was sworn in by Recording Secretary Houston and said he had nothing to add other than that patching was not an option and the roof had to be replaced.

HOUSE_OVERSIGHT_016613

MOTION BY MR. FRIED TO ASSESS A FINE IN THE AMOUNT OF $100.00 A DAY FOR FOUR (4) DAYS FOR VIOLATIONS (A) FOR A TOTAL OF $400.00 AND A FINE IN THE AMOUNT OF $250.00 A DAY FOR VIOLATIONS (B), COMMENCING ON APRIL 15, 2008 AND CONTINUING UNTIL COMPLIANCE IS ACHIEVED.
SECONDED BY MR. OCHSTEIN

During discussion on the motion, Mr. Fried told Ms. Fisher that although they appreciated her testimony, fines had a way of giving people incentive and it was in the Board's discretion to reconsider the fine if compliance was done in an appropriate time. Mr. Koeppel said he was going to make a similar comment especially in a case such as this one where one form of repair was anticipated and it became something significantly different. He thought the Board needed to take that into consideration.

MOTION PASSED UNANIMOUSLY

IX. Comments:

Mr. Fried said he wanted to revisit the subject Mr. Raffo had enjoyed so much over the past couple of months, regarding outstanding fines. He requested an update on the progress made in collecting some of them. Ms. Houston advised the outstanding water restriction fines had been reduced to $6400.00 this month from over $9000.00 due the previous month and liens were in the process of being filed for the remainder that had not been paid. The non-running fines either had liens filed or were agenda items which are pending. Cases that had substantial fines and were not homesteaded would be looked at for foreclosure proceedings. The list of the daily running fines indicated which of those properties were homesteaded and Ms. Houston indicated she anticipated bringing some of those non-homesteaded properties to the Board for foreclosure consideration next month.

Mr. Fried asked about the motion made by Mr. Raffo at the last meeting, requesting the Town Council to address the issue of giving final authority for foreclosure action to the Code Enforcement Board. He asked for an update from Mr. Randolph or Ms. Houston as to whether this would appear on the Town Council agenda. Mr. Randolph asked if the minutes of that last meeting had been sent to the Town Council and Ms. Houston told him those were the minutes that had just been approved today by the Board so they would now be sent to the Town Council. Mr. Randolph said since these minutes had now been approved, he would go ahead and call them to the attention of Peter Elwell and ask him to agenda it on the next meeting of the Council. Mr. Fried asked that the outstanding fines be prioritized for foreclosure starting with the largest ones first. Ms. Houston said she would address the oldest and the largest outstanding fines first. She said she had also waited, based on the motion from the last meeting because it would be a different procedure if it was just brought to the Code Enforcement Board for approval or if it came to them for final action. Mr. Randolph said it was his understanding that the Code Enforcement Board wanted final approval as set forth in State Statute rather than just

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recommending foreclosure to the Town Council. Captain Blouin advised he also needed to speak to Mr. Randolph to get a prudent cutoff for what cases would be brought for foreclosure in terms of dollar amount.

Mr. Ballentine said he was intrigued by the leaf blower case and asked Captain Blouin how it was monitored in the Town. Captain Blouin said in November of last year, the Police Department had queried the most common types of complaints they were receiving and most were about construction or landscape noise. It was decided to focus most of his resources, which were generally small, outside of the police officers, whose main focus is keeping the community safe, not code violations. The department started with an educational campaign for the landscape industry, consisting of brochures outlining all of the ordinances which applied to them and voluntary testing of their equipment. He said the last time he had checked, 89 warnings had been written but he did not recall how many violations. Most of the violations would not come before the Code Board because the violator has the option of paying a fine or if they want to contest it, to come before the Code Board. Some people
have just elected to pay the fine. All of the major landscapers are going to be contacted again and two more testing dates have been set up. The code enforcement officers have been told this is a priority because of the complaints from the citizens. Captain Blouin said that even if everyone was in compliance with the ordinance, it was still going to be a nuisance to some citizens because leaf blowers are noisy.

Ms. Greenberg asked Mr. Randolph if it could be discussed if someone had a prior history of violations. Mr. Randolph said the case before them should be considered on the merits, not on the prior history. He said it could become relevant in considering the amount of a fine.
There was discussion about the Susan Gibson and the Susan Lee Trust and the outstanding fines on those cases.

X. Adjournment:

The meeting was adjourned without benefit of a motion.

HOUSE_OVERSIGHT_016615

TOWN OF PALM BEACH

POLICE DEPARTMENT

A NATIONAL AND STATE ACCREDITED LAW ENFORCEMENT AGENCY

CODE ENFORCEMENT BOARD MINUTES
2:00 P.M. THURSDAY, JULY 17, 2008
AT THE TOWN COUNCIL CHAMBERS, 360 S. COUNTY ROAD

I. **Call to Order**: The meeting was called to order at 2:00 p.m. by Chairman Timothy Hoffman.

II. **Roll Call:**

Present:
Timothy Hoffman, Chairman
Harris Fried, Vice Chairman
Larry Ochstein, Member
Catherine M. Duemler, Member
Madelyn Greenberg, Member
Cynthia Van Buren, Member
James M. Ballentine, Jr., First Alternate
William P. Vanneck, Second Alternate

Absent:
Joel P. Koeppel, Member

Staff:
John Randolph, Town Attorney
Captain Kirk Blouin, Support Services
Rob Walton, Lead Code Enforcement Officer
Nick Gerry, Code Enforcement Officer
Bryant Weymer, Code Enforcement Officer
Raychel Houston, Recording Secretary

III. **Approval of the Minutes of June 19, 2008:**

MOTION BY MS. DUEMLER FOR APPROVAL OF THE JUNE 19, 2008 MINUTES
MOTION SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

IV. **Administration of the Oath to all persons who wish to testify:**

Let the record show that all persons wishing to testify were sworn in at this time by Recording Secretary Raychel Houston.

V. Public Hearings:

A. Case # 08-2431, 434 Seaspray Ave., Christopher Kaufman
Violation of Chapter 18, Section 18-242, Subsection 1 (104.1.1) of the Town of Palm Beach Code of Ordinances, building permits required to construct, install, repair or alter any building or building system.

Lead Code Enforcement Walton requested the case be postponed until a date certain of September 18, 2008 as Mr. Kaufman has a hearing before the Town Council.

MOTION BY MS GREENBERG TO POSTPONE THE CASE UNTIL SEPTEMBER 18, 2008
SECONDED BY MR. OCHSTEIN
MOTION PASSED UNANIMOUSLY

B. Case # 08-2511, 114 N. County Rd., Palm Beach Affair
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry requested the case be dismissed as the fees were paid and it came into compliance.

MOTION BY MR. FRIED TO DISMISS THE CASE
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

C. Case # 08-2512, 235 Sunrise Ave., Suite C8, Palm Beach Resorts International
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said the Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties by July 21, 2008. Mr. Hoffman inquired about the late penalties and Mr. Gerry said they were based on a monthly penalty of 10% per month. In response to Mr. Ochstein's question, Mr. Gerry explained that both the business and the property owner were cited. Mr. Fried inquired about service and Mr. Gerry said it was sent by certified mail. Mr. Ballentine asked if any attempts, other than by mail, were made to get in touch with someone at the business. Mr. Gerry said he went to the business, was told the owner was difficult to reach and left his business card but had not received any response.

HOUSE_OVERSIGHT_016617

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY JULY 21, 2008.
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

D. Case # 08-2513, 329 Worth Ave., Dunville L'Antiquaire, LTD
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said he followed up after the certified letters were sent but the business could not be contacted. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties by July 21, 2008.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY JULY 21, 2008.
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

E. Case # 08-2514, 235 Sunrise Ave., C8, C.J.'s Simply Gourmet, Inc.
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and recommended a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fire inspection fee in addition to any late penalties by July 21, 2008. Mr. Gerry said he also tried, with negative results, to make contact with the owner of this business as it is the same owner as the other case at this location. Mr. Ochstein remarked that this was the same business which had been before the Board previously and had even "bounced a check" to the Town and wanted to know if there was something more that could be done other than the standard $150.00 costs. Mr. Gerry said he could review the case further to see if it could be brought back for additional fines. Mr. Hoffman asked if these cases were brought to Code Enforcement by the Finance Department and Mr. Gerry said they came from the Fire Prevention Bureau who handles their own billing and explained the procedure for that. Mr. Hoffman said it seemed like a year was a long time for these cases to be in arrears. Mr. Gerry said the cases were coming over quicker now from Fire Prevention and he thought it would improve in the future.

HOUSE_OVERSIGHT_016618

MOTION BY MR. OCHSTEIN TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY JULY 21, 2008.
SECONDED BY MR. FRIED
MOTION PASSED UNANIMOUSLY

F. Case # 08-2515, 140 N. County Rd., Bank of America
Violation of Chapter 46, Section 46-68 of the Town of Palm Beach Code of Ordinances, annual fire and life safety inspection fees not paid

Code Enforcement Officer Gerry presented the facts of the case and said he had spoken with Robin Gert who advised him the bill had been mishandled and gotten lost in their system. He said he spoke to her yesterday and was told the payment was still in process. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the fine inspection fee in addition to all late penalties and costs by August 4, 2008.

MOTION MADE BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER THEM TO PAY THE FIRE INSPECTION FEE IN ADDITION TO ANY LATE PENALTIES BY AUGUST 4, 2008.
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

G. Case # 08-2516, 313 ½ Worth Ave., # B2, David Clark
Violation of Chapter 114, Section 114-32 of the Town of Palm Beach Code of Ordinances, business tax receipt required

Code Enforcement Officer Gerry presented the facts of the case and said Mr. Clark had submitted his paperwork and paid the fee but there was a zoning issue still in question. The Zoning Administrator is out of the office this week on jury duty and based on the inability to get the issue resolved, the Town recommends the case be postponed until the August 21, 2008 hearing date.

Mr. Fried questioned what the zoning issue had to do with a business tax receipt and Mr. Gerry said the Town records do not show this particular suite existing at this address but Mr. Clark has documents showing it there.

Mr. Gerry said zoning is tied into business tax receipts because zoning requirements do not allow certain businesses in some districts. There is also the

HOUSE_OVERSIGHT_016619

question of whether the space is legitimate because people will subdivide suites and make two spaces where there should only be one. Mr. Gerry said it looked like a legal space from the documentation Mr. Clark provided but the Zoning Administrator needed to approve it.

MOTION BY MR. FRIED TO POSTPONE THE CASE UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

H. Case # 08-2517, 2270 E. Ibis Isle Road, Mark Remson Trust
REPEAT Violation of Chapter 42, Section 42-86 of the Town of Palm Beach Code of Ordinances, Environment, properties to be maintained in a good condition.

Code Enforcement Officer Weymer presented the facts of the case and said the violation was discovered from routine patrol in the area but shortly after the notice of repeat violation was sent out, a citizen complaint was received as well. Mr. Weymer said there had been at least seven previous letters to this property owner regarding lack of maintenance on the property. A repeat notice of code violation was mailed out on June 24, 2008 with a mandatory hearing date. The lot was cut on or around July 2, 2008. This particular violation is a Class II violation under the fine schedule which calls for a fine of $400.00, however, by law, the Board has the ability to impose a fine of up to $500.00 because it is a repeat violation. Mr. Weymer said he believes it is important to look at the track record of this property in considering the fine. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and a fine of $500.00, which is the maximum fine for a repeat violation.

Mr. Hoffman said it seemed that every time the property owner gets notified he comes into compliance but he has to be notified. Mr. Weymer says there are times when he comes into compliance but on at least two other occasions, he has been before the Board because he has not complied by the time set. Mr. Ochstein asked if he has been fined in the past and Mr. Weymer said there are two outstanding fines for which liens have been placed on the property.

MOTION BY MS. GREENBERG TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND A FINE OF $500.00
SECONDED BY MS. DUEMLER
MOTION PASSED UNANIMOUSLY

I. Case # 08-2518, 230 Esplanade Way, Kenneth J. Horton

HOUSE_OVERSIGHT_016620

Violation of Chapter 42, Section 42-86 (19) of the Town of Palm Beach Code of Ordinances, cleared land must be re-sodded or replanted to prevent the creation of windblown dust or dirt and Chapter 42, Section 42-86, unsightly, unsafe or unsanitary conditions not permitted and properties to be maintained in good condition.

Code Enforcement Officer Weymer presented the facts of the case and said the violation was discovered on routine patrol. Mr. Weymer has been in contact with a property representative, Louis Pascerelli who said Mr. Horton had not been in Town to receive his mail. Mr. Weymer said Mr. Pascerelli had proposals from Hansen Landscape for the clean up and re-sod of the lot and a weekly maintenance contract to assure this does not happen again. Tropical Irrigation has also been contacted to put in a new irrigation system. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and the property owner be given until August 18, 2008 to come into compliance. Mr. Fried said he believed a fine of some sort should be imposed. Mr. Ballentine asked how long Mr. Horton had been out of compliance. Mr. Weymer said the original warning was sent on June 5, 2008 and a notice of violation and hearing was sent on June 20, 2008. Mr. Weymer said the first contact with the property owner was July 7, 2008. Mr. Ballentine asked if the August compliance date was reasonable and Mr. Weymer said Jim Hansen of Hansen Landscape thought the work would be done before that date but wanted more time in case he ran into any problems.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND GIVE HIM UNTIL AUGUST 18, 2008 TO COME INTO COMPLIANCE.
SECONDED BY MR. OCHSTEIN
MOTION PASSED UNANIMOUSLY

J. Case # 08-2519, 206 Dunbar Road, AMF Estate Management
Violation of Chapter 42, Section 42-230 of the Town of Palm Beach Code of Ordinances, leaf blower over 65dBA at 50 ft.

Code Enforcement Officer Weymer presented the facts of the case and said he witnessed the violation on June 26, 2008. AMF had previously been warned on February 19, 2008 for using a leaf blower over 65dBA. Mr. Weymer performed a decibel test for this violation and the reading was 79.6 dBA at 50 feet. This is a class II violation under the fine schedule which has a $125.00 fine for the first offense. The violation was issued on site to a superintendant for AMF and has not been paid. The Town recommends a finding of non-compliance, administrative costs in the amount of $150.00 and payment of the $125.00 fine.

Mr. Hoffman asked whether this company had participated in the leaf blower testing being offered by Code Enforcement. Mr. Weymer said AMF had participated in the testing program and had several leaf blowers certified. He said

HOUSE_OVERSIGHT_016621

the truck he was out with had 2 other leaf blowers on the truck that he could identify as being over 65dBA but he only tested the one they were using and wrote a violation for that one. Ms. Van Buren asked about the testing method and Mr. Weymer explained how it was done.

MOTION BY MR. OCHSTEIN TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND ORDER HIM TO PAY THE $125.00 FINE
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

K. Case # 08-2520, 165 Brazilian Ave., Richard Lynn
Violation of Chapter 10, Section 10-45 (i) of the Town of Palm Beach Code of Ordinances, if any dog attacks and causes severe injury or death to any human or domestic animal more than once, the owner shall be required to have said dog removed from the Town or humanely euthanized at his/her sole expense and violation of Chapter 10, Section 10-6 of the Code which prohibits animals from creating nuisances which are detrimental to the public safety and welfare.

(Mr. Ochstein recused himself, stating that he has a relative who has a business relationship with Dr. Lynn and Mr. Hoffman advised Mr. Vanneck would be a voting member in this case)

Sgt. Curtis Krauel said this case was brought to Code Enforcement through a culmination of events spanning back over a period of 4 years. Sgt. Krauel explained Section 10-6 of the Code and said he was going to be showing some graphic photographs. Sgt. Krauel presented the facts of each of the documented cases involving attacks by Duke from March 17, 2004 until May 11, 2008.

Mr. Hoffman questioned how the Code Enforcement Board came into this procedure since the Town Council had already said Duke is a dangerous dog. Mr. Randolph explained that Town Council does not have the authority to fine. Originally, the police department did not issue a code enforcement board citation but ordered the dog be removed from the Town or humanely euthanized which was appealed to Town Council. Town Council denied the appeal. Since that time, Dr. Lynn has refused to comply with the order of the Town Council so a citation was issued by Code Enforcement to bring the matter before the Board to determine whether there should be a finding of violation and at a later time, whether a fine should be imposed. Mr. Randolph said it was now the jurisdiction of the Code Enforcement Board and not the Town Council. Mr. Hoffman questioned whether or not the Board had to determine if the dog was going to be euthanized or removed from the Town and Mr. Randolph explained that this was not the Board's determination. The Board was only to determine whether or not there had been a violation of the Town Code.

HOUSE_OVERSIGHT_016622

Sgt. Krauel continued his presentation remarking that once Duke had been found "potentially dangerous" by Animal Care and Control, there had been another attack but due to an administrative error by Animal Care and Control in failing to document their records appropriately, Duke was classified as "potentially dangerous" again. This is an error that Animal Care and Control completely acknowledges.

After the last attack on May 11, 2008, Duke was taken into custody by Animal Care and Control and after a hearing, was classified as "dangerous". Sgt. Krauel noted that the hearing before Special Magistrate Earl Mallory did not classify Duke as vicious because Duke had no documented cases of attacks on humans. After this last case was reviewed by Code Enforcement, sufficient evidence was also found by the Town to classify Duke as dangerous and Dr. Lynn was notified by registered mail. Dr. Lynn appealed to Town Council and that appeal was denied by Town Council by a 5-0 vote. The Town recommends a finding of non-compliance with Chapter 10, Section 10-6 as the Town has the two required affidavits of residents of the Town occupying separate households. The Board was provided with copies of four (4) affidavits.

Sgt. Krauel then proceeded with an explanation of Chapter 10, Section 10-45 and said the Town was requesting a separate motion for a finding of non-compliance of Chapter 10, Section 10-45 (i) and that Dr. Lynn be given until July 18, 2008 to come into compliance by either removing the dog from the Town or having it humanely euthanized. If compliance is not achieved, the Town recommends a daily fine of $250.00 a day commence on July 19, 2008 and continue until compliance is achieved.

Mr. Randolph requested the Board treat these two sections of the Code separate and apart. He said the first evidence heard related to Section 10-6 (3) and involved the affidavits from the residents of the Town. Because of the dispute Dr. Lynn's attorney has with regard to the manner that Section 10-45 was applied, Mr. Randolph recommended the two Code sections not be mixed up. Mr. Randolph said he would like for the Board to first consider whether there had been a violation of 10-6 and to make a motion one way or the other with regard to the Staff's recommendation. He then requested that Section 10-45 be entertained separately after Dr. Lynn's attorney and anyone else who wanted to speak had an opportunity to do so.

Vivian Dorris, 155 Brazilian Ave., said her beagle/bassett, Charlie, was viciously attacked by Dr. Lynn's dog, Duke and she has sustained approximately $8500 in vet's bills. She said her dog will never walk properly again because of severe nerve damage. She does not feel there are enough precautions being taken for the safety of residents on Brazilian Ave. She asked that the Board take this into consideration and thanked them for their service.

Wayne Gerl, 149 Brazilian Ave., said he has two dogs and every time he exits his driveway or front yard, he has to stop and peek around and make sure the other

HOUSE_OVERSIGHT_016623

dogs are not in the area. He said he was bitten by Duke a couple of years ago. He was talking with Dr. Lynn and the dog just reached out and bit him, tearing his pants and breaking the skin. He said he has been friends with Dr. Lynn and Margrit for many years but it was just unsafe for anybody and any animals in the area.

Bobby Goodnough said he was jogging in the area and the dog lunged at him, causing him to have to dive through a 12 foot hedge to get away from it. He said he just thought it was a matter of time before the dog got a person or a child. Sgt. Krauel asked if Mr. Goodnough had reported the incident to the police department or had a time frame of occurrence. Mr. Goodnough said he had not made a police report but it occurred about 2 years ago.

Laura Klein, 130 Seaspray Ave., said she had lived here for 12 years, having moved from Washington, D.C. for a sense of security. She said she was now in the process of installing surveillance cameras. She said she could no longer walk her dog without constantly looking around, worrying if Duke had once again escaped from the open gates. She said it is a privilege to own a dog and dog ownership and responsibility should go hand in hand. She said Dr. Lynn was issued a citation in August of 2002 for locking his dog in a car with the windows rolled up. She said she mentioned this to prove his irresponsibility. She said his voluminous file from Animal Care and Control would attest to this. She said no one was safe while Duke is in Palm Beach.

James Merola was present on behalf of Dr. Lynn and said he was present on a revised Notice of Code Violation and Hearing dated July 15, 2008. He said he was not denying there were incidents with Duke. Palm Beach County had the dog taken into custody and the hearing was held June 5, 2008. At that hearing, it was agreed upon by the County and Dr. Lynn that the dog would be classified as dangerous. The dog was classified as dangerous which required certain restrictions on the dog which Dr. Lynn complied with and the dog was returned to him. In the event Duke has another incident, pursuant to state and county law, but some reason not Town law, the dog would be taken into custody and euthanized. Mr. Merola said Dr. Lynn feels very badly about the situation and agreed with the County to do what they required. Mr. Merola said Dr. Lynn then received a letter, dated June 16, 2008 from the police department, mentioning the order of the County and stating for the first time that the Town was declaring the dog dangerous and giving him ten (10) days to appeal, which he did not. On June 20, 2008, 4 days after the dog was declared dangerous by the Town, the police department sent a second letter, citing 10-45 (i), advising that since the dog already had two incidents, they wanted it removed or euthanized. The dog had not done anything since being declared dangerous. This letter did not mention an appeal, but he sent a letter anyway, stating they did not agree with that. He said the dog was declared dangerous on June 16th, requirements were imposed and they complied with those, including the filing of a $1000 bond and they did not agree the dog should now be removed. There was a Town Council hearing on August 8th and the Council said they needed to have the dog removed or euthanized. Mr.

HOUSE_OVERSIGHT_016624

Merola went into detail about the requirements of 10-45 and said Dr. Lynn had complied with all of those. Then the letter of June 20th came, requiring Dr. Lynn to remove the dog or euthanize it. Mr. Merola read subsection (h) into the record and said the Code Enforcement Board did not have any jurisdiction over subsection (i) as subsection (h) just mentioned (d) through (g). The Town filed a lawsuit and he and Mr. Randolph were before Judge Hoy this morning. The Town is asking to have the dog removed or euthanized and asking for a permanent injunction, stating an emergency situation. Judge Hoy gave them a hearing at 1:30 p.m. on Tuesday where it will be determined whether the dog is a nuisance, whether 10-45 (i) even applies to the situation and if the Board has authority over 10-45 (i). If the Judge says the dog has to go, they are not going to argue with the Court but he believes they have a right to present their case. He does not believe the Town's position that the fine should start tomorrow is correct. He believes the Board can only find violations of subsections (d) through (g) of 10-45. There have been no allegations that Dr. Lynn has violated subsections (d) through (g). Mr. Merola believes it is clear that the Code Enforcement Board has no authority under (i). Mr. Merola then addressed 10-6 and said he believed that since all precautions have been taken under 10-45, the dog does not constitute a nuisance. Mr. Merola said he has an injunction relief request before the Judge to stop the Board from making this decision. Mr. Merola said Mr. Randolph has asked them to determine these two (2) ordinances separately and he does not believe 10-45 (i) is in the Board's purview, and as to the nuisance, the dog has to be a nuisance now and it is not. This is all going to be determined Tuesday and he is asking the Board to either deny the Town's recommendation because the Town cannot prove the dog is a nuisance now or reset this case until next month's hearing.

Sgt. Krauel advised he wanted to make a rebuttal to some of Mr. Merola's comments. The service of notice Mr. Merola referred to in declaring the dog dangerous was when the police department spoke with Dr. Lynn on June 12, 2008 and was told Duke was being housed at a kennel in Palm Beach County. A notice could not be served to Dr. Lynn to have him come into compliance with something he was already in compliance with. The dog was not in the Town. The police department did not find out the dog was in Town until June 20th when Laura Klein reported the dog attempted to break free of Dr. Lynn to attack her and this is when the letter was sent out requesting compliance with Section 10-45. Dr. Lynn was given the entire ordinance on June 10th, not just sections or specific acts that he needed to comply with. Duke was not on the property at that time and no notification to remove the dog from the property could be served then because the dog was not there. As far as the police department was concerned, Dr. Lynn was in compliance with the ordinance. Sgt. Krauel pointed out that the Town does not abide by the state and the county ordinances, that the Town has the ability to enforce more stringent and strict ordinances and that is what we have done here.

Sgt. Krauel said he was prepared, based on Counsel's recommendation, to recommend a motion to find Dr. Lynn in non-compliance with Section 10-6 and move to postpone 10-45 (i) until after further consideration by the Circuit Court on Tuesday. The Town recommends administrative costs in the amount of

HOUSE_OVERSIGHT_016625

$150.00 and a fine of $250.00 a day to start on June 19, 2008 if compliance is not achieved by June 18, 2008.

Mr. Ballentine asked for clarification on the motion and was advised by Mr. Randolph that it would be a finding of non-compliance of Chapter 10, Section 10-6, administrative costs of $150.00 and a compliance date of July 18, 2008 with a fine to be considered at the next meeting if compliance was not achieved.

Ms. Duemler said she believed that the dog, besides being a nuisance, is a threat to society and she hoped that by Tuesday the dog did not break loose from Dr. Lynn and maul some child, that she believed it is a disgrace and she supports the Town.

(*applause from the audience)*

MOTION BY MR. FRIED TO FIND DR. LYNN IN VIOLATION OF CHAPTER 10, SECTION 10-6, ASSESS ADMINISTRATIVE COSTS IN THE AMOUNT OF $150.00 AND REQUIRE HIM TO COME INTO COMPLIANCE BY JULY 18, 2008
MOTION SECONDED BY MR. BALLENTINE
MOTION PASSED UNANIMOUSLY

Mr. Randolph asked if a motion could be made to defer the consideration of violation of Chapter 10, Section 10-45 (i) until the August 21, 2008 meeting and Ms. Greenberg advised she would make that motion. Mr. Fried asked Mr. Randolph if he would explain the reason for this. Mr. Randolph said the argument had been made that 10-45 should not apply because the dog has already been deemed dangerous by the County and pursuant to the Town's Code. Mr. Randolph said he believed the argument was going to be made in court on Tuesday that it is not appropriate for the Town to move forward with regard to 10-45 (i) because that only applies to any incident that occurs after the dog has been declared dangerous. The argument has been made that Dr. Lynn has done everything he is required to do. Mr. Randolph said he hesitated to explain further if the matter was going to be deferred. Mr. Randolph said the position of Staff is that item (i) stands on its own merits, that it is not connected to 10-45 (a) through (h). It is also the position of Staff that it is appropriate to bring a violation of (i) to the Code Enforcement Board even though it does not specifically state that in 10-45 because Section 2-439, which is the citation fine schedule, sets forth all of the sections of the Code of Ordinances which can be brought before the Code Enforcement Board and 10-45 is listed. Code Enforcement has the right to bring a violation directly to the Code Enforcement Board instead of issuing the fine set forth in the fine schedule. Mr. Randolph said the Board could move forward in considering 10-45 instead of deferring it to the next meeting.

Mr. Fried commented that based on the egregious nature of what they had been presented with, he believed the Board should do everything they could to put pressure on Dr. Lynn to comply. Mr. Randolph questioned whether the Town

HOUSE_OVERSIGHT_016626

would be requesting a separate fine of $250.00 a day for non-compliance and Sgt. Krauel said that was his recommendation, that there would be two concurrent fines running. Mr. Hoffman asked about the administrative costs and Sgt. Krauel said the Town was only asking for one.

MOTION BY MR. FRIED TO FIND DR. LYNN IN VIOLATION OF CHAPTER 10, SECTION 10-45 (i) AND REQUIRE HIM TO COME INTO COMPLIANCE BY JULY 18, 2008
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

Mr. Merola questioned what the order was with regard to 10-6, if it was to have the dog removed or euthanized by Friday or just to abate the nuisance. He said he needed to know what to tell Dr. Lynn what had to be done by Friday to avoid the potential fine. Mr. Hoffman said Dr. Lynn needed to either remove the dog or have it euthanized and Mr. Fried said that was his intention in making the motion.

VI. Old Business:

A. Case # 08-2484, 515 N. County Road, Trump Properties, LLC
Violation of Chapter 18, Section 18-205 of the Town of Palm Beach Code of Ordinances, the Architectural Commission may attach conditions to any approval it grants.

Lead Code Enforcement Officer Walton advised this case would be heard at Town Council on August 11, 2008 and requested the case be postponed until the August 21, 2008 hearing date. Mr. Trump's attorney and the attorney for the new purchaser were both present.

Robert Brody said he was the attorney for County Road Property LLC, who had just purchased the property two days ago. He said it was the intent of his client to comply with the Town and also to work with the Town. There is an appeal pending and Mr. Brody said it was his client's intent to work everything out with ARCOM prior to that appeal. He said he had recommended to his client that he withdraw the appeal. Mr. Brody said his client had hired the Lawrence Group and Gene Lawrence planned to work with ARCOM.

MOTION BY MS. DUEMLER TO POSTPONE THE CASE UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

VII. Fine Consideration:

HOUSE_OVERSIGHT_016627

A. Case # 08-2432, Beachfront Vista Property, Nightingale Beach Club Association
Violation of Chapter 134, Section 134-1472 (3) of the Town of Palm Beach Code of Ordinances, no additional walls, fences, hedges or other structures or growth shall be erected or be grown eastwardly of Ocean Boulevard to a height greater than four (4) feet above the surface of the Ocean Boulevard.

(Ms. Duemler recused herself as part of a previously declared conflict and Mr. Hoffman advised Mr. Vanneck would be a voting member in this case)

Lead Code Enforcement Officer Walton said Nightingale Beach Club had previously been found in violation and was given time to obtain a permit. A permit was obtained but there were some conditions attached to it. There have been two inspections with the Florida Wildlife Commission and an agreement was reached to not require the vegetation to be trimmed until after turtle season. Since they have already been found in non-compliance, the Town recommends the time for compliance be extended to November 7, 2008 and if compliance is not achieved by that date, a fine of $250.00 a day be imposed.

Jack Maxey, 244 Nightingale Trail, presented some documents to the Board and advised he was president of the Nightingale Trail Beach Club Association. He said one of the documents was his application under duress for the permit. Mr. Maxey advised he had not been sworn in and was administered the oath of office by Recording Secretary Houston.

Mr. Maxey said he has had a long correspondence with the legal department of the Department of Environmental Protection and he believes on an emotional level, they do not believe the trees should come down but they told him they could not find any statutory way to force the Town not to enforce the permit. They told him it should be the jurisdiction of a court, not the DEP. Mr. Maxey said the Town was cutting down its own sea grapes in violation of the permitting process. Mr. Maxey said there were all kinds of burdens in this permit he needed to comply with, one of which was replacement of the whole plant if anything over 6 feet tall which was larger than 3 inches in diameter was cut down. He said he was supposed to provide a signature on the document putting himself at risk of a $10,000 a day fine if he did not comply with the requirements of the permit. Mr. Maxey said Jean Higgins, a biologist for the State Fish & Wildlife, recommended sea grapes should not be trimmed because they are the best source of protection against the lighting. Ms. Higgins made some suggestions such as changing light fixtures and extinguishing lights during turtle season and maintaining a substantial healthy vegetation light blocking buffer.

Mr. Maxey said an approximate 24 inch piece of aluminum is hanging from the light on Nightingale Trail and it seemed highly unusual that a shield of that nature would only be necessary on that light when the recommendations given by Fish & Wildlife are recommendations with broad reaching impact for the entire island. He

HOUSE_OVERSIGHT_016628

noted that the street lights in Palm Beach do not go off during turtle nesting season. He said a field permit for trimming of the sea grapes at the Nightingale Beach Club Association was not recommended during the nesting season. He said the indifference to materials he had brought forth more than a year ago that had now been brought forth officially by the DEP were offensive to him and that is one of the reasons he had continued to "hammer" this. He said he believed the Board should recommend to the Town Council that they remove this section of the Code, given the current environmental regime, especially when one considers the public relations downside of fighting him on this issue and spending $2,000,000 to fight Lake Worth on the other side. Mr. Maxey said this was probably not a win-win situation and that NOAA had not even been brought into the fold yet.

Mr. Ochstein wanted to know if the Board was precluded from enforcing the ordinance now. Mr. Walton said it should not be enforced now, that in speaking with Mr. Wettstein from DEP and Ms. Higgins from FWC, an agreement had been reached to wait until the end of turtle season to require the trimming. The Town recommends granting the Nightingale Beach Club until November 7, 2008 to come into compliance. The permit is good until that date. In response to Mr. Hoffman's question, Mr. Walton said the permit was issued on June 16, 2008. Mr. Maxey said he applied on March 19, 2008. Mr. Balletine inquired as to whether 7 days was sufficient for compliance after the end of turtle season and Mr. Walton said it was not a large area and he believed it was. Mr. Maxey said he did not believe it was sufficient, that it would be an economic hardship if he had to replace every tree that is over 3 inches in diameter in order to get it below 6 feet and he brought up other issues involved with the trimming. Mr. Balletine told Mr. Maxey he just wanted to know, without going into a lot of detail, whether he could comply in a 7 day period. Mr. Maxey said that before he could remove any native plant, he had to first remove every single non-native one from the property and he had some questions whether or not he could comply within that time period. He also said he had some real questions about whether the law, both at the State and the local level, had been equally applied within the Town. Mr. Maxey said he is in consultation with an attorney to find out what measures he can take. The Town did not apply for a permit to cut its own sea grapes and judging from the guidelines he has in his permit, the Town would be in violation of almost everyone of those guidelines. The DEP counsel's office asked him to provide photographs of the Town's illegal cutting back in February.

Mr. Vanneck said there should be more research as to what should and should not be cut. He believes the Town code may have gone too far.

Mr. Hoffman said the Board did not have the authority to modify the Code and could only enforce the Codes as they had been written.

MOTION BY MR. OCHSTEIN TO GRANT THE VIOLATOR UNTIL NOVEMBER 7, 2008 TO COME INTO COMPLIANCE AND IF COMPLIANCE IS NOT ACHIEVED BY THAT DATE, TO ASSESS A FINE IN THE AMOUNT OF $250.00 A DAY UNTIL COMPLIANCE IS ACHIEVED SECONDED BY MR. BALLENTINE

HOUSE_OVERSIGHT_016629

Mr. Vanneck asked for clarification on what the motion was and Mr. Walton advised the motion was that the sea grapes must be cut after turtle season, by November 7, 2008 and if they were not cut by that date, a $250.00 a day fine would commence on November 8, 2008 and continue until compliance was achieved.

Mr. Fried asked who the fine would apply to and Mr. Walton said it would be to the Nightingale Trail Beach Club Association. Mr. Fried asked if this was a legally constituted body and Mr. Maxey said it was an informal body, that on the deeds, everyone owns this piece of property in common. There was some additional discussion on the ordinance. Ms. Van Buren asked if every single property owner on the street was a member of the association and Mr. Maxey said every property owner on Nightingale Trail was and there were one or two houses on North Ocean and North Lake as well. Mr. Maxey said there were 23 separate memberships. Ms. Van Buren asked about the finances and Mr. Maxey said there were annual dues of $75.00 a year and a common bank account of $3500 or $3600. Mr. Maxey said that if a fine was incurred, that is probably where the money would come from but he did not believe, because of his fiduciary responsibility to the group, he could fight the decision with any of those monies. Mr. Ochstein asked if he was an elected officer and Mr. Maxey said he was president and that he keeps the books and makes sure the place is in good condition.

MOTION BY MR. OCHSTEIN TO GRANT THE VIOLATOR UNTIL NOVEMBER 7, 2008 TO COME INTO COMPLIANCE AND IF COMPLIANCE IS NOT ACHIEVED BY THAT DATE, TO ASSESS A FINE IN THE AMOUNT OF $250.00 A DAY UNTIL COMPLIANCE IS ACHIEVED
SECONDED BY MR. BALLENTINE
MOTION OPPOSED

ROLL CALL VOTE:

MR. OCHSTEIN	**YES**
MR. BALLENTINE	**YES**
MR. FRIED	**YES**
MS. GREENBERG	**YES**
MS. VAN BUREN	**YES**
MR. VANNECK	**NO**
MR. HOFFMAN	**YES**
MOTION PASSES	**6-1**

Mr. Fried advised Mr. Maxey that the Code Enforcement Board's position was to enforce the Code and said that he had always found the Town Council members to be very receptive, individually and as a group. Mr. Fried said it was not beyond

HOUSE_OVERSIGHT_016630

the Town Council's power and authority, if persuaded, to look into an ordinance and suggested Mr. Maxey address it with them.

B. Case # 08-2508, 227 Brazilian Ave., 2F, Hillen J. Smith
Violation of Chapter 18, Section 18-241 of the Town of Palm Beach Code of Ordinances, building permits required to construct, install, repair or alter any building or building system

Lead Code Enforcement Officer said Mr. Smith was found in violation, assessed $150.00 in administrative costs and given until July 16, 2008 to come into compliance. Compliance has not been achieved so this is the time a fine would be assessed. Mr. Walton said the contractor was present to speak.

Steve Pappanelli said he was hired by Mr. Smith after Mr. Smith had been cited and he was 90% complete with the job. He was just waiting on his final inspection and he should have it by next week but the building is closed to all construction inspections for two (2) weeks. Mr. Pappanelli said he was present on Mr. Smith's behalf to request a three (3) week extension. Mr. Walton said the Town did not oppose the extension of time. Mr. Walton said the three weeks was necessary because the building would not let inspections be done while their maintenance man was on vacation. Mr. Walton said if compliance was not achieved by August 7, 2008 then he would ask for a $250.00 a day fine to commence on August 8, 2008.

Ms. Greenberg asked some questions about the type of permits and remarked that it is unfortunate in multi-family dwellings that this type of situation would exist to begin with because electrical and plumbing can have catastrophic effects on other owners. She said it is unfortunate the people do not do the right thing until they get caught. Mr. Pappanelli said he was not the contractor working without permits.

MOTION BY MR. OCHSTEIN TO GRANT AN EXTENSION OF TIME UNTIL AUGUST 8, 2008 TO COME INTO COMPLIANCE AND TO ASSESS A FINE OF $250.00, RETROACTIVE TO JULY 17, 2008 IF COMPLIANCE WAS NOT ACHIEVED
SECONDED BY MS. GREENBERG

During discussion on the motion, Ms. Duemler stated she believed the retroactive fine was a little harsh. Mr. Ballentine said he agreed and asked the reason for the retroactive fine. Mr. Ochstein said there are so many people who do work without a permit and they know they need a permit. That is a very dangerous thing in a multi-family dwelling and it should be egregious.

MOTION BY MR. OCHSTEIN TO GRANT AN EXTENSION OF TIME UNTIL AUGUST 8, 2008 TO COME INTO COMPLIANCE AND TO

HOUSE_OVERSIGHT_016631

ASSESS A FINE OF $250.00, RETROACTIVE TO JULY 17, 2008 IF COMPLIANCE WAS NOT ACHIEVED
SECONDED BY MS. GREENBERG
MOTION PASSED UNANIMOUSLY

VIII. Fine Reduction:

A. Case # 08-2301, 167 E. Inlet Drive, The Landfall Group,
Violation of Chapter 18, Section 18-242, Subsection 104.5.1.6, medium projects, all new or remodel construction projects 4000 sq. ft, to 8,999 sq. ft. under roof be allowed 22 months

Lead Code Enforcement Officer Walton said in October, 2007, Ajax Equity LLC was found in violation of going over the construction time limits. On November 15, 2008 they still were not in compliance and a daily fine of $250.00 started running. The final inspection was obtained in March, 2008. The fine ran for 137 days prior to compliance being achieved and the accumulated fine due is $34,250.00 and the $150.00 hearing costs have not been paid.

Frank Lynch advised he was the attorney for both The Landfall Group and Ajax. He said when they appeared before the Board in October, Lazslo Wagner, the principal of The Landfall Group, who has built homes throughout the Town of Palm Beach for 26 years acknowledged he was unaware of this particular code provision. Had he been, they would have applied for an extension of time to complete the construction. At the hearing, Mr. Koeppel made a motion to allow them an additional sixty (60) days to complete the construction, find them in non-compliance and assess the $150 costs. After a significant amount of discussion, that motion went to a vote and failed 4-3. A second motion was made and Ms. Duemler thought the $250.00 fee was significant and believed the fine should be $125.00 a day. Mr. Lynch gave Mr. Walton a copy of that transcript to put in the record. As part of their request, they are asking the Board to consider what Ms. Duemler suggested at the meeting. At the same time, Mr. Lynch said he would like them to consider that The Landfall Group is a good corporate citizen and made a legitimate mistake. As a result, a fine was incurred and they are willing to accept some level of fine, some level of responsibility for what they did. The construction was continually on going, there were no delays other than the construction process itself. This was not someone's house, it was a speculative venture. There had been some concerns with the shell contractor and the finish items themselves were significant enough that there were substantial delays. At that same hearing, Code Enforcement Officer Gerry said it was the position of Code Enforcement to get more assertive at the suggestion of Town Council and that these projects were to be more aggressively pursued. Under the new ordinance, for a house of approximately 5,000 sq. feet, they would be entitled to 24 months. This would

HOUSE_OVERSIGHT_016632

have brought them to November 2007 and they would have gotten additional time for Hurricane Wilma which would have brought them to December. If they were under the new Code, they would not be before the Board today and may not have a fine at all. He realizes a mistake was made, he realizes something has to be paid but he thinks $35,000 is a significant fine. The Board has gotten their attention and they would ask for a significant reduction in the fine.

Mr. Fried asked how long it took to get the final inspection after the 22 months had run. Mr. Walton said they had been given 23 months due to the hurricanes and they were 5 months and 9 days beyond that. Mr. Ballentine asked how far out they would be under the new rules. Mr. Walton said they would be given 24 months which with the hurricane would be 25 months. Mr. Lynch said that at the end of that 24 month period, if they had not sought an extension of time within the required time period, no earlier than 6 months and no later than 45 days, before the expiration of that 24 months, their project would have been shut down. Mr. Wagner's lack of knowledge of this particular situation would have become irrelevant because they would have been red tagged on the next day after the 24 month period. Mr. Lynch said Mr. Wagner did not know because he has been a good corporate citizen and had never been before the Board except on one occasion which was beyond his control; it was a maintenance item on the Glazer house. Mr. Walton said that situation was not due to Mr. Wagner's fault, that he was just representing the owner.

Mr. Ballentine asked how Mr. Wagner did not know the Code requirement if he had built so many homes in the area and said he had difficulty with the ignorance of that.

Mr. Fried said he agreed with Mr. Ballentine and found it hard to believe that Mr. Wagner did not know the time limits. He said some reduction should be considered but he was not sure on what basis.

Mr. Ochstein remarked that the fine was around $35,000 and the house was on the market for $10.6 million dollars so he did not see the hardship. Mr. Lynch said he did not know the price but he would accept Mr. Ochstein's statement on that. Mr. Lynch said the hardship was in the imposition of the fine itself, there were mistakes made and he believed that Council would have given them a significant extension of time if Mr. Wagner had been aware of the situation and filed the proper notice with Town Council.

Mr. Lynch said if some sort of arrangement could be reached today, his client would be in a position to pay within the next two weeks. Mr. Hoffman said he was concerned because he believed that when the case was originally heard, they had the option of fining $250.00 a day and they gave them a fine reduction at the time they initiated the fine of $125.00 a day. Mr. Walton corrected Mr. Hoffman, advising there was a motion for a fine of $125.00 a day which failed and the fine that was in effect was $250.00 a day. Mr. Lynch said he believed the record reflects something different than that. Mr. Walton said his records reflect $250.00

HOUSE_OVERSIGHT_016633

a day but he would review it. Mr. Walton reviewed the transcript and noted that it showed $125.00 a day but the Board order specified $250.00 a day and he would have to do further research.
Mr. Fried advised he could make a motion to postpone the matter to the next meeting and have Mr. Walton bring back the correct information. There was additional discussion about the amount of the fine and Mr. Lynch said he was seeking a reduction of the $17,125.00 which would be the amount of the fine if it was $125.00 a day. Mr. Hoffman said he would find that hard to accept. Mr. Hoffman read from the minutes that a motion was made by Mr. Fried that the defendant was found in non-compliance, ordered to pay an administrative fee in the amount of $150.00, obtain a final building inspection by October 25, 2008 and a fine of $125.00 to commence on October 26, 2007. He said that motion passed 4-3. Mr. Walton said he could not dispute that but he would have to do some research. Mr. Hoffman said he would not be in favor of reducing the $17, 125.00 any further.

Mr. Ochstein said he was hesitant to do anything until they know what the number is. Mr. Walton suggesting postponing the case until next month.

MOTION BY MR. OCHSTEIN TO POSTPONE THE FINE REDUCTION HEARING UNTIL AUGUST 21, 2008
SECONDED BY MR. FRIED
MOTION OPPOSED

ROLL CALL VOTE:

MR. OCHSTEIN	**YES**
MR. FRIED	**YES**
MS. DUEMLER	**YES**
MS. GREENBERG	**NO**
MS. VAN BUREN	**NO**
MR. BALLENTINE	**YES**
MR. HOFFMAN	**NO**
MOTION PASSES	**4-3**

B. Case # 08-2302, 9 Via Vizcaya, Macari Building & Design, Casa Picchio, LLC
Violation of Chapter 18, Section 18-242, Subsection 104.5.1.6, medium projects, all new or remodel construction projects 4000 sq. ft, to 8,999 sq. ft. under roof be allowed 22 months

Lead Code Enforcement said the property was found in non-compliance and they requested a fine reduction hearing. The owner of the property was called out of town and they requested a postponement until the August hearing.

HOUSE_OVERSIGHT_016634

MOTION BY MS. GREENBERG TO POSTPONE THE FINE REDUCTION HEARING UNTIL AUGUST 21, 2008
SECONDED BY MS. VAN BUREN
MOTION PASSED UNANIMOUSLY

IX. Comments:

Ms. Greenberg said that the presentation using the "slides" made it too dark in the room. She wanted to know if there was anything they could do as a Board in making a suggestion to the Council about an ordinance that could address people not pulling permits because of the safety issues in terms of multi-family dwellings. Capt. Blouin said there was a provision in place. If work is done without a permit, there is a penalty involved. There was an ordinance drafted last year that requires them to pay four times the permit fee.

Mr. Fried asked Mr. Randolph if he had spoken to Mr. Elwell about the foreclosure action being brought to the Board's area of responsibility as opposed to the Town Council. Mr. Randolph said he had but did not have an answer yet and would try to get one. Mr. Fried asked Ms. Houston about progress on the fines and she said the Town was now inputting fines into the computer system and if someone had outstanding fines they could not get any permits. People are contacting Code Enforcement because they cannot get permits and are either paying or asking to come back to the Board for a fine reduction.

Capt. Blouin advised that with regard to any foreclosure action, the police department is scrutinizing each and every one of them as some of these cases we have liens on were pre-existing prior to coming to the police department. We do not want to bring a case to the board that can be handled in a different manner.

Mr. Walton remarked that it was a good thing that there are a number of working without permit cases being brought to the Board, that it means Staff is doing their job.

X. Adjournment:

The meeting was adjourned without benefit of a motion.

HOUSE_OVERSIGHT_016635

TOWN OF PALM BEACH

Information for the Water Committee Meeting on January 29, 2009

To: Water Committee:
David A. Rosow, Chair
Denis P. Coleman, Member

Via: Peter B. Elwell, Town Manager

From: Sarah E. Hannah, Assistant Town Manager

Re: Information Regarding Water Supply

Date: January 23, 2009

The following documents are attached for your review in preparation for the Water Committee meeting on January 29 at 3 p.m.:

1. Agenda

2. PowerPoint presentation from the City of West Palm Beach regarding the four options for the Town's water supply and relationship with the City.

3. Cost estimates and other information regarding private wells.

4. Follow-up on prior water committee information requests:

    a. Information from the City regarding per capita usage in Palm Beach.
    b. Information from the City regarding a comparison of the City's water quality with New York City's water quality
    c. Statistical analysis of the top 100 water consumers on the island.
    d. Average daily effluent flow for the cities that use the East Central Regional Water Reclamation Facility (ECRWR).
    e. Executive summary of the results from the Town's testing of the City's potable water (the rest of the report is available in the Town Manager's Office).

cc: Mayor and Town Council
Eduardo Balbis, P.E., City of West Palm Beach
Jane Struder, Finance Director
H. Paul Brazil, Director of Public Works
John Page, Director of Planning, Zoning, and Building
James Bowser, Town Engineer

TOWN OF PALM BEACH

Town Manager's Office

TENTATIVE-SUBJECT TO REVISION

WATER COMMITTEE MEETING

AGENDA

JANUARY 29, 2009

3:00 P.M.

WELCOME!

The progress of this meeting may be monitored by visiting the Town's web site (www.townofpalmbeach.com) and selecting "Live Agenda" or "Council Audio". If you have questions relative to these two features, please contact the Office of Information Systems (561) 227-6315.

I. CALL TO ORDER AND ROLL CALL

II. PLEDGE OF ALLEGIANCE

III. APPROVAL OF AGENDA

IV. PRESENTATION BY CITY OF WEST PALM BEACH OF FOUR (4) WATER SUPPLY OPTIONS

V. DISCUSSION OF INDIVIDUAL PRIVATE WELLS FOR IRRIGATION

VI. FOLLOW-UP ON PRIOR WATER COMMITTEE INFORMATION REQUESTS

VII. ANY OTHER MATTERS

VIII. ADJOURNMENT

Note: Disabled persons who need an accommodation in order to participate in the Town Council Meeting are requested to contact the Town Manager's Office at 838-5410 or through the Florida Relay Service by dialing 1-800-955-8770 for voice callers or 1-800-955-8771 for TDD callers, at least two (2) working days before this meeting.

Post Office Box 2029 * 360 South County Road * Palm Beach, Florida 33480
Telephone (561) 838-5410 * Facsimile (561) 838-5411 * townmanager@townofpalmbeach.com

HOUSE_OVERSIGHT_016637

TOWN OF PALM BEACH WATER COMMITTEE

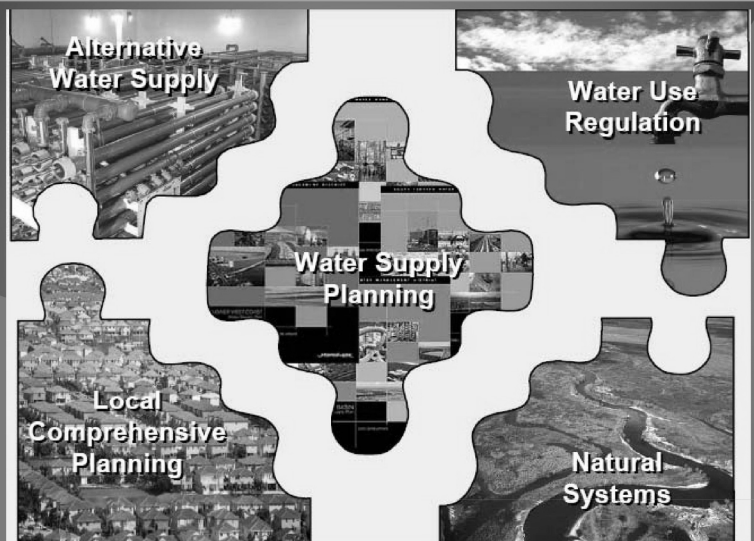
Discussion of Future Plant Options

January 2009

PRESENTATION AGENDA

- Competing Regulations
- Desalination Water Plant
- Floridan Water Plant
- Town Remains As Equal Customer
- Town Becomes Bulk Customer
- Next Steps

COMPETING REGULATIONS



DRAFT YEAR ROUND IRRIGATION RULE

- Latest draft SFWMD language dated October 31, 2008.
- Public Hearing Scheduled for January 15th.

40E-24.201 Year-Round Landscape Irrigation Conservation Measures.

(1) The year-round landscape irrigation conservation measures contained in this chapter are applicable to all users as defined in subsection 40E-24.101(16)~~(10)~~, F.A.C., including permitted and exempt users under Chapter 40E-2, F.A.C., unless indicated otherwise herein. These conservation measures apply to all water sources, except that landscape irrigation accomplished using reclaimed water and/or supplemented reclaimed water is subject to only paragraphs (5)(a), (l) and (5)(b), (l) of this section. In addition to the requirements of this section, all permitted users under Chapters 40E-2 and 40E-20, F.A.C., are required to maintain compliance with all CUP conditions and

(14) "Supplemented reclaimed water" and "blended reclaimed water" means reclaimed water which has been commingled with other sources of water, such as potable water, groundwater, surface water, and water treatment process by-product by a public or private utility.

Unless the Town uses reclaimed water for irrigation it may be subject to the Year Round Irrigation Rule – even if Floridan or Seawater is used.

SUPPLY SOURCES

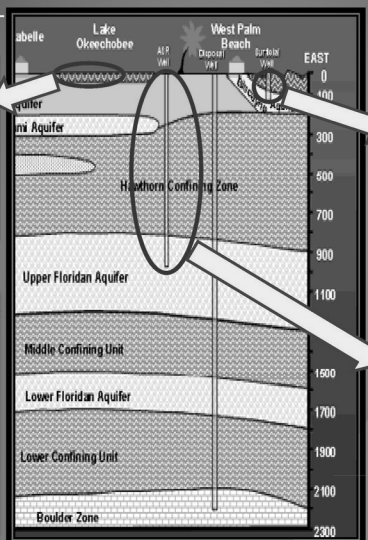
SURFACE WATER SOURCES

Clear Lake

- Existing Infrastructure
- Variable Quality
- Watering Restrictions
- Permitted

Atlantic Ocean

- Unlimited Supply
- Complex Treatment
- Consistent WQ
- Greenhouse Gases
- Highest Cost



GROUNDWATER SOURCES

Surficial Aquifer

- 100 – 150 feet deep
- Consistent WQ
- Watering Restrictions
- Saline Intrusion
- Limited Allocation
- Availability Unknown
- 30 – 50 Sites Needed

Floridan Aquifer

- 1,000-1,200 ft deep
- Consistent WQ
- Long-Term Degradation
- Very Costly
- No Watering Restrictions
- Limited Allocation
- 12 – 20 Sites Needed

DESALINATION PLANT OPTION

City Dedicates Seawater Plant for Town

- Town remains a customer of the City of West Palm Beach
- Additional capital and operational costs to Town of Palm Beach
- Desalination plant located on City property

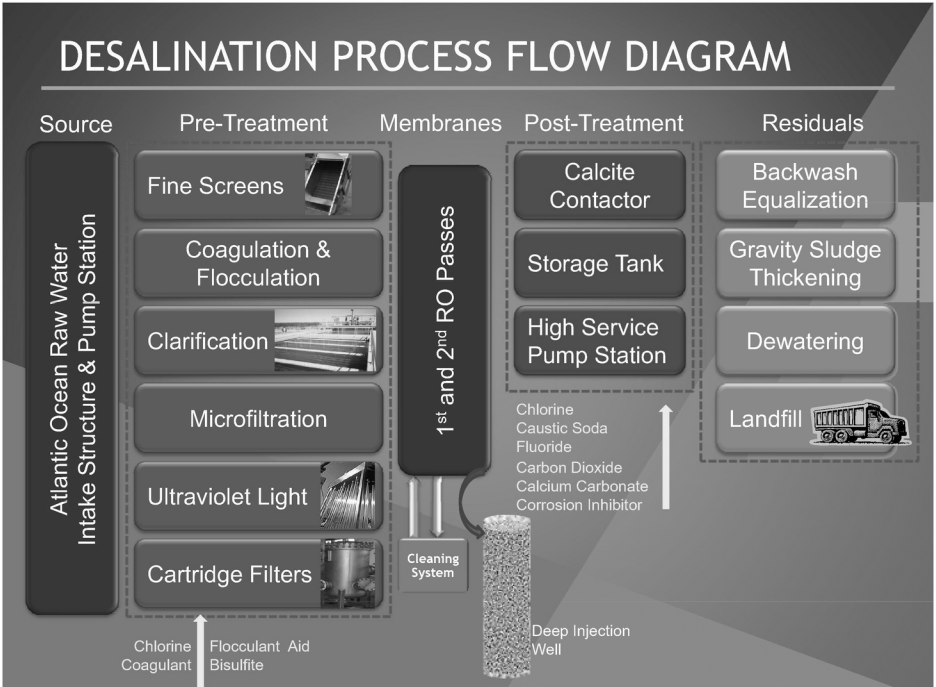
secure
reliable
sustainable

WHY LOOK TO THE OCEAN?

- Sustainable drought-proof source of water
- Concern for availability of fresh surface water and groundwater resources = ***regulatory pressure***
- Decreasing costs due to technology improvements
- Comparable costs to indirect potable water reuse projects

TAMPA BAY DESALINATION FACILITY

- 25 mgd plant
- Co-located with power plant
- 8.5-acres for WTP
- Provides 10% water demand for region
- Screening, filtration, RO membranes, chemical systems
- AWS funding provided


DESALINATION PROCESS FLOW DIAGRAM
Source
Pre-Treatment
Membranes
Post-Treatment
Residuals
Atlantic Ocean Raw Water Intake Structure & Pump Station
Fine Screens
Coagulation & Flocculation
Clarification
Microfiltration
Ultraviolet Light
Cartridge Filters
1st and 2nd RO Passes
Cleaning System
Calcite Contactor
Storage Tank
High Service Pump Station
Chlorine
Caustic Soda
Fluoride
Carbon Dioxide
Calcium Carbonate
Corrosion Inhibitor
Backwash Equalization
Gravity Sludge Thickening
Dewatering
Landfill
Deep Injection Well
Chlorine
Coagulant
Flocculant Aid
Bisulfite

PRE-TREATMENT IS KEY TO SUCCESS

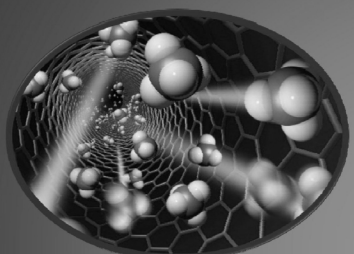
- Protect the Membranes
- Screens remove shells, creatures, wood and debris greater than ¼ inch
- Heavier solids settled out via flocculation and clarification
- Smaller solids filtered via microfiltration membranes
- Ultraviolet light controls biological activity and fouling
- Control scale formation by adjusting pH and using antiscalants

Fine screens

UV units

Clarification Basin

SPECIALIZED MEMBRANES FOR TREATMENT

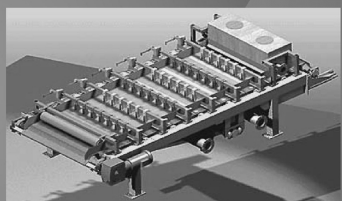


- RO membranes allow water particles (dissolved ions) to pass through tiny screens, while blocking salts
- Highly specialized technology
- Large amounts of power required to “push” water through the membranes via pressure
- Pre-treatment important to protect costly membranes

SOLIDS HANDLING REQUIRED

Desalination produces "waste" streams that require materials to be disposed via landfill.

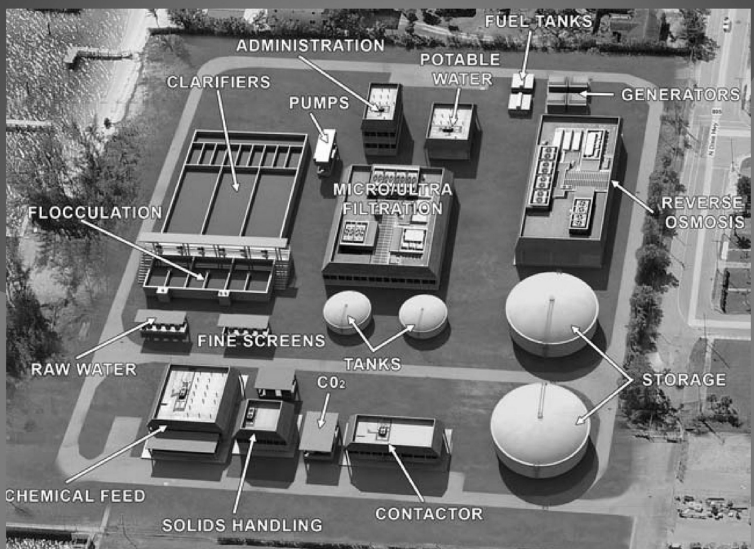
- Debris removed by screens (shells, wood, etc) must be landfilled



- Clarification process & microfiltration backwash solids are thickened, dewatered, and sent to the landfill for disposal

Transportation of solids increase facility operations cost and result with a larger carbon footprint.

DESALINATION PLANT LAYOUT



DESALINATION PLANT ISSUES

- 25 mgd facility required to produce 10 mgd potable water.
- Approximately 10 acres required for infrastructure.
- Complex treatment processes.
- Brine by-product waste disposal via deep injection well (ocean outfalls no longer permitted for WTPs).
- Dewatered sludge must be disposed at landfill.
- Highly energy intensive to operate.
- Not necessarily exempt from proposed year-round water restrictions drafted by SFWMD

DESALINATION PLANT COSTS

Cost Estimate for 10 mgd Desalination Plant		
Site Work	$	3,000,000
Raw Water Intake, Pumping, Piping, and Fine Screens	$	12,000,000
Coagulation, Flocculation, Clarification	$	3,900,000
Pretreatment Transfer Pumping	$	700,000
Microfiltration	$	22,000,000
Ultraviolet Light	$	4,100,000
Chemical Treatment	$	1,600,000
Reverse Osmosis Membrane System	$	48,600,000
Post Treatment Chemical Systems	$	2,300,000
Ground Storage Tanks	$	3,900,000
High Service Pumping	$	2,100,000
Residuals Handling	$	10,300,000
Administration & Laboratory Building	$	1,900,000
Brine Disposal Injection Well	$	6,000,000
Dedicated Water Transmission Piping	$	6,000,000
Conceptual Cost	**$**	**128,400,000**
General Requirements (2%)	$	2,568,000
Construction Mark-up (3%)	$	3,852,000
Mobilization (2%)	$	2,568,000
Contingency (10%)	$	12,840,000
Engineering and Other Non-Construction Costs (8%)	$	10,272,000
TOTAL CONCEPTUAL COST	**$**	**160,500,000**

Assumes plant on City property & no additional cost for land.

FLORIDAN AQUIFER WATER PLANT OPTION

City Dedicates Floridan Plant for Town of Palm Beach

- Town remains a customer of the City of West Palm Beach
- Additional capital and operational costs to Town of Palm Beach
- Low Pressure Reverse Osmosis plant located on City property

secure
reliable
sustainable

water

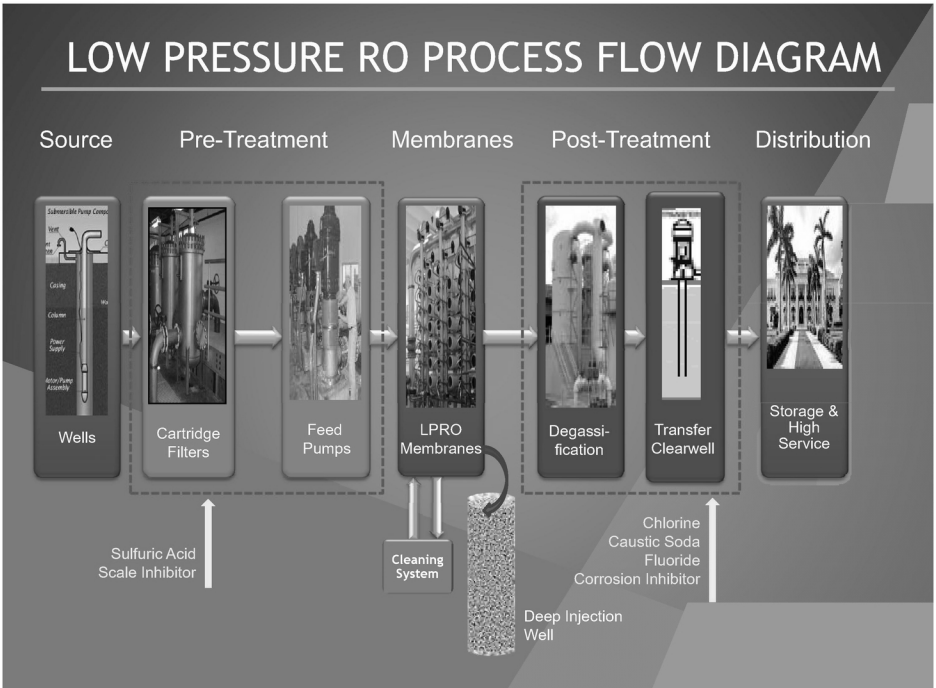
WHY LOOK TO THE FLORIDAN AQUIFER?

- Reliable and drought-proof source located approximately 1,200 feet below ground surface
- Relatively stable water quality seasonally, but geographically variable
- Reduces demands on water for the Everglades
- Significantly less energy intensive than desalination processes
- Landfill transportation and disposal costs not applicable

LOCAL UTILITIES ARE USING FLORIDAN AQUIFER

- Palm Beach County
- Jupiter
- Deerfield Beach
- Broward County
- Highland Beach
- Fort Myers
- Palm Coast
- Marion County
- St. John's County
- Hollywood
- Miramar
- Florida Keys

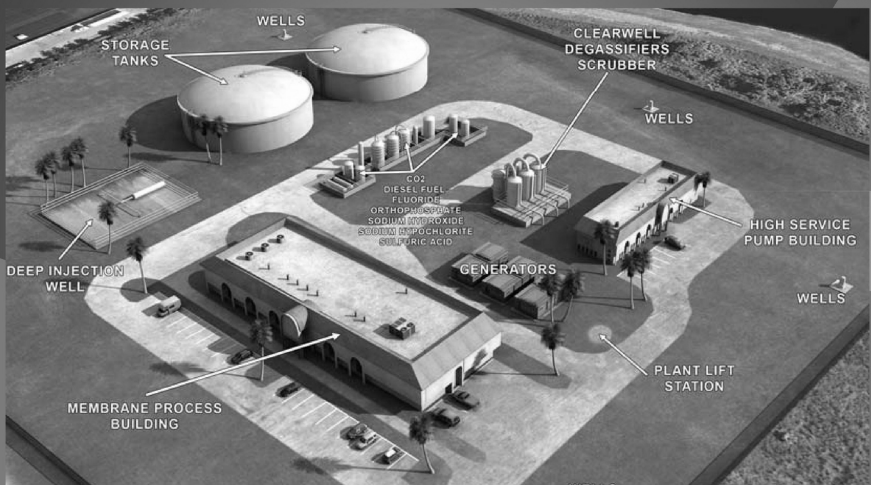
Palm Beach County's 10 mgd Lake Region WTP


LOW PRESSURE RO PROCESS FLOW DIAGRAM
Source
Pre-Treatment
Membranes
Post-Treatment
Distribution
Wells
Cartridge Filters
Feed Pumps
LPRO Membranes
Degassi-fication
Transfer Clearwell
Storage & High Service
Sulfuric Acid
Scale Inhibitor
Cleaning System
Deep Injection Well
Chlorine
Caustic Soda
Fluoride
Corrosion Inhibitor

TREATMENT PROCESSES

- SOURCE - wells can be located near the plant. No existing users to cause interference (today).
- PRE-TREATMENT- disposable 5 micron cartridge filters, pH adjustment, & scale inhibitor.
- MEMBRANES – Low Pressure Reverse Osmosis elements require less power to push water thru screens.
- POST-TREATMENT – hydrogen sulfide removal with odor control, disinfection, pH adjustment, blending.
- DISTRIBUTION – connect to existing water main network without subaqueous crossings.

FLORIDAN PLANT LAYOUT



LOCATION

The Floridan Aquifer wells are not restricted with respect to specific location in that no other production wells exists today near the City's WTP.

FLORIDAN AQUIFER PLANT ISSUES

- Floridan Aquifers can be used for both Aquifer Storage and Recovery and source water
- Potential increased energy costs associated with lifting water and impacts to adjacent users
- Potential for decline in water quality over time
  - ~ Some pumping wells become saltier (up-coning of more saline water from below or laterally along coast)
  - ~ Membrane design and periodic replacement
  - ~ Blending with Surficial Aquifer water
- Estimated 125% of raw water to meet treated water demands
- Concentrate disposal via deep injection well

FLORIDAN AQUIFER PLANT COSTS

Cost Estimate for 10 mgd Floridan Plant		
Site Work & Site Electrical	$	3,000,000
Raw Water Wells & Piping	$	13,500,000
Pretreatment System	$	5,000,000
Membrane Building w/LPRO system	$	19,000,000
Chemical Feed Systems	$	2,000,000
Yard Piping	$	1,500,000
Clearwell	$	1,200,000
Transfer Pump Station	$	1,000,000
High Service Pump Station	$	2,100,000
Ground Storage Tanks	$	3,900,000
Brine Disposal Injection Well	$	6,000,000
Dedicated Water Transmission Piping	$	6,000,000
Conceptual Cost	**$**	**64,200,000**
General Requirements (2%)	$	1,284,000
Construction Mark-up (3%)	$	1,926,000
Mobilization (2%)	$	1,284,000
Contingency (10%)	$	6,420,000
Engineering and Other Non-Construction Costs (8%)	$	5,136,000
TOTAL CONCEPTUAL COST	**$**	**80,250,000**

Assumes no additional cost for land.

TOWN REMAINS AS EQUAL CUSTOMER

- Town subject to same water restrictions imposed on water supply for the entire service area

  A portion of the City's water supply IS supplemented with reclaimed water

- Town subject to same rates and debt service as other customers.
- Town's demand met with City's plant

Pilot testing membrane treatment of surface water now

secure
reliable
sustainable

water

TOWN BECOMES A BULK CUSTOMER

- Town sets its own rate structure
- New Bulk Service Interlocal Agreement Required
- Town to become a retail utility service provider
- Study on-going by City's rate consultant regarding options for setting a bulk user rate

The City evaluated finished water demand data for all Town of Palm Beach customers.

SUMMARY

Option	Capital Costs	Retail Costs	Bulk Costs
Desalination Plant	$160,500,000	TBD(+)	N/A
Dedicated Floridan Plant	$80,250,000	TBD(+)	N/A
Bulk Customer	N/A	N/A(+)	TBD
Remain as Equal	N/A	Current Rates	N/A

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water

NEXT STEPS

- SFWMD Rulemaking Outcome
- Determine City's Future Water System – Long-Term Improvements
- Develop Bulk Rates

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water

CITY OF WEST PALM BEACH
1921
FLORIDA

QUESTIONS?

SEAL OF THE TOWN OF PALM BEACH FLORIDA
INCORPORATED
APRIL 17, 1911

THE TOWN OF
SOUTH
PALM BEACH
1925
FLORIDA

TOWN OF PALM BEACH

MEMORANDUM

TO: Paul Brazil, Director of Public Works

FROM: James M. Bowser, Town Engineer JMB

RE: Private Irrigation Water Supply Systems

DATE: January 22, 2009

Town staff was asked to look into what it would cost for a "typical" Palm Beach homeowner to construct their own independent irrigation water supply system. This is not an easy question and would take a fairly detailed analysis from one of our water consultants that time and funding has not permitted. Town staff has had several discussions with our consultants and the results of these discussions revealed the following.

- A 12 acre site in Manalapan constructed its' own water supply system using Floridan Aquifer, total price, between $400,000 and $450,000.

- Floridan water well permits for individual owners are possible, but wells cost hundreds of thousands of dollars to construct due to the 1200 to 1400 foot depths. These wells are not necessarily drought proof.

- Shallow salt water wells are possible and would provide a water supply that would not have restrictions. Dig too shallow, and the water will be aerobic and hydrogen sulfide is present, requiring a chlorination system. Dig deeper, you would get to an anaerobic zone that avoids the hydrogen sulfide. These salt water aquifers will require a higher degree of treatment, costing more than a Floridan source.

- Treatment facilities will need to be sized to irrigation demand. To minimize treatment capacity, storage is needed. A pressurized system will need to be built. If requested, several scenario's can be developed and priced.

- Electrical service and treatment facility housing needs will be tailored to the system design.

- Ballpark, the cheapest systems will likely exceed $100,000 with ongoing operation and maintenance costs,

c. Peter Elwell, Town Manager
Sarah Hannah, Assistant Town Manager

City of West Palm Beach, Florida

Estimate of Gallon per Capita Per Day for the Town of Palm Beach

Line No.		Fiscal Year 2009 Single Family Residential	SRF and MF Residential	Total Town of Palm Beach (2)
1	Total Water Sales (ccf) (1)	1,226,662	2,205,898	2,961,994
2	Total Single Family Units	2,206	2,206	2,206
3	Total Multi-family Units	0	6,807	6,807
4	Total Residential Units Recognized	2,206	9,013	9,013
5	Water Use per Month per Residential Unit (ccf)	46.34	20.4	27.39
6	Water Use per Month per Residential Unit (gallons)	34,662	15,259	20,488
7	Average Daily Flow per Residential Unit	1,139	502	674
8	Assumed Household Size (3)	1.81	1.81	1.81
9	Household Per Capita Per Day Flow Estimate	629	277	372

Footnotes:

(1) Water sales forecast based on the Water, Wastewater, and Stormwater Rate and Charge Study prepared by PRMG dated March 24, 2008.

(2) Includes all water sales, including irrigation and commercial use.

(3) Household size derived from demographic information published on the Nationmaster.com website (www.nationmaster.com/encyclopedia/Palm-Beach, -Fl). Note that the family size for the Town was 2.38 persons per household.

based firm Carrère and Hastings and helped establish the Palm Beach winter "season" by constant entertaining. The town was incorporated on April 17, 1911.

Geography

Palm Beach is the easternmost town in Florida, located on a sixteen-mile-long barrier island, centered at 26°42'54"N, 80°2'22"W (26.715067, -80.039371).[4]

According to the U.S. Census Bureau, the town has a total area of 27.0 km² (10.4 mi²). 10.2 km² (3.9 mi²) of it is land and 16.9 km² (6.5 mi²) of it is water. The total area is 62.45% water.

Demographics

As of the 2000 census, over half the population (52.6%) are 65 years of age or older, with a median age of 67 years. 9.4% are under the age of 18, 1.5% are from 18 to 24, 11.5% are from 25 to 44, and 25.0% from 45 to 64. For every 100 females there are 79.3 males. For every 100 females age 18 and over, there are 77.0 males.

Town of Palm Beach

The per-capita income for the town is $109,219. Males have a median income of $71,685 versus $42,875 for females. 5.3% of the population and 2.4% of families are below the poverty line. 4.6% of those under the age of 18 and 2.9% of those 65 and older are living below the poverty line.

The racial makeup of the town is 96.00% White (93.8% were Non-Hispanic White,) [5] 2.57% Black or African American, 0.53% Asian, 0.04% Native American, 0.02% Pacific Islander, 0.21% from other races, and 0.63% from two or more races. 2.56% of the population are Hispanic or Latino of any race.

$\frac{10,468}{5,789} = 1.81$

The 10,468 people in the town are organized into 5,789 households and 3,021 families. The population density is 1,031.1/km² (2,669.2/mi²). There are 9,948 housing units at an average density of 979.8/km² (2,536.6/mi²). 7.7% of the households have children under the age of 18 living with them, 48.1% are married couples living together, 3.3% have a female householder with no husband present, and 47.8% are non-families. 42.6% of all households are made up of individuals and 27.6% have someone living alone who is 65 years of age or older. The average household size is 1.81 and the average family size is 2.38.

Many of Palm Beach's residents are affluent, with a median household income of $94,562 and a median family income of $137,867. The town's affluence, and its "abundance of pleasures" and "strong community-oriented sensibility" were cited when it was selected in June, 2003 as America's "Best Place to Live" by *Robb Report* magazine.

As of 2000, speakers of English was the first language of 87.81% of all residents, while French comprised 4.48%, Spanish consisted of 3.65%, German made up 2.16%, Italian speakers made up 0.45%, Yiddish made up 0.36%, Russian was at 0.30% (even though those of Russian ancestry made up 10.30% of the population),

HOUSE_OVERSIGHT_016669

City of West Palm Beach

As of the census[2] of 2000, there are 82,103 people, 34,769 households, and 18,253 families residing in the city. The population density is 574.9/km□ (1,488.9/mi□). There are 40,461 housing units at an average density of 283.3/km□ (733.8/mi□). The racial makeup of the city is 58.09% White, 32.21% African American, 0.33% Native American, 1.46% Asian, 0.16% Pacific Islander, 4.35% from other races, and 3.40% from two or more races. 18.21% of the population are Hispanic or Latino of any race.

$\frac{82,103}{34,769} = 2.36$

There are 34,769 households out of which 22.4% have children under the age of 18 living with them, 34.3% are married couples living together, 13.6% have a female householder with no husband present, and 47.5% are non-families. 37.6% of all households are made up of individuals and 11.8% have someone living alone who is 65 years of age or older. The average household size is 2.26 and the average family size is 3.02.

In the city the population is spread out with 21.3% under the age of 18, 9.8% from 18 to 24, 31.5% from 25 to 44, 21.4% from 45 to 64, and 16.0% who are 65 years of age or older. The median age is 37 years. For every 100 females there are 97.3 males. For every 100 females age 18 and over, there are 94.8 males.

The median income for a household in the city is $36,774, and the median income for a family is $42,074. Males have a median income of $30,221 versus $26,473 for females. The per capita income for the city is $23,188. 18.9% of the population and 14.5% of families are below the poverty line. Out of the total population, 29.2% of those under the age of 18 and 14.8% of those 65 and older are living below the poverty line.

The city has Palm Beach International Airport, which also serves Palm Beach County, Florida.

External links

- West Palm Beach official website (*http://www.cityofwpb.com/*)
- **Maps and aerial photos**
  - Street map from Mapquest (*http://www.mapquest.com/maps/map.adp?latlongtype=decimal&latitude=26.709992&longitude=-80.064373&zoom=6*) or Google (*http://maps.google.com/maps?ll=26.709992,-80.064373*)
  - Topographic map from Topozone (*http://www.topozone.com/map.asp?lat=26.709992&lon=-80.064373&s=200&size=m&layer=DRG100*)
  - Aerial photograph from Microsoft Terraserver (*http://terraserver.microsoft.com/map.aspx?t=1&s=14&lon=-80.064373&lat=26.709992&w=750&h=500*)

Regions of Florida

Flag of Florida

Central Florida | Emerald Riviera | First Coast | Florida Panhandle | Florida Keys | Lee Island Coast | Nature Coast | Orlando Area | Redneck Riviera | Space Coast | Treasure Coast | South Florida | Sun Coast | Tampa Bay Area

Largest Cities

Cape Coral | Clearwater | Coral Springs | Fort Lauderdale | Hialeah | Hollywood | Jacksonville | Miami | Miramar | North Miami | Orlando | Pembroke Pines | Plantation | Pompano Beach | Port St. Lucie | St. Petersburg | Sunrise | Tallahassee | Tampa | **West Palm Beach**

Counties

HOUSE_OVERSIGHT_016670

From: EBalbis@wpb.org
To: SHannah@TownofPalmBeach.com
Date: 12/03/2008 01:26 PM
Subject: Fw: WPB/NYC Water Quality Data

Sarah,

We have obtained information about the water supply in NYC as requested. Note that the City of NY produces about 33 times the amount of water than the City of West Palm Beach. We tried to compile data that can be comparable. However, NYC act as their own State agency and track different parameters than the State of Florida. See below for additional information.

Eduardo E. Balbis, P.E.
Assistant City Administrator
City of West Palm Beach
200 - 2nd Street
West Palm Beach, FL 33402
561-822-1400
561-822-1424 fax

----- Forwarded by Eduardo Balbis/WESTPALM on 12/03/2008 01:26 PM -----
David Hanks/WESTPALM

12/03/2008 10:33 AM

To Eduardo Balbis/WESTPALM@WESTPALM
cc
Subject WPB/NYC Water Quality Data

Please let know if you want any changes made. NCY produces 1.1 billion mgd per day.

Below is what they say about their treatment process:

Water Treatment

All surface water and groundwater entering New York City's distribution system is treated with chlorine, fluoride, food grade phosphoric acid and, in some cases, sodium hydroxide. New York City uses chlorine to meet the New York State Sanitary Code and federal Safe Drinking Water Act (SDWA) disinfection requirements. Fluoride, at a concentration of one part per million, is added to help prevent tooth decay and has been added since 1966 in accordance with the New York City Health Code. Phosphoric acid is added to create a protective film on pipes that reduces the release of metals such as lead from household plumbing. Sodium hydroxide is added to Catskill/Delaware water to raise the pH and reduce corrosivity.

David Hanks
Public Utilities Director
City of West Palm Beach
1000 45th Street, Suite # 15
West Palm Beach, FL 33407
561-494-1046 Work
561-714-4619 Cell

dhanks@wpb.org Water Quality Tables.xls

City of West Palm Beach and New York City Water Quality Tables

	WPB 2007		WPB 2006		WPB 2005		NY City 2007		NY City 2006		NY City 2005			
CONTAMINANTS AND UNIT OF MEASURE	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS	MCL* OR MRDL*	LIKELY SOURCE OF CONTAMINATION
Stage 1 Disinfectant / Disinfections By - Produce (D/DBP) Parameter														
Trihalomethanes (TTHM) (ppb)*	73.5	6.95 -283.83**	25.29	6.70 - 35.7	21.1	10.9 - 41.9	220	.12-76	246	.10-81	218	19-69	MCL = 80	By-product of drinking water dis infection
Haloacetic Acid (HAA5) (ppb)	30.79	1.82 - 70.0	22.9	9.08 - 37.0	24.4	12.8 - 42.9	218	19 - 62	245	19-69	215	21-69	MCL = 60	By-product of drinking water disinfection
Chloramines (ppm)*	3.1	ND* - 5.8	3.33	1.0 - 4.2	3.1	0.3 - 4.2							MRDL = 4.0	Water additive used to control microbes
Free Chlorine (ppm)	2.4	0.2 - 7.8											MDRL = 4.0	Water additive used to control microbes
CONTAMINANTS AND UNIT OF MEASURE	90th PERCENTILE RESULT	No of Sampling Sites Exceeding the AL	90 th PERCENTILE RESULTS	No of Sampling Sites exceeding the AL	90th PERCENTILE RESULTS	No of Sampling Sites exceeding the AL	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	MCL	LIKELY SOURCE OF CONTAMINATION
Lead and Copper (tap water) Round One														
lead (tap water) (ppb)	*16.125.9	13 out of 100	7.6	5 out of 100	ND	0 out of 100	126	ND-122.3	120	ND-123.2	326	ND-11	15	Corrosion of household plumbing systems; erosion of natural deposits
Copper (tap water) (ppm)	0.433	1 out of 100	0.276	0 out of 100	ND	0 out of 100	126	ND-0.320	120	0.022-0.661	117	ND-198	1.3	Corrision of household plumbing systems; erosion of natural deposits;leaching from wood preservatives
Lead and Copper (Tap Water) Round Two														
Lead (tap water) (ppb)	10.5	8 out of 100											15	Corrosion of household plumbing systems; erosion of natural deposits
Copper (tap water) (ppm)	0.352	0 out of 100											1.3	Corrosion of household plumbing systems; erosion of natural deposits; leaching from wood preservatives
Contaminants and unit of measure	Highest single measurement	The lowest monthly percentage of samples meeting regulartory requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	MCL	LIKELY SOURCE OF CONTAMINATION
Turbidity														
Turbidy (ntu)*	0.46	95.6	0.33	97	0.37	100%	10061%	0.8-1.4%	966100%	0.8-1.5%	0%	0%	TT*	SOIL RUNOFF
CONTAMINANTS AND UNIT OF MEASURE	Highest single measurement	Lowest monthly percentage of samples meeting regulartoty requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	MCL	LIKELY SOURCE OF CONTAMINATION
Total Organic Carbon														
TOTAL ORGANIC CARBON (RATIO)	1.1	1.1 - 1.8	1.1	1.1 - 1.8	1.1	1.1 - 1.2							TT	Naturally present in the environment

CONTAMINANTS AND UNITS OS MEASURE	Highest single measurement	Lowesst monthly percentage of samples meeting regulartoty requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	TT	LIKELY SOURCE OF CONTAMINATION
Microbiological Contamanants														
Total Coliform Bacteria	13.3	0	0	0	0	0	0	0						NATURALLY PRESENT
Contaminants and Unit of Measure	Total Number of Positive Samples for Year	MCLG	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	Highest single measurement	The Lowest Monthly Percentage of Samples meeting Regulartory Requirements	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results	LEVEL DETECTED	Range of Results		LIKELY SOURCE OF CONTAMINATION
Fecal Coliform % Coli	*41	0	0	0	0	0	0	0					0	Human and fecal waste
Contaminants and Unit of Measure	Highest Level Dectected	Range of Results	Highest Level Detected	Range Results	Highest Level Detected	Range Results	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS	LEVEL DETECTED	RANGE OF RESULTS9661	MCL	LIKELY SOURCE OF CONTAMINATION
Inorganic Contaminants														
Antimony (ppb)	3.4	N/A	0.13	N/A	0.21	N/A							6	discharge from petroleum refineries; fire - retardants; ceramics; electronics; solder
Barium (PPM)	0.0089	N/A	0.0079	N/A		N/A	332	0.002-0.07	319	0.01-0.02	319	0.01-0.04	2	Dishcharge or drilling wastes; discharge from metal refineries; erosion of naturaal deposits
Floride (PPM)	0.946	N/A	0.71	N/A	0.51	N/A	1405	ND-1.3					4	Erosion of natural deposits; discharge from fertilizer and aluminum factories; water additive which promotes strong teeth when at optimum levels between 0.7 and 1.2ppm
Lead (Point of entry) (PPB)	2.7	N/A											15	Residue from man-made pollution such as auto emissions and paint;lead pipe, casing and solder
Nitrates (as Nitrogen) (PPB)	0.678	ND - 0.678	0.12	N/A	0.038	N/A	324	0.2-O.59	321	0.13-0.84	319	0.01-0.04	10	Runoff from fertilizer use; leaching from septic tanks, sewage; erosion of natural deposits
Sodium (ppm)	84.6	N/A	33	N/A	34	N/A	332	.4 - .11	319	.6-.12			160	Discharge or drilling wastes; discharge from metal refineries; erosion of natural deposits
Thallium (ppb)	0.067	N/A											2	Leaching from ore-processing sites; discharge from electronics, glass, and drug factories.
Endothal (ppb)	4.4	N/A	4.4	N/A	4.4	N/A							100	Runoff from herbicide use
Gross Alpha Emitters (pCi/l)	1	N/A											15	Erosion of natural deposits
Combine radium (pCi/L	1.3	N/A					6	#VALUE!					5	Erosion of natural deposits

TOP 100 PALM BEACH ACCOUNTS BY AVERAGE MONTHLY CONSUMPTION FY 07-08

	Customer's Name	Address 1	FY 07-08 Average Monthly Consumption in CCF	FY 07-08 Average Monthly Consumption in Gallons	FY 07-08 Average Monthly Bill	Premise Type	Percentage of Total Avg Monthly Consumption for Palm Beach	Percentage of Total Avg Monthly Revenue for Palm Beach
1	BREAKERS PB INC	100 E MAIN ST	5,277	3,947,138	$18,277.80	GEN	2.23%	3.12%
2	OCEAN GRAND RESORTS	2800 S OCEAN BLVD	3,908	2,922,839	$13,305.34	GEN	1.65%	2.27%
3	BREAKERS PB INC	100 VIA BETHESDA	3,009	2,250,962	$10,545.23	GEN	1.27%	1.80%
4	BREAKERS PB INC	100 PINEWALK	2,879	2,153,780	$10,134.22	GEN	1.22%	1.73%
5	TRUMP,DONALD J	1100 S OCEAN BLVD	2,746	2,053,663	$9,826.33	GEN	1.16%	1.68%
6	PALM BEACH TOWERS CO	44 COCOANUT ROW	2,671	1,997,735	$6,435.42	RES-MULT	1.13%	1.10%
7	TOWN OF PALM BEACH	2301 S OCEAN BLVD	1,827	1,366,769	$5,890.04	GEN	0.69%	1.00%
8	2000 CONDOMINIUM ASSOC	2000 S OCEAN BLVD	1,637	1,224,131	$3,675.58	RES-MULT	0.69%	0.63%
9	BEACH POINT CONDO ASSOC	2660 S OCEAN BLVD	1,527	1,142,311	$3,390.44	RES-MULT	0.65%	0.58%
10	COUNTY ROAD PROPERTY LLC	515 N COUNTY RD	1,373	1,026,755	$6,011.29	RES-MULT	0.58%	1.03%
11	PALM BEACH BILTMORE CONDO ASSOC INC	150 BRADLEY PL	1,292	966,309	$2,890.03	RES-MULT	0.55%	0.49%
12	REEF CONDO ASSOC INC	2275 S OCEAN BLVD	1,278	955,714	$2,889.17	RES-MULT	0.54%	0.49%
13	KRAMER,IRWIN	1295 S OCEAN BLVD	1,226	916,933	$4,020.31	RES	0.52%	0.69%
14	2295 S OCEAN BLVD ASSOC	2295 S OCEAN BLVD	1,145	856,115	$3,459.06	RES-MULT	0.48%	0.59%
15	PATRICIAN MGMT CORP	3450 S OCEAN BLVD	1,139	851,627	$3,676.41	RES-MULT	0.48%	0.63%
16	KRAVIS,HENRY R	700 N LAKE WAY	1,078	806,023	$3,100.25	RES-MULT	0.46%	0.53%
17	2100 CONDO ASSOC INC	2100 S OCEAN BLVD	1,027	767,966	$2,517.47	RES-MULT	0.43%	0.43%
18	ENCLAVE OF PB CONDO ASSOC,THE	3170 S OCEAN BLVD	979	732,062	$2,255.78	RES-MULT	0.41%	0.38%
19	OCEAN COVE CONDO	2600 S OCEAN BLVD	977	731,084	$2,255.21	RES-MULT	0.41%	0.38%
20	123 LLC	455 N COUNTY RD	925	691,900	$2,883.96	RES	0.39%	0.49%
21	SCHWARZMAN,STEPHEN	1768 S OCEAN BLVD	908	678,839	$2,882.59	RES	0.38%	0.49%
22	2500 S OCEAN BLVD INC	2500 S OCEAN BLVD	890	666,008	$1,991.55	RES-MULT	0.38%	0.34%
23	SYDELL MILLER	1415 S OCEAN BLVD	887	663,361	$2,873.34	RES	0.37%	0.49%
24	LEVERETT HOUSE INC	110 SUNSET AVE	845	632,233	$1,993.92	RES-MULT	0.36%	0.34%
25	SUTTON PLACE CONDO ASSOC INC	2778 S OCEAN BLVD	838	626,651	$1,992.96	RES-MULT	0.35%	0.34%
26	SUN & SURF	100 SUNRISE AVE	813	608,469	$2,447.50	RES-MULT	0.34%	0.42%
27	BOHL REAL ESTATE MGMT CORP	184 BRADLEY PL	809	604,758	$1,762.83	RES-MULT	0.34%	0.30%
28	STERLING PALM BEACH LLC	10 ROYAL POINCIANA PLZ	792	592,202	$2,869.67	GEN	0.33%	0.49%
29	OASIS III CORP	3120 S OCEAN BLVD	772	577,456	$1,731.67	RES-MULT	0.33%	0.30%
30	WINTHROP HSE COND	100 WORTH AVE	750	560,827	$2,190.64	RES-MULT	0.32%	0.37%
31	KESSLER,PATRICIA	120 CASA BENDITA	730	545,810	$2,261.12	RES	0.31%	0.39%
32	LA PALMA COND APTS	2860 S OCEAN BLVD	720	538,330	$1,866.68	RES-MULT	0.30%	0.32%
33	HENRY MORRISON FLAGLER MUSEUM	1 WHITEHALL WAY	715	534,762	$2,539.20	GEN	0.30%	0.43%
34	BRAZILIAN COURT MGMT INC	300 BRAZILIAN AVE	712	532,921	$2,414.10	GEN	0.30%	0.41%
35	CHOPIN TRUSTEE PB TR,L FRANK	300 N LAKE WAY	666	498,382	$1,901.99	RES	0.28%	0.32%
36	PALM BEACH COUNTRY CLUB	760 N OCEAN BLVD	664	496,672	$2,413.12	GEN	0.28%	0.41%
37	T H COURT LIMITED PARTNERSHIP	363 COCOANUT ROW	662	495,521	$2,178.26	GEN	0.28%	0.37%
38	THE COLONY HOTEL	155 HAMMON AVE	650	485,855	$2,285.71	GEN	0.27%	0.39%

TOP 100 PALM BEACH ACCOUNTS BY AVERAGE MONTHLY CONSUMPTION FY 07-08

	Customer's Name	Address 1	FY 07-08 Average Monthly Consumption in CCF	FY 07-08 Average Monthly Consumption in Gallons	FY 07-08 Average Monthly Bill	Premise Type	Percentage of Total Avg Monthly Consumption for Palm Beach	Percentage of Total Avg Monthly Revenue for Palm Beach
39	RESIDENCES AT SLOAN CURVE,THE	2000 S OCEAN BLVD	645	482,345	$1,445.07	RES-MULT	0.27%	0.25%
40	PELTZ,NELSON	548 N COUNTY RD	643	480,734	$2,161.55	GEN	0.27%	0.37%
41	TAYLOR,TERRY R	780 S OCEAN BLVD	636	475,670	$1,977.13	RES	0.27%	0.34%
42	CLARIDGES CONDO INC,THE	3456 S OCEAN BLVD	617	461,631	$1,950.41	RES-MULT	0.26%	0.33%
43	ROYAL SAXON INC	2840 S OCEAN BLVD	615	460,078	$2,262.94	RES-MULT	0.26%	0.39%
44	WILKENS,FRANK	1491 N OCEAN BLVD	614	459,042	$2,022.24	GEN	0.26%	0.34%
45	2770 CONDOMINUM,THE	2770 S OCEAN BLVD	605	452,885	$1,360.94	RES-MULT	0.26%	0.23%
46	PALM BEACH STRATFORD CONDO ASSOC INC	2580 S OCEAN BLVD	588	439,594	$1,382.49	RES-MULT	0.25%	0.24%
47	PALM BEACH HAMPTON CORP	3100 S OCEAN BLVD	568	424,806	$1,287.78	RES-MULT	0.24%	0.22%
48	VARGAS,VICTOR	1960 S OCEAN BLVD	563	421,182	$1,763.28	RES	0.24%	0.30%
49	DESMARAIS,PAUL	1600 S OCEAN BLVD	562	420,549	$1,860.38	GEN	0.24%	0.32%
50	SUBOTNICK TRUSTEE,STUART	89 MIDDLE RD	560	419,168	$1,769.33	RES-MULT	0.24%	0.30%
51	EMERAUDE CONDO ASSOC	3390 S OCEAN BLVD	556	415,715	$1,293.06	RES-MULT	0.23%	0.22%
52	BATH & TENNIS CLUB INC	1168 S OCEAN BLVD	549	410,710	$1,950.50	GEN	0.23%	0.33%
53	ROSS,STEPHEN M	702 N COUNTY RD	548	410,134	$1,812.82	RES	0.23%	0.31%
54	PALM BEACH HAMPTON CORP	3100 S OCEAN BLVD	548	409,731	$1,254.34	RES-MULT	0.23%	0.21%
55	389 CORP	389 S LAKE DR	543	406,337	$1,237.91	RES-MULT	0.23%	0.21%
56	PRESIDENT OF P B CONDO INC	2505 S OCEAN BLVD	542	405,646	$1,657.75	RES-MULT	0.23%	0.28%
57	HALCYON CONDO ASSOC	3440 S OCEAN BLVD	542	405,128	$1,333.89	RES-MULT	0.23%	0.23%
58	LA BONNE VIE COND AP	3475 S OCEAN BLVD	541	404,726	$1,835.83	RES-MULT	0.23%	0.31%
59	HAMMONDS,SANDRA	1275 S OCEAN BLVD	541	404,668	$1,955.04	RES	0.23%	0.33%
60	BEACH CLUB INC	755 N COUNTY RD	541	404,610	$1,959.22	GEN	0.23%	0.33%
61	ATRIUMS OF PB MGMT	3400 S OCEAN BLVD	530	396,325	$1,770.74	RES-MULT	0.22%	0.30%
62	BIENSTAR	151 GRACE TRL	529	395,692	$1,276.45	RES-MULT	0.22%	0.22%
63	DU PONT,WILLIS H	1860 S OCEAN BLVD	521	389,535	$1,473.75	RES-MULT	0.22%	0.25%
64	HALCYON CONDO ASSOC INC	3440 S OCEAN BLVD	520	389,018	$1,260.18	RES-MULT	0.22%	0.21%
65	AMBASSADOR SOUTH DEV CORP	2774 S OCEAN BLVD	518	387,637	$1,627.66	RES-MULT	0.22%	0.28%
66	105 CLARENDON CORP	105 CLARENDON AVE	514	384,472	$1,560.62	RES	0.22%	0.27%
67	123 LLC	455 N COUNTY RD	507	379,236	$2,304.58	GEN	0.21%	0.39%
68	MERIDIAN OF PALM BCH	3300 S OCEAN BLVD	506	378,488	$1,188.94	RES-MULT	0.21%	0.20%
69	CLARK,JAMES H	1500 S OCEAN BLVD	504	377,222	$1,738.51	GEN	0.21%	0.30%
70	PERGAMENT,LOUIS	333 SUNSET AVE	503	376,030	$1,420.95	RES-MULT	0.21%	0.24%
71	SUN & SURF 130 ASSOC	130 SUNRISE AVE	492	368,304	$1,721.05	RES-MULT	0.21%	0.29%
72	ATRIUMS II OF PB	3360 S OCEAN BLVD	483	361,514	$1,529.28	RES-MULT	0.20%	0.26%
73	BLACK,CONRAD	1930 S OCEAN BLVD	476	356,278	$1,453.39	RES	0.20%	0.25%
74	PALM BEACH TOWNHOUSES LTD PTN	230 BRADLEY PL	471	352,041	$964.09	RES-MULT	0.20%	0.16%
75	CARLYLE HOUSE ASSOC INC	2773 S OCEAN BLVD	466	348,913	$1,504.13	RES-MULT	0.20%	0.26%
76	L'ERMITAGE A PB CONDO ASSCINC	200 BRADLEY PL	454	339,913	$1,055.41	RES-MULT	0.19%	0.18%
77	COVE CONDOMINIUM ASSOCIATION INC	2784 S OCEAN BLVD	451	337,348	$1,420.04	RES-MULT	0.19%	0.24%
78	300 SO OCEAN BLVD CORP OF PB	300 S OCEAN BLVD	444	331,898	$1,010.42	RES-MULT	0.19%	0.17%
79	PERIODICAL DSTRBTRS	691 N COUNTY RD	441	330,213	$1,344.31	RES-MULT	0.19%	0.23%
80	330 SOUTH OCEAN INC	330 S OCEAN BLVD	440	328,832	$987.36	RES-MULT	0.19%	0.17%

TOP 100 PALM BEACH ACCOUNTS BY AVERAGE MONTHLY CONSUMPTION FY 07-08

	Customer's Name	Address 1	FY 07-08 Average Monthly Consumption in CCF	FY 07-08 Average Monthly Consumption in Gallons	FY 07-08 Average Monthly Bill	Premise Type	Percentage of Total Avg Monthly Consumption for Palm Beach	Percentage of Total Avg Monthly Revenue for Palm Beach
81	APPLEBAUM,EUGENE	325 VIA LINDA	433	323,884	$1,238.27	RES	0.18%	0.21%
82	THE REGENCY OF P B INC	2760 S OCEAN BLVD	431	322,388	$1,421.00	RES-MULT	0.18%	0.24%
83	KIRKLAND HOUSE CONDO ASSOCIATION INC	101 WORTH AVE	429	321,007	$956.68	RES-MULT	0.18%	0.16%
84	MARTIN GRUSS	1574 S OCEAN BLVD	427	319,741	$1,454.71	GEN	0.18%	0.25%
85	CONDO ASSOC OF OCEAN TOWERS INC	170 N OCEAN BLVD	426	318,418	$1,214.23	RES-MULT	0.18%	0.21%
86	SOCIETY OF THE FOUR ARTS	417 ROYAL PALM WAY	423	316,511	$1,220.88	GEN	0.18%	0.21%
87	ATRIUMS OF PB MGMT	3400 S OCEAN BLVD	418	312,491	$1,357.12	GEN	0.18%	0.23%
88	NESBITT II,ABRAM	79 MIDDLE RD	415	310,420	$1,182.56	RES-MULT	0.18%	0.20%
89	LAUDER,JOSEPH	126 S OCEAN BLVD	412	308,176	$1,154.42	RES-MULT	0.17%	0.20%
90	BEACH CLUB INC	220 COUNTRY CLUB RD	410	306,947	$1,201.81	GEN	0.17%	0.21%
91	TRES VIDAS	2335 S OCEAN BLVD	407	304,724	$894.77	RES-MULT	0.17%	0.15%
92	MERIDIAN OF PALM BCH	3300 S OCEAN BLVD	405	302,940	$983.57	RES-MULT	0.17%	0.17%
93	CUNNINGHAM,JOHN	353 EL BRILLO WAY	404	302,480	$1,243.20	RES	0.17%	0.21%
94	MONTGOMERY,ROBERT M	1800 S OCEAN BLVD	402	300,869	$1,141.35	RES-MULT	0.17%	0.19%
95	THORNTON,JOHN L	1236 S OCEAN BLVD	393	294,285	$1,229.17	RES	0.17%	0.21%
96	LAKE TOWERS ASSOC INC	250 BRADLEY PL	393	294,017	$1,054.34	RES-MULT	0.17%	0.18%
97	PICOWER,JEFFRY M	1410 S OCEAN BLVD	389	291,030	$1,088.20	RES-MULT	0.16%	0.19%
98	EVERGLADES CLUB	409 COCOANUT ROW	385	287,922	$1,345.22	GEN	0.16%	0.23%
99	589 NORTH COUNTY ROAD LLC	589 N COUNTY RD	383	286,110	$1,156.78	RES-MULT	0.16%	0.20%
100	OCEANSIDE PALMS ESTATE CORP	641 N COUNTY RD	375	280,385	$1,049.12	RES-MULT	0.16%	0.18%
	Total for Top 100		**82,339**	**61,589,614**	**$ 247,769.35**			
	Total for Palm Beach		236,498	176,900,442	$586,175.22			
	% of Use/Revenue for Top 100		35%	35%	42%			

* Top 10% of Consumption

** Top 10% of Revenue

Revenue produced by use and fixed service chrg only	$561,794.65
% of Revenue for Top 100 (use & service charge)	44%

Water Committee
Town Sewage Effluent
Jim Bowser to: Patricia Gayle-Gordon 01/22/2009 01:54 PM

Pat, I believe one of the questions asked was what was the sewage flows to West Palm Beach. Here is an email to Peter sent on 1/9/09.

James M. Bowser, P.E.
Town Engineer
Town of Palm Beach
Public Works Department
Post Office Box 2029
Palm Beach, Florida 33480-2029
email: jbowser@townofpalmbeach.com
561-838-5440
Fax : 561-835-4691
----- Forwarded by Jim Bowser/PalmBeach on 01/22/2009 01:56 PM -----

From:	Jim Bowser/PalmBeach
To:	Peter B Elwell/PalmBeach@PalmBeach
Cc:	Paul Brazil/PalmBeach@PalmBeach, Eric Brown/PalmBeach@PalmBeach, Douglas Terry/PalmBeach@PalmBeach
Date:	01/09/2009 10:36 AM
Subject:	Town Sewage Effluent

Peter, as requested, attached is sewage flow data from our Lake Worth Billings and ECRWRF monthly report. I am seeking the peak daily flows, but that is going to take additional time.

Base upon the monthly flows, here is the average daily flow for each entity in Fiscal Year 2008 expressed as million gallons a day:

Month	WPB	LW
Oct	2.70	0.654
Nov	2.39	0.593
Dec	2.23	0.627
Jan	2.33	0.668
Feb	2.36	0.691
Mar	2.23	0.672
Apr	2.12	0.561
May	2.02	0.408
Jun	2.09	0.389
Jul	2.22	0.552
Aug	2.33	0.537
Sep	2.54	0.563
Yearly Ave	2.30	0.563

Total average daily flow from Town to ECRWRF 2.863 million gallons a day.

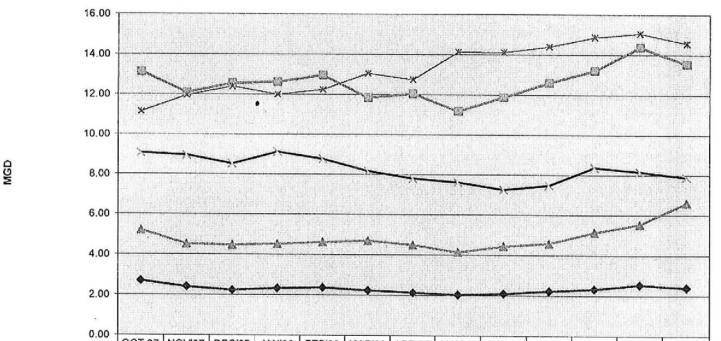
Sewage Flows WPB and LW FY 2008.pdf

James M. Bowser, P.E.

1. Plant Influent Flows: FOR MONTH OF OCTOBER, 2008.

Entity	Average Daily Influent Flow (MGD)		
	Flow	Reserve Cap	% of Capacity
Palm Beach	2.39	5.00	47.8%
West Palm Beach	13.55	17.00	79.70%
Riviera Beach	6.59	8.00	82.37%
Palm Beach County	14.57	21.50	67.76%
Lake Worth	7.88	12.50	63.04%
ECRWRF TOTAL	44.98	64.00	70.28%

Average Daily Influent Flow (MGD)



	OCT 07	NOV'07	DEC'07	JAN'08	FEB'08	MAR'08	APR 08	MAY 08	JUN 08	Jul-08	Aug-08	Sep-08	Oct-08
Palm Beach	2.70	2.39	2.23	2.33	2.36	2.23	2.12	2.02	2.09	2.22	2.33	2.54	2.39
West Plm Bch	13.13	12.09	12.56	12.62	12.96	11.85	12.05	11.18	11.88	12.61	13.22	14.38	13.55
Riv Beach	5.20	4.51	4.46	4.52	4.61	4.69	4.48	4.13	4.43	4.58	5.13	5.53	6.59
Lake Worth	9.07	8.95	8.52	9.12	8.76	8.17	7.80	7.61	7.25	7.46	8.37	8.16	7.88
Plm Bch Cty	11.14	11.95	12.39	12.00	12.24	13.06	12.75	14.13	14.12	14.40	14.87	15.06	14.57

"An Equal Opportunity Employer"

Drinking Water Quality Evaluation: Analysis of the City of West Palm Beach's Potable Water Product Delivered to The Town of Palm Beach

HSA Project No. 803-0319

Prepared for:

Town of Palm Beach
Public Works Department
951 Old Okeechobee Rd., Suite D
West Palm Beach, Florida 33401

Prepared by:

HSA Engineers & Scientists
1486-A Skees Road
West Palm Beach, FL 33411

January 2009

TABLE OF CONTENTS

EXECUTIVE SUMMARY 1
INTRODUCTION.....2
CITY OF WEST PALM BEACH'S DRINKING WATER
MONITORING PROGRAMS.....3
POINTS OF ENTRY FOR THE CITY'S DELIVERY OF DRINKING WATER
TO THE TOWN.....4
SAMPLING AND ANALYSIS OF THE DRINKING WATER PRODUCT
DELIVERED TO THE TOWN.....5
RESULTS FROM INDEPENDENT ANALYSIS OF
THE CITY'S DRINKING WATER PRODUCT.....5
COMPARISON TO RECENT CITY MONITORING PROGRAM RESULTS.....6
APPLICATION OF DISINFECTION CHEMICALS, BYPRODUCTS,
AND THE EFFECT ON TASTE.....6
CONCLUSION.....7

FIGURES

FIGURE 1 Site Location Map

TABLES

TABLE 1 Test Results Comparative to Regulatory Acceptable Maximum Limits per Chapter 62-550, Florida Administrative Code

APPENDICES

APPENDIX A Laboratory Report of Test Results

EXECUTIVE SUMMARY

Recent Drinking Water Testing Completed and the Results

The City of West Palm Beach (City) treats surface waters at their downtown facility and produces drinking water for the residents of West Palm Beach. Residents of the Town of Palm Beach (Town) receive potable water from the City through a franchise agreement that expires in the year 2029. Due, in part, to the highly publicized " precautionary boil water" notice issued by the City in September of 2007, concerns arose regarding the overall safety of the drinking water supply being provided to the Town. Accordingly, HSA Engineers and Scientists was asked to collect and analyze additional samples from the water supply. These additional samples were collected by HSA personnel on November 14, 2008 and were submitted to a laboratory independent of the ones used by the City for their routine drinking water testing requirements mandated by the U.S. Environmental Protection Agency (USEPA) and the Florida Department of Environmental Protection (FDEP). There are more than 90 testing parameters that are required to be analyzed on drinking water supplies by the USEPA and the FDEP. HSA collected samples and tested for all of these drinking water parameters and the detailed results are supplied in the enclosed tabular summary.

Also as shown in the attached detailed summary table, all of the testing results obtained from our recent sampling passed and all constituents were well below the allowable limits established by State and Federal regulations.

What are Trihalomethanes (THMs) and Why Did We Receive a Notice That They Were Elevated?

During the precautionary boil water notice that occurred during the latter part of 2007, the City added more chlorine to their finished drinking water to ensure adequate bacterial kill. Chlorine reacts with natural organics (that cause variations in the water's color) producing a group of compounds called Trihalomethanes (THMs). Up to a point, the higher the chlorine dose added, the higher the THM concentrations produced. The USEPA has established a limit of 80 parts per billion (ppb) for drinking water supplies. In a few samples collected by the City during the 'boil water notice' time period, elevated THM test results were obtained due to the additional chlorine in the drinking water. This represented a one-time spike in THM results and the current level is well below the 80 parts per billion limit. During the special testing completed by HSA, the THM level was measured at slightly more than 50 parts per billion, well below the acceptable limit set by the regulators.

What Do I Need To Do To Ensure My Drinking Water is Safe?

Aside from the recent test results collected and analyzed by HSA, we reviewed historical test results, also summarized in the enclosed table. The City produces a safe drinking water of high quality based on the test results over the last several years. According to the USEPA and the FDEP established standards, the City's drinking water supply is of good quality and can be consumed directly without concern. For those who want an added measure of protection, substituting bottled drinking water is an option or under the kitchen counter reverse osmosis (RO) filtration system can be installed as added intermediary treatment to provide an excellent source of high quality of drinking water. These RO units are not cost prohibitive, can be easily installed, and can usually supply sufficient drinking water for a typical household. A separate tap is usually installed near the standard sink faucet so the RO water is delivered on demand. There are several local reputable vendors that can provide free quotation for installing under the kitchen counter RO units. Please note that the typical RO unit we are referring to does not treat the entire household water supply but rather just the water intended for drinking or cooking purposes.

To add a layer of confidence to residents' concerns about the quality of the City's drinking water, we also recommend that the Town establish a primary point of contact for the City for courtesy notification and/or discussion of real time details related to issues with the City's treatment and distribution processes. This could potentially avoid dramatized response to typically less-detailed public notification.

INTRODUCTION

Residents of Palm Beach receive potable water from the City of West Palm Beach (City) through a franchise agreement Town of Palm Beach (Town). As required under rule 62-550, Florida Administrative Code, to protect the public health and ensure the quality of the delivered potable water product, these taps are routinely sampled by the City of West Palm Beach's Public Utilities Department for specified monitoring parameters. Concerned about assuring the quality of the potable water product delivered to Town residents by the City, the Town authorized HSA Engineers & Scientists (HSA) to conduct a one-time sampling event from two of the sampling taps on the potable water distribution system (piping) serving the Town. Collected samples were targeted for laboratory analyses for regulated water chemistry parameters, constituents, and microbiologics most likely to be present in South Florida drinking water supplies.

CITY OF WEST PALM BEACH'S DRINKING WATER MONITORING PROGRAMS

HSA evaluated the City's monitoring program and most recent results. Steve Schmidt, laboratory manager at the City's water treatment plant and Chris Saliba of U.S. Water, Corporation, the City's treatment system process and monitoring consultant, assisted with the acquisition of sampling protocols and laboratory analytical documentation related to the City's drinking water monitoring program. Discussions with both yielded important information about the City's drinking water monitoring and quality assurance programs. In addition, records of the City's Monthly Operating Records (MORs) and recent results from the City's water monitoring programs were obtained from the Palm Beach County Health Department (part of the State of Florida's Department of Health, FDOH).

The City conducts two programs to monitor its drinking water quality, a Compliance Monitoring Program (compliance) and a Routine Monitoring Program (routine). Sampling locations for the City's two monitoring programs include the surface water impoundments, inbound raw water, aquifer storage and recovery (ASR) wells, treatment plant points of entry, distribution system points of entry, and distribution system pumps and sampling taps. While Routine program sampling events generally range from monthly to "as needed", compliance program sampling events generally range from daily to quarterly to annually to sampling for contaminants (like asbestos) every ninth year.

To monitor the drinking water quality delivered to the Town, the City conducts routine sampling at ten (10) permanent and temporary compliance distribution system sampling points (taps) situated within the Town's boundaries. These include:

- Distribution System Tap 3230 (located at 3230 S. Ocean Dr.);
- Distribution System Tap 2780 (located at 2780 S. Ocean Dr.);
- Distribution System Tap PBGC (located at the Palm Beach Golf Course);
- Distribution System Tap SOFS (located at the South Fire Station);
- Distribution System Tap ISRD (located at Island Rd.);
- Distribution System Tap RPBR (located at Royal Poinciana Blvd. X Bradley Pl.);
- Distribution System Tap NOFS (located at the North Fire Station);
- Distribution System Tap 702 (located at 702 N. County Rd.);
- Distribution System Tap LINL (located at List Rd. X N. Lake Wy.); and
- Distribution System Tap IDSE #6 (located at the north end of Ocean Blvd.);

An eleventh distribution system tap, 4201, is located at 4201 South Ocean Boulevard (in the South Palm Beach municipality), outside the jurisdiction of the Town. The Phipps Park "Booster" Pumping Station (PS) is located within the Town's jurisdiction. The Phipps Park "Booster" is not a point of entry (POE) to the Town's distribution system. The City's map indicates the locations of the sampling taps, the booster pump station, and a one million gallon (1 MG) storage tank within the Town's jurisdiction. **Figure 1** depicts the distribution system sampling taps, "booster" pumping station, and storage tank located within the Town's boundary.

The City conducts annual compliance sampling at several sampling locations, most notably from the first point of entry (POE) to the distribution system. According to the City's Water Treatment Plant laboratory manager, the first POE is the tap located in the Water Treatment Plant's analytical laboratory.

POINTS OF ENTRY FOR THE CITY'S DELIVERY OF DRINKING WATER TO THE TOWN

Plans of the distribution system serving the Town, provided by the Town's Public Works Department (PWD), identified five potable water transmission mains (large diameter pipes) crossing the Intracoastal Waterway and connecting to the distribution system to deliver the City's potable water product to the Town. These five pipes include:

- A 24-inch diameter transmission main crossing the Intracoastal Waterway (ICW) from/to 5th Street (in the City) to the eastern flank of the Royal Poinciana Bridge (in the Town):
- A 16-inch diameter water main crossing the ICW from/to 45th Street (in the City) to the intersection of North Lake Way and Orange Grove Road (in the Town);
- A 16-inch diameter water main crossing the ICW from the southern end of Flagler Drive (in the City) to the west end of "Sloan's Curve (on State Road A1A, in the Town);
- A 16-inch diameter water main crossing the ICW from the intersection of Southern Boulevard with Flagler Drive (in the City) to the eastern flank of the Southern Boulevard Bridge (in the Town); and
- A 20-inch main crossing the ICW from the City to Everglades Island, near Barcelona Avenue (in the Town).

Figure 1 also depicts the approximate ICW crossings and points of entry (POEs) of the transmission mains to the Town. The scale of the map does not allow an accurate depiction of the POEs associated with the mains. Maps of the Town's distribution system provided by the PWD, generated at a significantly larger scale, were used to reference the locations of the POEs for the transmission mains.

SAMPLING AND ANALYSIS OF THE DRINKING WATER PRODUCT DELIVERED TO THE TOWN

As a means to independently evaluate the quality of the drinking water being delivered to the Town, on November 14, 2008 HSA, accompanied by an employee of the City's Public Utilities Department, sampled distribution system tap IDSE #6, representing the northern-most extent of the system, and tap 3230, representing the southern-most extent of the system,. **Figure 1** depicts these sampling tap locations.

Sampling was performed by modification of the City's (distribution system) General Sampling Procedures to reflect the intended exclusion of sampling equipment, field parameter testing, associated equipment calibration requirements. Samples were collected in laboratory-supplied, unpreserved and pre-preserved containers. As required by select analytical methodologies, at the sampling locations preservative was added to those sample containers immediately prior to filling or to the water sample immediately prior to sealing the sample container.

Collected water samples were submitted to FDOH/NELAC-certified testing laboratories for analysis for typical public potable water system routine and compliance monitoring parameters including Primary Drinking Water Standards (excluding select Disinfection Byproducts, Haloacetic Acids; Bromite; and Chlorite), for Secondary Drinking Water Standards, and for Total Coliform as listed in the Florida Administrative Code rule 62-550. Test America Laboratories performed all of the analyses for chemical parameters. Jupiter Environmental Laboratories performed the analyses for the microbiologics.

RESULTS FROM INDEPENDENT ANALYSIS OF THE CITY'S DRINKING WATER PRODUCT

Results of laboratory analysis for target Primary and Secondary Drinking Standards yielded all chemical and physical parameters below method detection limits (MDLs) or less than respective maximum contaminant limits (MCLs).

Results of laboratory analysis for target microbiologicals yielded an absence of Total Coliform in the water samples collected from northern-most Tap A (IDSE #6) and southern-most

Tap B (3230). **Table 1** arrays the target Primary and Secondary Drinking Standards, regulated MCLs, required sampling frequency, and laboratory analytical results for the November 14, 2008-collected water samples.

Appendix A contains the laboratory analytical reports from HSA's November 14, 2008 sampling event.

COMPARISON TO RECENT CITY MONITORING PROGRAM RESULTS

The City's most recent annual compliance monitoring event for Primary and Secondary Drinking Water Standards was performed in June 2008. The sample of 'finished' water product was collected at a sampling point (laboratory tap) at the water treatment plant. Analysis was performed by the City's FDOH/NELAC-certified, vendor analytical laboratory, Genapure. Analysis yielded all target parameter results below method detection limits (MDLs) or less than respective maximum contaminant limits (MCLs) per Chapter 62-550, F.A.C.

The City's most recent quarterly routine monitoring event for Nitrate and Nitrite was performed in August 2008. The sample of 'finished' water product was also collected at the water treatment plant's laboratory tap. Analysis was again performed by the City's vendor analytical laboratory, Genapure. The detected concentration of Nitrate was less than the MCL (10 mg/L). The concentration of Nitrite was below the MDL (< 0.053 mg/L). Nitrate concentrations from HSA's November 2008 sampling event are lower than either result reported from the City's annual or latest quarterly sampling from the water treatment plant's laboratory tap. The difference between these results is not relevant since the reported concentrations from the City and from HSA's sampling event are still less than the MCL.

Table 1 includes a comparative array of the City's monitoring program results to the results from HSA's November 2008 distribution system tap sampling for the target Primary and Secondary Drinking Standards.

APPLICATION OF DISINFECTION CHEMICALS, BYPRODUCTS, AND THE EFFECT ON TASTE

To eliminate the presence of microbiologics, such as Coliform bacteria, the City applies chlorine at the treatment plant to disinfect the processed supply water. This treatment process results in the formation of chemical compounds in the potable water product known as Disinfection Byproducts (DBPRs). The allowable concentrations of DBPRs in drinking water are set as Standards in FDEP rule 62-550, F.A.C.

The latest quarterly (3-month) reporting period for the City's weekly routine monitoring of DBPRs (Total Trihalomethanes, TTHMs) ended September 2008. The samples of water

product are regularly collected at a series of distribution system sampling taps. Analysis was performed by the City's analysts at the Water Treatment Plant's laboratory. Results from HSA's sampling of the Town's drinking water from northern-most Tap A (IDSE #6) are directly compared to the City's routine sampling of drinking water from distribution system tap LINL (closest to Tap A). Results from HSA's sampling of the Town's drinking water from southern-most Tap B (3230) are compared directly to those from the City's sampling of that tap. TTHM concentrations from HSA's November 2008 sampling event are slightly higher than the averages of the results reported from the City's latest quarterly sampling from tap LINL and tap 3230, respectively. The difference between these results is not relevant since the reported concentrations from the City and from HSA's sampling event are still less than the MCL. It is noted that the concentration of TTHMs reported from the City's annual compliance event (collected at the Treatment Plant) is close to the MCL. This is not unexpected as the sampling location (treatment plant laboratory tap) is much closer to the point of disinfection than the distribution system sampling taps. **Table 1** includes a comparative array of the detected TTHM's from City's monitoring program to those detected from HSA's November 2008 sampling event as well as the TTHM Standards per rule 62-550, F.A.C.

The City Public Utilities Department acknowledges that to keep the potable water product free of microbiologics occasionally requires increasing the concentration of disinfecting chlorine added to the supply water. This results in brief incidences of potable water product with a notable change in the taste and higher concentrations of DBPRs. Concentrations of DBPRs and the stronger taste of chlorine subside with the inevitable reduction of chlorination.

CONCLUSION

As a measure of the quality of the drinking water product being delivered to the Town by the City, results from HSA's November 2008 collection of potable water from the northern-most and southern-most distribution system sampling taps revealed target regulated drinking water parameters at concentrations below the MCL standards established in FDEP rule 62-770, F.A.C.

A comparative of the results obtained from HSA's sampling event to the City's reported annual and quarterly results from 2008 monitoring events found minor variations in reported concentrations for select parameters (see **Table 1**). These variations pose no concern for the quality of the potable water product being delivered to the Town since all parameter concentrations reported from the City's monitoring events and by HSA's sampling event are less than respective MCLs.

Comparison of a three-year average of the concentrations of Primary and Secondary Drinking Water Standards from the City's annual compliance monitoring events (circa 2006, 2007, and 2008) to the results from HSA's November 2008 distribution system tap sampling reveals relative equivalence with irrelevant differences between select parameters concentrations since the averaged City results are less than respective MCLs (see **Table 1**).

With the exception of the occasional spike in concentrations of DBPRs (and corresponding stronger taste of chlorine in the delivered drinking water) resulting from the City's need to increase the application of sanitizing chemicals (i.e. chlorine) to treat supply water, HSA concludes that the quality of the potable water product delivered to the Town by the City meets or beats the criteria for the standards established under rule 62-550, F.A.C.

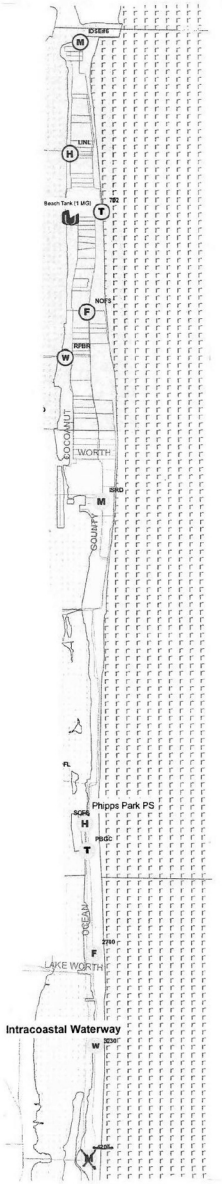
Prepared by:

HSA Engineers & Scientists
A member of the CRA family of companies

Michael R. Fisher, P.G.
Senior Project Manager

Thomas Emenhiser
Regional Manager

Attachments: Figure 1
Table 1
Appendix A – Laboratory Reports of Test Results



After Malcolm Pirnie, Exhibit 3
"City of West Palm Beach/ Water Distribution System
Recommended TCR Sampling Sites and Schedule"

Legend

Sampling Schedule

- E Every day
- F Fri
- M Mon
- A Mon and Thu
- H Thu
- T Tue
- W Wed

Sampling Route

- North Palm Beach
- South Palm Beach

Scale

0 1.5 3 Miles

Status	Region	Abbreviation	Street address	Schedule
Existing	North Palm Beach	702	702 N. County Rd.	Tue
Existing	North Palm Beach	LINL	List Rd and N. Lake Way	Thu
Existing	North Palm Beach	NOFS	NOFS North Fire Station	Fri
Existing	North Palm Beach	RPBR	Royal Poinciana and Bradley Pl.	Wed
New	North Palm Beach	IDSE#6	North end of ocean blvd	Mon
Existing	South Palm Beach	2780	2780 S. Ocean Blvd	Fri
Existing	South Palm Beach	3230	3230 S. Ocean Drive	Wed
Existing	South Palm Beach	4201	4201 S. Ocean Blvd	Mon
Existing	South Palm Beach	ISRD	ISRD Island Road	Mon
Existing	South Palm Beach	PBGC	PBGC Palm Beach GolfCourse	Tue
Existing	South Palm Beach	SOFS	SOFS South Fire Station	Thu

FIGURE 1

SHEET TITLE
TOWN OF PALM BEACH
DISTRIBUTION SYSTEM
SAMPLING SITES

DESIGNED	JOB NO.: 803031900
DRAWN K. GRECO	DATE: 10/07/2008
CHECKED M. FISHER	CAD NO.: 001

HSA ENGINEERS & SCIENTISTS
1486-A Skees Road West Palm Beach, Florida 33411 Tel: (561) 688-9008

TOWN OF PALM BEACH PUBLIC WORKS
951 OLD OKEECHOBEE ROAD
WEST PALM BEACH, FLORIDA

From: Kirk Blouin
To: John Page
Cc: Police Code Enforcement
Subject: Re: ARCOM
Date: Thursday, June 26, 2008 2:09:06 PM

JP,

Here is a copy of the minutes from the April CEB hearing. Each month thereafter the case was postponed because we were aware that it was being brought to ARCOM. Now that this matter has been resolved with ARCOM we will proceed with a code enforcement case until the property is in compliance (meaning they plant the shrubbery and hedges approved by the Town).

Sgt. Krauel or Rob Walton will be available on July 23rd as I will be attending a conference.

H. Case # 08-2484, 515 N. County Road, Trump Properties, LLC

Violation of Chapter 18, Section 18-205 of the Town of Palm Beach Code of Ordinances, the Architectural Commission may attach conditions to any approval it grants (Declaration of Use Agreement).

Lead Code Enforcement Walton presented the facts of the case and said the previous owner of the property, Abe Gosman, had been granted approval by the Architectural Commission to do some remodeling. One of the conditions of this approval was that the hedge along the front of the property be maintained in the condition it was in at the time the approval was granted. This agreement was a binding agreement, which passes on to any subsequent property owner. The agreement was made January 31, 1990. The subsequent buyer of this property was Mr. Trump, Trump Properties, LLC and some remodeling work was done, removing the previous hedge. A new hedge was planted to replace the original hedge and that one has now been removed. This is a violation of the agreement. A letter was received from Mr. Royce, representing Mr. Trump, asking for a postponement of today's hearing. The Town does not feel this matter should be postponed.

Mr. Randolph summarized the letter from Mr. Royce which indicated the ficus hedge keeps dying and they want to replace it with something different. They plan on hiring a landscape architect to go before the next Architectural Commission meeting to get approval to install a hedge in an attempt to meet the conditions of the declaration of use agreement. Mr. Randolph said he had discussions with Mr. Royce and Mr. Walton and Mr. Royce was told the Town could not recommend a postponement and the recommendation would be that they are found in violation, assessed the $150.00 in administrative costs and be given until June 18th, which is the day before the June Code Enforcement Board meeting, to comply. This would give them the opportunity to appear before the Architectural Commission to see if they can get approval to re-plant a hedge. The hedge has to be installed to the height which existed at the time of the agreement which Mr. Randolph said he believed was twenty-two (22) feet. Mr. Randolph said Mr. Royce was not present today because he had a planned vacation.

MOTION BY MR. FRIED TO FIND THE VIOLATOR IN NON-COMPLIANCE, ASSESS ADMINISTRATIVE COSTS OF $150.00 AND GIVE THEM UNTIL JUNE 18, 2008 TO COMPLY.

SECONDED BY MS. VAN BUREN

MOTION PASSED UNANIMOUSLY

From: John Page/PalmBeach
To: Kirk Blouin/PalmBeach@PalmBeach
Cc: Tim Frank/PalmBeach@PalmBeach
Date: 06/26/2008 09:00 AM
Subject: ARCOM

Kirk: We had our June monthly ARCOM meeting yesterday. You likely know that ARCOM is working with Mr. Trump to re-install a hedge on his North County Road property. I believe this case is now pending in front of Code Enforcement. In May, ARCOM approved a plan to replace the former hedge with silver buttonwood shrubbery, which would additionally be back-planted with silver buttonwood trees....the overall effect would be an eventual 20' high screen. The shrubs have been planted, but yesterday attorney Ray Royce asked for postponing the trees until the end of the Hurricane season. ARCOM said NO and directed the attorney and landscaper to get the trees in ASAP. Also, more shrubbery was required at the main entry (north side) to match the newly installed hedge on the south side.

As the meeting was ending, the Commissioners asked for one of two things. They asked that either 1) a quick written report from Code Enforcement be made available to them at their next meeting on July 23 (9:00 a.m.) about the enforcement status of the case, or 2) that someone from Code Enforcement attend their meeting to provide a verbal status report. Their patience is wearing thin with the whole hedge issue, and it has them naturally curious about what is happening with their counterparts on Code Enforcement.

Would you or the appropriate representative from Code Enforcement be available on July 23? That would be my preference because follow-up questions almost always pop up. If not, can you provide me with a brief summary of your enforcement history and pending status? Thanks, JP

From: John Page
To: [redacted]
Subject: Re: Russian House
Date: Monday, May 04, 2009 5:23:18 PM

Mayor:

Happy to help. The address is 515 N. County Road.

JP

From: [redacted]
To: [redacted]
Date: 05/04/2009 04:28 PM
Subject: Russian House

JP: What is the address of the former Trump mansion on North Ocean purchased by the Russian?

MM

Remember Mom this Mother's Day! Find a florist near you now.

From: John Page
To: [redacted]
Subject: Re: Trump house
Date: Wednesday, November 19, 2008 7:54:32 AM

[redacted]

Mayor: The address you want is: 515 North County Road. (NOT North Ocean Blvd.) JP

From: [redacted]
To: [redacted]
Date: 11/19/2008 07:43 AM
Subject: Trump house

JP: Can you provide the # address for the old Gosman/Trump house on North Ocean Boulevard?

MM

Get the Moviefone Toolbar. Showtimes, theaters, movie news & more!

Document Produced in Native Format

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Document Produced in Native Format

OGE Form 278e (March 2014)
U.S. Office of Government Ethics; 5 C.F.R. part 2634 | Form Approved: OMB No. (3209-0001)

Report Type:	Annual
Year (Annual Report only):	2018
Date of Appointment/Termination:	January 20, 2017

UNITED STATES OFFICE OF
GOVERNMENT ETHICS
Preventing Conflicts of Interest in the Executive Branch

Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e)

Filer's Information

Last Name	First Name	MI	Position	Agency
Trump	Donald	J	President of the United States of America	

Other Federal Government Positions Held During the Preceding 12 Months:
N/A

Name of Congressional Committee Considering Nomination (Nominees only):
N/A

Filer's Certification - I certify that the statements I have made in this report are true, complete and correct to the best of my knowledge:

Signature:	Date:
	5/15/19

Agency Ethics Official's Opinion – On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments below)

Signature:	Date:
	5/15/19

Other Review Conducted By:

Signature:	Date:

U.S. Office of Government Ethics Certification (if required):

Signature:	Date:
	16 May 2019

Comments of Reviewing Officials:

OGE Form 278e(March 2014)

Instructions for Part 1

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	2 of 42

Part 1: Filer's Positions Held Outside United States Government

#	Organization Name	City/State	Organization Type	Position Held	From	To
1.	The Donald J. Trump Foundation, Inc. (Inactive)	New York, NY	Non profit	Director/President	02.16.87/02.16.87	Present/11.13.2016
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Prior reports indicated that President Trump resigned the Director position on 1/19/17. However, the resignation did not take effect as the Foundation was in the process of dissolution. The position of President was inadvertently omitted on prior reports.

Instructions for Part 2

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	3 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
002	40 Wall Street LLC Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	005	Over $50,000,000	rent	Over $5,000,000
004	401 North Wabash Venture LLC Underlying Assets: residential & commercial real estate Location: Chicago, IL See attached schedule	N/A	008	Over $50,000,000	rent condo sales	Over $5,000,000 $189,973
005	809 NORTH CANON LLC Underlying Assets: residential real estate Location: Beverly Hills, CA See attached schedule	N/A	009	$5,000,001 - $25,000,000		None (or less than $201)
007	845 UN Limited Partnership Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	012	$25,000,001 - $50,000,000	rent	$1,000,001 - $5,000,000
008	Caribusiness Investments, S.R.L. Underlying Assets: land (sold) Location: Dominican Republic See attached schedule	N/A	025	None (or less than $1,001)	land sales	$3,200,000
010	Country Apartments, LLC Value reported reflects bank account holding only. Additional Underlying Asset: none Entity set up to buy & sell residential real estate, New York, NY; See attached schedule	N/A	032	$1,001 - $15,000		None (or less than $201)
011	Country Properties, LLC Underlying Assets: residential real estate (sold) and residual receivables Location: Norfolk, VA See attached schedule	N/A	034	$15,001 - $50,000	sale	$146,875

THE ACCOMPANYING SCHEDULE (PART 2 - EXHIBIT A) IS AN INTEGRAL PART OF THE ABOVE AND SHOULD BE READ IN CONJUNCTION THEREWITH. Gaps in numerical sequence are due to the removal of previously reported items no longer reportable on this part. Information being reported from January 1, 2018 to December 31, 2018.

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
012	D B Pace Acquisition, LLC Value reported reflects bank account holding only. Additional Underlying Assets: land, building and ff&e (sold) Location: New York, NY See attached schedule	N/A	036	None (or less than $1,001)	sale	$4,100,000
013	DJT AEROSPACE LLC Underlying Assets: aircraft Location: New York, NY See attached schedule	N/A	039	$1,000,001 - $5,000,000		None (or less than $201)
014	DJT HOLDINGS LLC Value reported reflects bank account only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Holding company, New York, NY	N/A	042	$1,000,001 - $5,000,000	interest	$5,001 - $15,000
017	DJT OPERATIONS I LLC Underlying Assets: aircraft Location: New York, NY See attached schedule	N/A	046	Over $50,000,000	rent	$1,000,001 - $5,000,000
018	DT CONNECT II LLC Underlying Assets: aircraft Location: Palm Beach, FL See attached schedule	N/A	055	$1,000,001 - $5,000,000	rent	$15,001 - $50,000
020	DT DUBAI GOLF MANAGER LLC Value reported reflects bank account holding only. Additional Underlying Asset: management deal with DAMAC CRESCENT PROPERTIES LLC - value not readily ascertainable. Management company, Dubai, UAE; See attached schedule	N/A	059	$15,001 - $50,000	management fees	$314,580
021	DT HOME MARKS INTERNATIONAL LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with RNA RESOURCES GROUP LTD, DORYA INTERNATIONAL LLC, HOMESTUDIO INTERNATIONAL SA, WONU CO LTD - value not readily ascertainable. License holder, New York, NY; See attached schedule.	N/A	063	$1,001 - $15,000	royalties	$50,001 - $100,000

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Filer's Name	Page Number
Donald J. Trump	5 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
024	Excel Venture I LLC Underlying Assets: residential rental property Location: St. Martin, French West Indies See attached schedule	N/A	098	$5,000,001 - $25,000,000		None (or less than $201)
026	Fifty-Seventh Street Associates LLC Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	100	Over $50,000,000	rent	Over $5,000,000
028	Golf Productions LLC Value reported reflects bank account holding only. Entity promotes golf business, New York, NY; See attached schedule Value not readily ascertainable.	N/A	105	None (or less than $1,001)	golf related revenue	$870,000
030	TRUMP NATIONAL GOLF CLUB - JUPITER Underlying Assets: golf club Location: Jupiter, FL See attached schedule	N/A	117	Over $50,000,000	golf related revenue	$13,131,919
031	LAMINGTON FAMILY HOLDINGS LLC Underlying Assets: land Location: Bedminster, NJ See attached schedule	N/A	119	$100,001 - $250,000		None (or less than $201)
032	TRUMP NATIONAL GOLF CLUB - BEDMINSTER Underlying Assets: golf club Location: Bedminster, NJ See attached schedule	N/A	120	Over $50,000,000	golf related revenue	$15,728,572
034	MAR-A-LAGO CLUB, L.L.C. Underlying Assets: resort Location: Palm Beach, FL See attached schedule	N/A	126	Over $50,000,000	resort related revenue	$22,692,146
036	PINE HILL DEVELOPMENT LLC Underlying Assets: golf club Location: Pine Hill, NJ See attached schedule	N/A	142	$100,001 - $250,000		None (or less than $201)
037	Seven Springs LLC Underlying Assets: real estate Location: Mt. Kisco, NY See attached schedule	N/A	153	$25,000,001 - $50,000,000		None (or less than $201)
038	TRUMP TURNBERRY Underlying Assets: golf courses and resort Location: Turnberry, Scotland See attached schedule	N/A	157	Over $50,000,000	golf related revenue	$23,446,634
039	T International Realty LLC Value reported reflects bank account holding only. Additional Underlying Asset: brokerage company - value not readily ascertainable. Brokerage company, New York, NY; See attached schedule	N/A	160	$1,001 - $15,000	commissions	$1,624,575

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Filer's Name	Page Number
Donald J. Trump	6 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
040	THC CENTRAL RESERVATIONS LLC Value reported reflects bank account holding only. Additional Underlying Asset: hotel company - value not readily ascertainable. Hotel company, New York, NY; see attached schedule	N/A	167	$500,001 - $1,000,000		None (or less than $201)
041	THC CHINA DEVELOPMENT LLC Value reported reflects bank account holding only. Additional Underlying Asset: developer - value not readily ascertainable. Developer, New York, NY; See attached schedule	N/A	169	$1,001 - $15,000		None (or less than $201)
042	THC SALES & MARKETING LLC Value reported reflects bank account holding only. Additional Underlying Asset: management company - value not readily ascertainable. Management company, New York, NY; See attached schedule	N/A	184	$250,001 - $500,000		None (or less than $201)
043	The East 61 Street Company, LP Underlying Assets: residential real estate Location: New York, NY See attached schedule	N/A	199	$5,000,001 - $25,000,000	rent	$15,001 - $50,000
044	THE TRUMP CORPORATION Underlying Assets: management company Location: New York, NY See attached schedule	N/A	200	Over $50,000,000	management and related fees	$14,835,168
045	The Trump-Equitable Fifth Avenue Company Value reported reflects bank account only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Pass-thru entity, New York, NY	N/A	208	None (or less than $1,001)	rent	$100,001 - $1,000,000
046	TRUMP INTERNATIONAL GOLF LINKS - DOONBEG Underlying Assets: golf course and resort Location: Doonbeg, Ireland See attached schedule	N/A	211	$25,000,001 - $50,000,000	golf related revenue	$14,498,625
047	TIHT COMMERCIAL LLC Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	218	$5,000,001 - $25,000,000	rent	$1,000,001 - $5,000,000
048	TIHT HOLDING COMPANY LLC Underlying Assets: hotel condo unit Location: New York, NY See at	N/A	219	$1,000,001 - $5,000,000	rent	$50,001 - $100,000

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Filer's Name	Page Number
Donald J. Trump	7 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
049	TRUMP NATIONAL GOLF CLUB - CHARLOTTE Underlying Assets: golf club Location: Charlotte, NC See attached schedule	N/A	223	$5,000,001 - $25,000,000	golf related revenue	$12,457,295
050	TRUMP NATIONAL GOLF CLUB - HUDSON VALLEY Underlying Assets: golf club Location: Hopewell Junction, NY See attached schedule	N/A	225	$5,000,001 - $25,000,000	golf related revenue	$4,243,331
051	TRUMP NATIONAL GOLF CLUB - PHILADELPHIA Underlying Assets: golf club Location: Pine Hill, NJ See attached schedule	N/A	229	$5,000,001 - $25,000,000	golf related revenue	$4,089,471
052	TRUMP 106 CPS LLC Value reported reflects bank account holding only. Additional Underlying Asset: none Location: New York, NY; See attached schedule	N/A	234	$15,001 - $50,000		None (or less than $201)
057	TRUMP BOOKS LLC THE MIDAS TOUCH Value reported reflects bank account holding only. Additional Underlying Asset: book deal with Plata Publishing LLC - value not readily ascertainable. Holder of book contract, New York, NY, See attached schedule (Published 2011)	N/A	243	None (or less than $1,001)	royalties	$5,001 - $15,000
059	TRUMP CAROUSEL LLC Value reported reflects bank account holding only. Additional Underlying Asset: operating agreement with NEW YORK CITY DEPARTMENT OF PARKS & RECREATION - value not readily ascertainable. Carousel operator, New York, NY. See attached schedule	N/A	250	$15,001 - $50,000	admissions	$465,186
061	TRUMP CPS LLC Underlying Assets: commercial and residential real estate Location: New York, NY See attached schedule	N/A	269	$25,000,001 - $50,000,000	rent	$1,000,001 - $5,000,000
064	TRUMP NATIONAL DORAL Underlying Assets: golf courses & resort Location: Miami, FL See attached schedule	N/A	279	Over $50,000,000	golf resort related revenues	$75,962,848
065	TRUMP FERRY POINT LLC Underlying Assets: operating agreement with NEW YORK CITY DEPARTMENT OF PARKS & RECREATION - golf course Location: New York, NY See attached schedule (Opening Day: April 1, 2015)	N/A	283	$5,000,001 - $25,000,000	golf related revenue	$6,469,831

THE ACCOMPANYING SCHEDULE (PART 2 - EXHIBIT A) IS AN INTEGRAL PART OF THE ABOVE AND SHOULD BE READ IN CONJUNCTION THEREWITH. Gaps in numerical sequence are due to the removal of previously reported items no longer reportable on this part. Information being reported from January 1, 2018 to December 31, 2018.

Filer's Name	Page Number
Donald J. Trump	8 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
066	TRUMP GOLF ACQUISITIONS LLC Value reported reflects bank account holding only. Additional Underlying Asset: none. Entity set up to sign letters of intent for golf related deals, New York, NY; See attached schedule	N/A	287	$1,001 - $15,000	golf related revenue	$7,057
067	TRUMP HOME MARKS LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with DOWNLITE INTERNATIONAL INC, GOURMET HOME PRODUCTS LLC, NORTHPOINT TRADING LLC, SIGN OF TIMES INC, TPS SAS - value not readily ascertainable. License holder, New York, NY See attached schedule	N/A	291	$1,001 - $15,000		None (or less than $201)
068	TRUMP ICE LLC Value reported reflects bank account holding only. Additional Underlying Asset: wholesale company - value not readily ascertainable. Water wholesaler, New York, NY; See attached schedule	N/A	294	$1,001 - $15,000	sales	$222,053
069	TRUMP INTERNATIONAL GOLF LINKS - SCOTLAND Underlying Assets: golf course Location: Aberdeen, Scotland See attached schedule	N/A	297	Over $50,000,000	golf related revenue	$3,543,487
070	TRUMP INTERNATIONAL GOLF CLUB - FLORIDA Underlying Assets: golf club Location: West Palm Beach, FL See attached schedule	N/A	299	$25,000,001 - $50,000,000	golf related revenue	$12,325,355
071	TRUMP INTERNATIONAL HOTEL HAWAII LLC Value reported reflects bank account holding only. Additional Underlying Asset: management and license agreements with IRONGATE AZREP BW LLC - value not readily ascertainable. License holder, Waikiki, HI See attached schedule	N/A	300	None (or less than $1,001)	royalties management fees	$100,001 - $1,000,000 $1,785,996
072	TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC Underlying Assets: management company Location: New York, NY See attached schedule	N/A	301	Over $50,000,000	management fees	$1,511,377
073	TRUMP LAS VEGAS DEVELOPMENT LLC Value reported reflects bank account holding only. Additional Underlying Assets: development deal with TRUMP RUFFIN TOWER I LLC - value not readily assertainable. Entity set up to receive development fees, Las Vegas, NV See attached schedule	N/A	308	$1,001 - $15,000	development fees	$3,308,936
076	TRUMP MARKS ASIA LLC Underlying Assets: residential real estate Location: Sterling, VA See attached schedule	N/A	316	$500,001 - $1,000,000		None (or less than $201)

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Filer's Name	Page Number
Donald J. Trump	9 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
078	TRUMP MARKS ISTANBUL II LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with ORTADOGU OTOMOTIV TICARET AS - value not readily ascertainable. License holder, New York, NY See attached schedule	N/A	342	None (or less than $1,001)	royalties	$100,001 - $1,000,000
080	TRUMP MARKS MATTRESS LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with SERTA - value not readily ascertainable. License holder, New York, NY See attached schedule	N/A	350	None (or less than $1,001)	royalties	$5,001 - $15,000
081	TRUMP MARKS MENSWEAR LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with PVH CORP, PEERLESS CLOTHING INTERNATIONAL, PARLUX LTD, OXFORD OPTHALMIC, RANDA ACCESSORIES - value not readily ascertainable. License holder, New York, NY See attached schedule	N/A	352	$1,001 - $15,000	royalties	$15,001 - $50,000
087	TRUMP MARKS WAIKIKI LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with IRONGATE AZREP BW LLC - value not readily ascertainable. License holder, New York, NY See attached schedule	N/A	391	None (or less than $1,001)	royalties	$100,001 - $1,000,000
090	TRUMP MIAMI RESORT MANAGEMENT LLC Value reported reflects bank account holding only. Management company - value not readily ascertainable, Miami, FL; See attached schedule	N/A	396	$1,000,001 - $5,000,000		None (or less than $201)
091	TRUMP MODEL MANAGEMENT LLC Value reported reflects bank account holding only. Modeling agency (business winding down) Location: New York, NY See attached schedule	N/A	398	$50,001 - $100,000	residual income	$547
092	TRUMP NATIONAL GOLF CLUB - COLTS NECK Underlying Assets: golf club Location: Colts Neck, NJ See attached schedule	N/A	399	Over $50,000,000	golf related revenue	$6,775,959
093	TRUMP NATIONAL GOLF CLUB - WESTCHESTER Underlying Assets: golf club Location: Briarcliff Manor, NY See attached schedule	N/A	401	Over $50,000,000	golf related revenue	$7,213,358
094	TRUMP NATIONAL GOLF CLUB - WASHINGTON DC Underlying Assets: golf club Location: Potomac Falls, VA See attached schedule	N/A	403	Over $50,000,000	golf related revenue	$13,318,369

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Filer's Name	Page Number
Donald J. Trump	10 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
095	TRUMP OLD POST OFFICE LLC Underlying Assets: hotel Location: Washington, DC See attached schedule	N/A	408	Over $50,000,000	hotel related revenue	$40,842,294
097	Miss Universe L.P., LLLP Value reported reflects bank account holding only. Additional Underlying Asset: none See attached schedule	N/A	413	$50,001 - $100,000		None (or less than $201)
098	TRUMP PALACE/PARC LLC Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	414	$5,000,001 - $25,000,000	rent	$100,001 - $1,000,000
099	TRUMP PARK AVENUE LLC Underlying Assets: residential & commercial real estate Location: New York, NY See attached schedule	N/A	420	Over $50,000,000	rent	$1,000,001 - $5,000,000
100	TRUMP PLAZA LLC Underlying Assets: residential & commercial real estate Location: New York, NY See attached schedule	N/A	424	$25,000,001 - $50,000,000	rent	$1,000,001 - $5,000,000
101	TRUMP PRODUCTIONS LLC Value reported reflects bank account holding only. Additional Underlying Assets: production company - value not readily ascertainable. Location: New York, NY See attached schedule	N/A	426	None (or less than $1,001)	production revenue	$279,868
103	Trump Restaurants LLC Underlying Assets: restaurant/retail Location: New York, NY See attached schedule	N/A	430	$1,000,001 - $5,000,000	food & beverage and related merchandise sales	$4,364,103
104	TRUMP RUFFIN TOWER I LLC Underlying Assets: commercial real estate Location: Las Vegas, NV See attached schedule	N/A	434	Over $50,000,000	condo sales hotel related revenue	$6,002,244 $22,556,054
106	TRUMP SCOTSBOROUGH SQUARE LLC Underlying Assets: residential real estate Location: Scotsborough Square, VA See attached schedule	N/A	438	$500,001 - $1,000,000	rent	$5,001 - $15,000
108	TRUMP TOWER COMMERCIAL LLC Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	444	Over $50,000,000	rent	Over $5,000,000

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Filer's Name	Page Number
Donald J. Trump	11 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
109	TRUMP TOWER MANAGING MEMBER INC. Value reported reflects bank account holding only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Pass-thru entity. New York, NY	N/A	445	$1,001 - $15,000		None (or less than $201)
110	TRUMP VINEYARD ESTATES LLC Underlying Assets: vineyard Location: Charlottesville, VA See attached schedule	N/A	447	$5,000,001 - $25,000,000	rent	$100,001 - $1,000,000
111	TRUMP VINEYARD ESTATES LOT 3 OWNER LLC Underlying Assets: vineyard Location: Charlottesville, VA See attached schedule	N/A	448	$500,001 - $1,000,000	rent	$100,001 - $1,000,000
112	TRUMP VIRGINIA ACQUISITIONS LLC Underlying Assets: commercial real estate Location: Charlottesville, VA See attached schedule	N/A	450	$5,000,001 - $25,000,000	hotel related revenue	$1,140,943
113	TRUMP VIRGINIA LOT 5 LLC Underlying Assets: vineyard Location: Charlottesville, VA See attached schedule	N/A	452	$500,001 - $1,000,000	rent	$15,001 - $50,000
114	TVV VENTURE II LLC Value reported reflects bank account holding only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Pass-thru entity. Doonbeg, Ireland	N/A	464	$1,001 - $15,000		None (or less than $201)
116	TRUMP NATIONAL GOLF CLUB - LOS ANGELES Underlying Assets: golf course and unsold lots Location: Los Angeles, CA See attached schedule	N/A	469	Over $50,000,000	golf related revenue land sales	$10,913,069 $7,010,000
119	Wollman Rink Operations LLC Underlying Assets: operating agreement with NEW YORK CITY DEPARTMENT OF PARKS & RECREATION - ice skating rinks Location: New York, NY See attached schedule	N/A	476	$1,000,001 - $5,000,000	ice skating rink operation	$8,493,215
120	HWA 555 Owners, LLC Underlying Assets: commercial real estate Location: San Francisco, CA See attached schedule	N/A	478	Over $50,000,000	rent	Over $5,000,000
121	1290 AVENUE OF THE AMERICAS, A TENANCY-IN-COMMON Underlying Assets: commercial real estate Location: New York, NY See attached schedule	N/A	479	Over $50,000,000	rent	Over $5,000,000

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Filer's Name	Page Number
Donald J. Trump	12 of 42

Part 2: Filer's Employment Assets and Income

#	Description	E/F	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
122	4% limited partnership interest in Starrett City Associates, L.P. (via the entities disclosed on Exhibit A and direct ownership by The Donald J. Trump Revocable Trust) Value of remaining distributions not readily ascertainable Additional Underlying Assets: residential real estate (sold) Location: Brooklyn, NY	N/A	018, 141, 154, 446		rent distributable share including sales proceeds	$1,000,001 - $5,000,000 $13,355,178
123	4% limited partnership interest in Spring Creek Plaza LLC (via the entities disclosed on Exhibit A and direct ownership by The Donald J. Trump Revocable Trust) Value of remaining distributions not readily ascertainable Additional Underlying Assets: commercial real estate (sold) Location: Brooklyn, NY	N/A	018, 141, 154, 446		rent distributable share including sales proceeds	$15,001 - $50,000 $1,099,840
124	Trump Tower Triplex Underlying Assets: residential real estate Location: New York, NY	N/A		Over $50,000,000		None (or less than $201)
125	N/K/A DT VENTURE I LLC Underlying Assets: residential real estate Location: Palm Beach, FL See attached schedule	N/A	533	$5,000,001 - $25,000,000	rent	$100,001 - $1,000,000
126	N/K/A DTW VENTURE LLC Underlying Assets: residential real estate Location: Palm Beach, FL See attached schedule	N/A	093	$1,000,001 - $5,000,000	rent	$100,001 - $1,000,000

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Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
127	DT Marks Worl LLC Underlying Assets: license deal Licensee(s): JAWALA REAL ESTATE PRIVATE LTD, LODHA DEVELOPERS PRIVATE LTD Location: New York, NY See attached schedule Value not readily ascertainable	N/A	089		royalties	$100,001 - $1,000,000
130	THC VANCOUVER MANAGEMENT CORP Underlying Assets: management company Location: Vancouver, Canada See attached schedule Value not readily ascertainable	N/A	190		management fees	$213,946
132	TNGC JUPITER MANAGEMENT LLC Value reported reflects bank account holding only. Additional Underlying Asset: management company Location: Jupiter, FL See attached schedule Value not readily ascertainable	N/A	227	$15,001 - $50,000	management fees	$375,552
133	TRUMP CHICAGO COMMERCIAL MANAGER LLC Underlying Assets: management company Location: New York, NY See attached schedule Value not readily ascertainable	N/A	254		management fees	$142,830
134	TRUMP CHICAGO HOTEL MANAGER LLC Value reported reflects bank account holding only. Underlying Asset: management company Location: New York, NY See attached schedule Value not readily ascertainable	N/A	256	None (or less than $1,001)	management fees	$1,702,003
135	TRUMP CHICAGO RESIDENTIAL MANAGER LLC Underlying Assets: management company Location: New York, NY See attached schedule Value not readily ascertainable	N/A	260		management fees	$524,819
136	TRUMP MARKS FINE FOODS LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with TWO RIVERS COFFEE - value not readily ascertainable. License holder, New York, NY See attached schedule	N/A	333	None (or less than $1,001)	royalties	$5,001 - $15,000

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Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
137	TRUMP MARKS PHILIPPINES LLC Value reported reflects bank account holding only. Licensee(s): CENTURY CITY DEVELOPMENT CORP Location: New York, NY See attached schedule Value not readily ascertainable	N/A	367	None (or less than $1,001)	royalties	$1,000,001 - $5,000,000
140	TRUMP MARKS SUNNY ISLES I LLC Value reported reflects bank account holding only. Additional Underlying Assets: license deal - value not readily ascertainable. Licensee(s): MICHAEL DEZER & NAOMI DEZERTOV Location: New York, NY See attached schedule	N/A	381	$1,001 - $15,000	royalties	$100,001 - $1,000,000
141	TRUMP PANAMA HOTEL MANAGEMENT LLC Value reported reflects bank account holding only Underlying Assets: management agreement Location: New York, NY See attached schedule Value not readily ascertainable	N/A	417	None (or less than $1,001)	management fees	$3,016
142	TRUMP TORONTO HOTEL MANAGEMENT CORP Value reported reflects bank account holding only. Additional Underlying Asset: management deal with TALON INTERNATIONAL INC - value not readily ascertainable. Management company, New York, NY; See attached schedule.	N/A	442	$1,001 - $15,000		None (or less than $201)
143	TW VENTURE I LLC Value reported reflects bank account holding only. Additional Underlying Asset: transportation services company - value not readily ascertainable. Palm Beach, FL See attached schedule	N/A	462	$15,001 - $50,000	operating income	$99,093
144	Trump Management Inc. Value reported reflects bank account holding only. Additional Underlying Asset: management company - value not readily ascertainable Location: Manhasset, NY See attached schedule	N/A	480	$15,001 - $50,000		None (or less than $201)
146	Think Like A Champion Publisher: Vanguard Press, a member of Perseus Books LLC Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2009)	N/A			royalties	$2,501 - $5,000

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Filer's Name	Page Number
Donald J. Trump	15 of 42

Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
147	The Art Of The Deal Publisher: Random House Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 1987)	N/A			royalties	$100,001 - $1,000,000
148	Time To Get Tough Publisher: Regnery Publishing Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2011)	N/A			royalties	$15,001 - $50,000
149	Think Like a Billionaire Publisher: Random House Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2004)	N/A				None (or less than $201)
150	The Art of the Comeback Publisher: Random House Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 1997)	N/A				None (or less than $201)
151	Why We Want You To Be Rich Publisher: Plata Publishing LLC Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2006)	N/A				None (or less than $201)
152	Trump 101: The Way to Success Publisher: John Wiley & Sons, Inc. Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2007)	N/A				None (or less than $201)
153	The America We Deserve Publisher: Renaissance Books Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2000)	N/A				None (or less than $201)
154	Never Give Up Publisher: John Wiley & Sons, Inc. Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2008)	N/A				None (or less than $201)

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Part 2: Filer's Employment Assets and Income

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155	The Best Real Estate Advice I Ever Received Publisher: Thomas Nelson, Inc. Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2005)	N/A				None (or less than $201)
156	The Way To The Top Publisher: Bill Adler Books Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2004)	N/A			royalties	$2,501 - $5,000
157	How to Get Rich Publisher: Random House Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2004)	N/A			royalties	$15,001 - $50,000
158	Think Big and Kick Ass Publisher: HarperCollins Publishers Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2007)	N/A				None (or less than $201)
159	Trump: Surviving At The Top Publisher: Random House Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 1990)	N/A				None (or less than $201)
160	SCREEN ACTORS GUILD PENSION Underlying Assets: pension Location: Burbank, CA Value not readily ascertainable	N/A			pension	$90,776
169	THC MIAMI RESTAURANT HOSPITALITY LLC Value reported reflects bank account holding only. Restaurant operations at Trump National Doral Location: Miami, FL	N/A	178	$50,001 - $100,000	food & beverage related sales	$5,454,349
178	THC IMEA DEVELOPMENT LLC Value reported reflects bank account holding only. Additional Underlying Asset: developer - value not readily ascertainable. Location: New York, NY See attached schedule.	N/A	177	$1,001 - $15,000		None (or less than $201)

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Part 2: Filer's Employment Assets and Income

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180	TRUMP MARKS PUNTA DEL ESTE LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with AETOS SA and FAROY SA - value not readily ascertainable. License holder, Punta Del Este, Uruguay; See attached schedule.	N/A	374	None (or less than $1,001)	royalties	$100,001 - $1,000,000
181	DT BALI TECHNICAL SERVICES MANAGER LLC Value reported reflects bank account holding only. Additional Underlying Asset: management deal with PT BALI NIRWANA RESORT - value not readily ascertainable. Management company, Bali, Indonesia; See attached schedule.	N/A	497	None (or less than $1,001)	management fees	$110,713
182	DT CONNECT EUROPE LIMITED Value reported reflects bank account holding only. Additional Underlying Assets: aircraft (transferred) Location: Turnberry, Scotland See attached schedule	N/A	499	$1,001 - $15,000	rent	$50,001 - $100,000
183	DT ENDEAVOR I LLC Underlying Assets: aircraft Location: Palm Beach, FL See attached schedule	N/A	500	$5,000,001 - $25,000,000		None (or less than $201)
184	DT LIDO TECHNICAL SERVICES MANAGER LLC Value reported reflects bank account holding only. Additional Underlying Asset: management deal with PT LIDO NIRWANA PARAHYANGAN - value not readily ascertainable. Management company, Lido, Indonesia; See attached schedule.	N/A	509	$1,001 - $15,000	management fees	$101,487
187	MOBILE PAYROLL CONSTRUCTION LLC Value reported reflects bank account holding only. Additional Underlying Asset: none Payroll company, Bedminster, NJ; See attached schedule	N/A	523	$50,001 - $100,000		None (or less than $201)
188	CRIPPLED AMERICA Publisher: Threshold Editions Underlying Assets: book Location: New York, NY Value not readily ascertainable (Published 2015)	N/A				None (or less than $201)
189	DTTM OPERATIONS LLC Value reported reflects bank account holding only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Pass-thru entity. New York, NY	N/A	519	$1,001 - $15,000		None (or less than $201)

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Part 2: Filer's Employment Assets and Income

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191	Trump Las Vegas Sales & Marketing, Inc. Value reported reflects bank account holding only. Additional Underlying Assets: sales & marketing deal with TRUMP RUFFIN TOWER I LLC - value not readily ascertainable. Entity set up to receive brokerage commissions, Las Vegas, NV; See attached schedule	N/A	311	$1,001 - $15,000	commissions	$162,439
192	DT TOWER KOLKATA LLC Value reported reflects bank account holding only. Additional Underlying Asset: license deal with CONCAST INFRASTRUCTURE PRIVATE LIMITED, TRIBECA CREATORS LLP, REGENT HIRISE PRIVATE LIMITED, RAJ CONSTRUCTION PROJECTS PRIVATE LIMITED, RDB REALTY & INFRASTRUCTURE LIMITED - value not readily ascertainable. License holder, Kolkata, India; See attached schedule.	N/A	517	$1,001 - $15,000	royalties	$100,001 - $1,000,000
194	STORAGE 106 LLC Underlying Assets: commercial real estate (asset transferred in 2018) Location: New York, NY See attached schedule	N/A	542	None (or less than $1,001)	rent	$50,001 - $100,000
195	SC CLEVELAND MS MANAGEMENT LLC Value reported reflects bank account holding only. Additional Underlying Asset: management deal with CHAWLA POINTE, LLC Management company, Cleveland, MS; See attached schedule Value not readily ascertainable	N/A	545	None (or less than $1,001)	management fees	$10,303
196	T RETAIL LLC Underlying Asset: online retail business Location: New York, NY See attached schedule	N/A	548	$250,001 - $500,000	sales	$520,305
197	WESTMINSTER HOTEL MANAGEMENT LLC Value reported reflects bank account holding only. Additional Underlying Asset: management deal with ESPLANADE LIVINGSTON, LLC Management company, Livingston, NJ; See attached schedule Value not readily ascertainable	N/A	550	None (or less than $1,001)	management fees	$142,415

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Part 2: Filer's Employment Assets and Income

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198	AMERICAN FEDERATION of TELEVISION and RADIO ARTISTS PENSION Underlying Assets: pension Location: New York, NY Value not readily ascertainable	N/A			pension	$8,724
199	WB Studio Enterprises Inc Residual income earned from movies/television Individual programs generated less than $200 of income Location: Burbank, CA Value not readily ascertainable	N/A			royalties	$201 - $1,000
200	Universal City Studios LLC Residual income earned from movies/television The Little Rascals All others generated less than $200 of income Location: New York, NY Value not readily ascertainable	N/A			royalties	$201 - $1,000
201	Entertainment Partners Residual income earned from movies/television Location: Burbank, CA Value not readily ascertainable	N/A				None (or less than $201)
202	GOLF RECREATION SCOTLAND LIMITED Value reported reflects bank account holding only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Pass-thru entity. Turnberry, Scotland	N/A	107	$1,001 - $15,000		None (or less than $201)
203	TRUMP DEVELOPMENT SERVICES LLC Value reported reflects bank account holding only. Additional Underlying Asset: management company - value not readily ascertainable. Location: New York, NY See attached schedule	N/A	271	None (or less than $1,001)	management fees	$848,604
204	TURNBERRY SCOTLAND LLC Value reported reflects bank account holding only. Entity's other holdings and assets are reported elsewhere; see attached schedule. Pass-thru entity. Turnberry, Scotland	N/A	460	$1,001 - $15,000		None (or less than $201)

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Part 2: Filer's Employment Assets and Income

#	Description	EIF	attached schedule (Part 2 - EXHIBIT A) Reference #	Value	Income Type	Income Amount
205	4T HOLDINGS TWO LLC Value reported reflects bank account holding only. Additional Underlying Asset: management company - value not readily ascertainable. Location: New York, NY See attached schedule	N/A	541	None (or less than $1,001)	consulting fees	$61,045
206	T EXPRESS LLC Value reported reflects bank account holding only. Additional Underlying Asset: potential hotel deal (inactive) - value not readily ascertainable. Location: New York, NY See attached schedule	N/A	543	None (or less than $1,001)	administrative fees	$1,937
207	T PROMOTIONS LLC Value reported reflects bank account holding only. Additional Underlying Asset: administrative agent entity for gift card redemptions Location: New York, NY See attached schedule	N/A	547	$50,001 - $100,000		None (or less than $201)
208	1125 South Ocean LLC Underlying Assets: residential real estate and bank account Location: Palm Beach, FL See attached schedule	N/A	552	$5,000,001 - $25,000,000	interest	$15,001 - $50,000

THE ACCOMPANYING SCHEDULE (PART 2 - EXHIBIT A) IS AN INTEGRAL PART OF THE ABOVE AND SHOULD BE READ IN CONJUNCTION THEREWITH. Gaps in numerical sequence are due to the removal of previously reported items no longer reportable on this part. Information being reported from January 1, 2018 to December 31, 2018.

Instructions for Part 3

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	21 of 42

Part 3: Filer's Employment Agreements and Arrangements

#	Employer or Party	City/State	Status and Terms	Date
1.	Screen Actors Guild - Producers	Burbank, CA	Pension Plan for Motion Picture Actors; payments received on a monthly basis. The date reflects the year that Donald J. Trump began participating in the plan.	1992
2.	AMERICAN FEDERATION of TELEVISION and RADIO ARTISTS Retirement Fund	New York, NY	Pension Plan for Television and Radio Artists; payments received on a monthly basis. The date reflects the year that Donald J. Trump began participating in the plan.	1989
3.				
4.				
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Instructions for Part 4

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	22 of 42

Part 4: Filer's Sources of Compensation Exceeding $5,000 in a Year

#	Source Name	City/State	Brief Description of Duties
1.	N/A		
2.			
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Instructions for Part 5

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	23 of 42

Part 5: Spouse's Employment Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
1.	Melania LLC Underlying Assets: inactive Location: New York, NY	N/A	None (or less than $1,001)		None (or less than $201)
2.	MELANIA MARKS ACCESSORIES LLC Underlying Assets: licensing agreement Licensee(s): MZ BERGER & COMPANY LLC Location: New York, NY Value not readily ascertainable	N/A			None (or less than $201)
3.	MELANIA MARKS ACCESSORIES MEMBER CORP (pass-thru company for MELANIA MARKS ACCESSORIES LLC) Location: New York, NY Value not readily ascertainable	N/A			None (or less than $201)
4.	721 33H LLC Underlying Assets: residential real estate Location: New York, NY	N/A	$1,000,001 - $5,000,000		None (or less than $201)
5.	721 33H Holdings LLC (pass-thru company for 721 33H LLC) Location: New York, NY Value not readily ascertainable	N/A			None (or less than $201)
6.	Getty Images Inc. Use of photographic images Location: New York, NY Value not readily ascertainable	N/A			None (or less than $201)

Instructions for Part 6

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Filer's Name	Page Number
Donald J. Trump	24 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
1	JP MORGAN CHASE - CHECKING AND SAVINGS ACCOUNTS	N/A	$500,001 - $1,000,000	Interest	$1,001 - $2,500
2	CAPITAL ONE BANK - CHECKING AND SAVINGS	N/A	$5,000,001 - $25,000,000	Interest	$100,001 - $1,000,000
3	SIGNATURE BANK - CHECKING	N/A	$100,001 - $250,000	Interest	$1,001 - $2,500
4	BANK UNITED, NA - MONEY MARKET	N/A	$100,001 - $250,000	Interest	$1,001 - $2,500
5	FIRST REPUBLIC BANK - CHECKING	N/A	$15,001 - $50,000	Interest	None (or less than $201)
6	INVESTMENT IN GOLD	N/A	$100,001 - $250,000		None (or less than $201)
7	WMTMF LLC (US BANK CASH ACCOUNT)	N/A	$50,001 - $100,000		None (or less than $201)
8	MBWT LLC Underlying assets are not reportable	No			
	The Fred C. Trump December 16, 1976 Trust- F/B/O Donald J. Trump				
1	JP MORGAN CHASE - SAVINGS ACCOUNT	N/A	$1,000,001 - $5,000,000	Interest	$2,501 - $5,000
1	JP MORGAN CLEARING CORP - BROKERAGE ACCOUNT - HOLDINGS				
2	ECO TEK 360 INC (f/k/a GLOBAL FASHION TECHNOLOGIES)	N/A	$1,001 - $15,000		None (or less than $201)
	The Donald J Trump Revocable Trust				
1	CAPITAL ONE BANK - CHECKING AND SAVINGS	N/A	$25,000,001 - $50,000,000	Interest	$100,001 - $1,000,000
2	PROFESSIONAL BANK - MONEY MARKET	N/A	$5,000,001 - $25,000,000	Interest	$50,001 - $100,000
3	SIGNATURE BANK - MONEY MARKET	N/A	$5,000,001 - $25,000,000	Interest	$2,501 - $5,000

Instructions for Part 6

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Filer's Name	Page Number
Donald J. Trump	25 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
4	BANK UNITED - MONEY MARKET	N/A	$5,000,001 - $25,000,000	Interest	None (or less than $201)
	Family Trust 1*			Interest, Dividends, Capital Gains	$15,001 - $50,000
1	AMG MG PICTET INTL-Z	Y	$1,001 - $15,000		
2	DODGE & COX INTL STOCK FD	Y	$1,001 - $15,000		
3	ISHARES MSCI EAFE INDEX FUND	Y	$15,001 - $50,000		
4	ISHARES CORE MSCI EAFE ETF	Y	$1,001 - $15,000		
5	JPMORGAN BETABUILDERS CANADA ETF	Y	$1,001 - $15,000		
6	SIX CIRCLES INTERNATIONAL UNCONSTRAINED EQUITY FUND	Y	$1,001 - $15,000		
7	ARTISAN INTL VALUE FD-INS	Y	$1,001 - $15,000		
8	JPM GL RES ENH IDX FD - USD - R6	Y	$15,001 - $50,000		
9	ISHARES INC MSCI JAPAN NEW	Y	$1,001 - $15,000		
10	FIDELITY 500 INDEX FD-AI	Y	$1,001 - $15,000		
11	JPM US L/C CORE PL FD - USD - R6	Y	$15,001 - $50,000		
12	NEUBERGER BER MU/C OPP-INS	Y	$15,001 - $50,000		
13	PRIMECAP ODYSSEY STOCK FD	Y	$15,001 - $50,000		
14	SPDR S&P 500 ETF TRUST	Y	$50,001 - $100,000		
15	SIX CIRCLES U.S. UNCONSTRAINED EQUITY FUND	Y	$1,001 - $15,000		
16	BLACKSTONE ALT MULTI-STRAT- Y	Y	$1,001 - $15,000		
17	CRM LONG/SHORT OPPORTUNITIES FUND	Y	$1,001 - $15,000		

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Instructions for Part 6

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Filer's Name	Page Number
Donald J. Trump	26 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
18	BOSTON P GL LG/SH EQ-INST	Y	$1,001 - $15,000		
19	GMO SGM MAJOR MARKETS FD-VI	Y	$1,001 - $15,000		
20	US Bank Cash Account	N/A	$15,001 - $50,000		
21	LORD ABBETT SHRT DUR INC-F3	Y	$1,001 - $15,000		
22	JPM SHRT-INT MUNI BND FD - USD - I	Y	$1,001 - $15,000		
23	SIX CIRCLES TAX AWARE ULTRA SHORT	Y	$1,001 - $15,000		
24	AMERICAN FUNDS THE TAX-EXEMPT BOND FUND OF AMERICA	Y	$1,001 - $15,000		
25	DODGE & COX INCOME FD	Y	$1,001 - $15,000		
26	ISHARES BARCLAYS 1-3 YEAR TREASURY	Y	$1,001 - $15,000		
27	METROPOLITAN WEST Total Return Bond-PLN	Y	$1,001 - $15,000		
28	AQR MANAGED FUTURES STR-R6	Y	None (or less than $1,001)		
29	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Y	None (or less than $1,001)		
30	FMI LARGE CAP FUND-INST	Y	None (or less than $1,001)		
31	AMERICAN BEACON GLG Total Return - Ultra	Y	None (or less than $1,001)		
32	JOHN HAN II-ABS RET CURR-R6	Y	None (or less than $1,001)		
33	MFS EMERGING MKTS DEBT FD R6	Y	None (or less than $1,001)		
34	PIMCO UNCONSTRAINED BOND-INS	Y	None (or less than $1,001)		
35	AQR LONG-SHORT EQUITY-R6	Y	None (or less than $1,001)		
36	BLACKROCK HIGH YIELD PT-BLAC	Y	None (or less than $1,001)		

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Instructions for Part 6

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Filer's Name	Page Number
Donald J. Trump	27 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
	Family Trust 2*			Interest, Dividends, Capital Gains	$15,001 - $50,000
1	AMG MG PICTET INTL-Z	Y	$1,001 - $15,000		
2	DODGE & COX INTL STOCK FD	Y	$1,001 - $15,000		
3	ISHARES MSCI EAFE INDEX FUND	Y	$15,001 - $50,000		
4	ISHARES CORE MSCI EAFE ETF	Y	$15,001 - $50,000		
5	JPMORGAN BETABUILDERS CANADA ETF	Y	$1,001 - $15,000		
6	SIX CIRCLES INTERNATIONAL UNCONSTRAINED EQUITY FUND	Y	$1,001 - $15,000		
7	ARTISAN INTL VALUE FD-INS	Y	$1,001 - $15,000		
8	JPM GL RES ENH IDX FD - USD - R6	Y	$15,001 - $50,000		
9	ISHARES INC MSCI JAPAN NEW	Y	$1,001 - $15,000		
10	FIDELITY 500 INDEX FD-AI	Y	$1,001 - $15,000		
11	JPM US L/C CORE PL FD - USD - R6	Y	$15,001 - $50,000		
12	NEUBERGER BER MU/C OPP-INS	Y	$15,001 - $50,000		
13	PRIMECAP ODYSSEY STOCK FD	Y	$15,001 - $50,000		
14	SPDR S&P 500 ETF TRUST	Y	$50,001 - $100,000		
15	SIX CIRCLES U.S. UNCONSTRAINED EQUITY FUND	Y	$15,001 - $50,000		
16	BLACKSTONE ALT MULTI-STRAT- Y	Y	$1,001 - $15,000		
17	CRM LONG/SHORT OPPORTUNITIES FUND	Y	$1,001 - $15,000		

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Filer's Name	Page Number
Donald J. Trump	28 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
18	BOSTON P GL LG/SH EQ-INST	Y	$1,001 - $15,000		
19	GMO SGM MAJOR MARKETS FD-VI	Y	$1,001 - $15,000		
20	US Bank Cash Account	N/A	$15,001 - $50,000		
21	LORD ABBETT SHRT DUR INC-F3	Y	$1,001 - $15,000		
22	JPM SHRT-INT MUNI BND FD - USD - I	Y	$15,001 - $50,000		
23	SIX CIRCLES TAX AWARE ULTRA SHORT	Y	$1,001 - $15,000		
24	AMERICAN FUNDS THE TAX-EXEMPT BOND FUND OF AMERICA	Y	$1,001 - $15,000		
25	DODGE & COX INCOME FD	Y	$1,001 - $15,000		
26	ISHARES BARCLAYS 1-3 YEAR TREASURY	Y	$1,001 - $15,000		
27	METROPOLITAN WEST Total Return Bond-PLN	Y	$1,001 - $15,000		
28	BLACKROCK HIGH YIELD PORTFOLIO	Y	None (or less than $1,001)		
29	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Y	None (or less than $1,001)		
30	Equinox IPM Systematic Macro Fund	Y	None (or less than $1,001)		
31	FMI LARGE CAP FUND-INST	Y	None (or less than $1,001)		
32	AMERICAN BEACON GLG Total Return - Ultra	Y	None (or less than $1,001)		
33	JOHN HAN II-ABS RET CURR-R6	Y	None (or less than $1,001)		
34	MFS EMERGING MKTS DEBT FD R6	Y	None (or less than $1,001)		
35	PIMCO UNCONSTRAINED BOND-INS	Y	None (or less than $1,001)		
36	AQR LONG-SHORT EQUITY-R6	Y	None (or less than $1,001)		

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Filer's Name	Page Number
Donald J. Trump	29 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
	Family Trust 3*			Interest, Dividends, Capital Gains	$15,001 - $50,000
1	AMG MG PICTET INTL-Z	Y	$1,001 - $15,000		
2	DODGE & COX INTL STOCK FD	Y	$1,001 - $15,000		
3	ISHARES MSCI EAFE INDEX FUND	Y	$15,001 - $50,000		
4	ISHARES CORE MSCI EAFE ETF	Y	$15,001 - $50,000		
5	JPMORGAN BETABUILDERS CANADA ETF	Y	$1,001 - $15,000		
6	SIX CIRCLES INTERNATIONAL UNCONSTRAINED EQUITY FUND	Y	$1,001 - $15,000		
7	ARTISAN INTL VALUE FD-INS	Y	$15,001 - $50,000		
8	JPM GL RES ENH IDX FD - USD - R6	Y	$15,001 - $50,000		
9	ISHARES INC MSCI JAPAN NEW	Y	$1,001 - $15,000		
10	FIDELITY 500 INDEX FD-AI	Y	$1,001 - $15,000		
11	JPM US L/C CORE PL FD - USD - R6	Y	$15,001 - $50,000		
12	NEUBERGER BER MU/C OPP-INS	Y	$15,001 - $50,000		
13	PRIMECAP ODYSSEY STOCK FD	Y	$15,001 - $50,000		
14	SPDR S&P 500 ETF TRUST	Y	$100,001 - $250,000		
15	SIX CIRCLES U.S. UNCONSTRAINED EQUITY FUND	Y	$15,001 - $50,000		
16	BLACKSTONE ALT MULTI-STRAT- Y	Y	$1,001 - $15,000		
17	CRM LONG/SHORT OPPORTUNITIES FUND	Y	$1,001 - $15,000		

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Instructions for Part 6

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Filer's Name	Page Number
Donald J. Trump	30 of 42

Part 6: Other Assets and Income

#	Description	EIF	Value	Income Type	Income Amount
18	BOSTON P GL LG/SH EQ-INST	Y	$1,001 - $15,000		
19	GMO SGM MAJOR MARKETS FD-VI	Y	$1,001 - $15,000		
20	US Bank Cash Account	N/A	$15,001 - $50,000		
21	LORD ABBETT SHRT DUR INC-F3	Y	$1,001 - $15,000		
22	JPM SHRT-INT MUNI BND FD - USD - I	Y	$15,001 - $50,000		
23	SIX CIRCLES TAX AWARE ULTRA SHORT	Y	$1,001 - $15,000		
24	AMERICAN FUNDS THE TAX-EXEMPT BOND FUND OF AMERICA	Y	$1,001 - $15,000		
25	DODGE & COX INCOME FD	Y	$1,001 - $15,000		
26	ISHARES BARCLAYS 1-3 YEAR TREASURY	Y	$15,001 - $50,000		
27	METROPOLITAN WEST Total Return Bond-PLN	Y	$1,001 - $15,000		
28	AQR MANAGED FUTURES STR-R6	Y	None (or less than $1,001)		
29	BLACKROCK HIGH YIELD PORTFOLIO	Y	None (or less than $1,001)		
30	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Y	None (or less than $1,001)		
31	AMERICAN BEACON GLG Total Return - Ultra	Y	None (or less than $1,001)		
32	JOHN HAN II-ABS RET CURR-R6	Y	None (or less than $1,001)		
33	MFS EMERGING MKTS DEBT FD R6	Y	None (or less than $1,001)		
34	PIMCO UNCONSTRAINED BOND-INS	Y	None (or less than $1,001)		
35	AQR LONG-SHORT EQUITY-R6	Y	None (or less than $1,001)		

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	31 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
	Family Trust 1*			
1	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	20-Dec-2018	$1,001 - $15,000
2	BOSTON P GL LG/SH EQ-INST	Purchase	16-Nov-2018	$1,001 - $15,000
3	LORD ABBETT SHRT DUR INC-F3	Purchase	09-Nov-2018	$1,001 - $15,000
4	BLACKSTONE ALT MULTI-STRAT- Y	Purchase	09-Nov-2018	$1,001 - $15,000
5	JPMORGAN BETABUILDERS CANADA ETF	Purchase	26-Oct-2018	$1,001 - $15,000
6	JPMORGAN BETABUILDERS CANADA ETF	Purchase	26-Oct-2018	$1,001 - $15,000
7	SIX CIRCLES U.S. UNCONSTRAINED EQUITY FUND	Purchase	26-Oct-2018	$1,001 - $15,000
8	FIDELITY 500 INDEX FD-AI	Purchase	26-Oct-2018	$1,001 - $15,000
9	SIX CIRCLES TAX AWARE ULTRA SHORT DURATION FUND	Purchase	26-Oct-2018	$1,001 - $15,000
10	SIX CIRCLES INTERNATIONAL UNCONSTRAINED EQUITY FUND	Purchase	26-Oct-2018	$1,001 - $15,000
11	JPMORGAN BETABUILDERS CANADA ETF	Purchase	16-Aug-2018	$1,001 - $15,000
12	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	17-Jul-2018	$1,001 - $15,000
13	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	17-Jul-2018	$1,001 - $15,000
14	CRM LONG/SHORT OPPORTUNITIES FUND	Purchase	17-Jul-2018	$1,001 - $15,000
15	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	13-Jun-2018	$1,001 - $15,000
16	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	06-Mar-2018	$1,001 - $15,000
17	DODGE & COX INTL STOCK FD	Purchase	06-Mar-2018	$1,001 - $15,000
18	FIDELITY 500 INDEX FD-AI	Purchase	06-Mar-2018	$1,001 - $15,000
19	PIMCO SHORT-TERM FD-INSTL	Purchase	06-Mar-2018	$1,001 - $15,000

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Filer's Name	Page Number
Donald J. Trump	32 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
20	FIDELITY 500 INDEX FD-AI	Purchase	12-Feb-2018	$1,001 - $15,000
21	AMER FNDS T/E BND FND AM-F3	Purchase	30-Jan-2018	$1,001 - $15,000
22	ISHARES CORE MSCI EAFE ETF	Purchase	25-Jan-2018	$1,001 - $15,000
23	SPDR S&P 500 ETF TRUST	Purchase	25-Jan-2018	$1,001 - $15,000
24	ISHARES INC MSCI JAPAN NEW	Purchase	25-Jan-2018	$1,001 - $15,000
25	PIMCO SHORT-TERM FD-INSTL	Purchase	25-Jan-2018	$1,001 - $15,000
26	METROPOLITAN WEST Total Return Bond-PLN	Purchase	25-Jan-2018	$1,001 - $15,000
27	CRM LONG/SHORT OPPORTUNITIES FUND	Purchase	25-Jan-2018	$1,001 - $15,000
28	AMERICAN BEACON GLG Total Return - Ultra	Purchase	25-Jan-2018	$1,001 - $15,000
29	GMO SGM MAJOR MARKETS FD-VI	Purchase	25-Jan-2018	$1,001 - $15,000
30	METROPOLITAN WEST Total Return Bond-PLN	Sale	20-Dec-2018	$1,001 - $15,000
31	DODGE & COX INCOME FD	Sale	20-Dec-2018	$1,001 - $15,000
32	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Sale	30-Nov-2018	$1,001 - $15,000
33	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Sale	16-Nov-2018	$1,001 - $15,000
34	PIMCO UNCONSTRAINED BOND-INS	Sale	09-Nov-2018	$1,001 - $15,000
35	JOHN HAN II-ABS RET CURR-R6	Sale	08-Nov-2018	$1,001 - $15,000
36	AMERICAN BEACON GLG Total Return - Ultra	Sale	08-Nov-2018	$1,001 - $15,000
37	CRM LONG/SHORT OPPORTUNITIES FUND	Sale	08-Nov-2018	$1,001 - $15,000
38	GMO SGM MAJOR MARKETS FD-VI	Sale	08-Nov-2018	$1,001 - $15,000
39	JPMORGAN GL RES ENH IDX-R6	Sale	29-Oct-2018	$1,001 - $15,000

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	33 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
40	DODGE & COX INTL STOCK FD	Sale	26-Oct-2018	$1,001 - $15,000
41	PIMCO SHORT-TERM FD-INSTL	Sale	26-Oct-2018	$1,001 - $15,000
42	FMI LARGE CAP FUND-INST	Sale	26-Oct-2018	$1,001 - $15,000
43	AMG MG PICTET INTL-Z	Sale	26-Oct-2018	$1,001 - $15,000
44	ARTISAN INTL VALUE FD-INS	Sale	26-Oct-2018	$1,001 - $15,000
45	ISHARES CORE MSCI EAFE ETF	Sale	16-Aug-2018	$1,001 - $15,000
46	AQR LONG-SHORT EQUITY-R6	Sale	17-Jul-2018	$1,001 - $15,000
47	AQR MANAGED FUTURES STR-R6	Sale	17-Jul-2018	$1,001 - $15,000
48	ISHARES MSCI EAFE INDEX FUND	Sale	08-Jun-2018	$1,001 - $15,000
49	ISHARES MSCI EAFE INDEX FUND	Sale	07-Jun-2018	$1,001 - $15,000
50	ISHARES MSCI EAFE INDEX FUND	Sale	07-Jun-2018	$1,001 - $15,000
51	PIMCO UNCONSTRAINED BOND-INS	Sale	01-Jun-2018	$1,001 - $15,000
52	FMI LARGE CAP FUND-INST	Sale	01-Jun-2018	$1,001 - $15,000
53	BLACKROCK HIGH YIELD PORTFOLIO	Sale	12-Feb-2018	$1,001 - $15,000
54	MFS EMERGING MKTS DEBT FD R6	Sale	12-Feb-2018	$1,001 - $15,000
55	PIMCO SHORT-TERM FD-INSTL	Sale	12-Feb-2018	$1,001 - $15,000
56	JPM SHRT-INT MUNI BND-I FUND 3602	Sale	25-Jan-2018	$1,001 - $15,000
57	JPMORGAN GL RES ENH IDX-R6	Sale	25-Jan-2018	$1,001 - $15,000
	Family Trust 2*			
1	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	20-Dec-2018	$1,001 - $15,000

* J.P. Morgan is the sole Trustee. Donald J. Trump retains an income interest only in the Family Trusts and has no investment decision authority.

Instructions for Part 7

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	34 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
2	BOSTON P GL LG/SH EQ-INST	Purchase	16-Nov-2018	$1,001 - $15,000
3	LORD ABBETT SHRT DUR INC-F3	Purchase	09-Nov-2018	$1,001 - $15,000
4	BLACKSTONE ALT MULTI-STRAT- Y	Purchase	09-Nov-2018	$1,001 - $15,000
5	JPMORGAN BETABUILDERS CANADA ETF	Purchase	26-Oct-2018	$1,001 - $15,000
6	JPMORGAN BETABUILDERS CANADA ETF	Purchase	26-Oct-2018	$1,001 - $15,000
7	SIX CIRCLES U.S. UNCONSTRAINED EQUITY FUND	Purchase	26-Oct-2018	$15,001 - $50,000
8	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	26-Oct-2018	$1,001 - $15,000
9	SIX CIRCLES TAX AWARE ULTRA SHORT DURATION FUND	Purchase	26-Oct-2018	$1,001 - $15,000
10	SIX CIRCLES INTERNATIONAL UNCONSTRAINED EQUITY FUND	Purchase	26-Oct-2018	$1,001 - $15,000
11	JPMORGAN BETABUILDERS CANADA ETF	Purchase	13-Aug-2018	$1,001 - $15,000
12	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	17-Jul-2018	$1,001 - $15,000
13	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	17-Jul-2018	$1,001 - $15,000
14	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	13-Jun-2018	$1,001 - $15,000
15	ISHARES CORE MSCI EAFE ETF	Purchase	27-Feb-2018	$1,001 - $15,000
16	FIDELITY 500 INDEX FD-AI	Purchase	27-Feb-2018	$1,001 - $15,000
17	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	27-Feb-2018	$1,001 - $15,000
18	PIMCO SHORT-TERM FD-INSTL	Purchase	27-Feb-2018	$1,001 - $15,000
19	FIDELITY 500 INDEX FD-AI	Purchase	12-Feb-2018	$1,001 - $15,000
20	AMER FNDS T/E BND FND AM-F3	Purchase	30-Jan-2018	$1,001 - $15,000
21	ISHARES CORE MSCI EAFE ETF	Purchase	25-Jan-2018	$1,001 - $15,000

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Filer's Name	Page Number
Donald J. Trump	35 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
22	ISHARES INC MSCI JAPAN NEW	Purchase	25-Jan-2018	$1,001 - $15,000
23	SPDR S&P 500 ETF TRUST	Purchase	25-Jan-2018	$1,001 - $15,000
24	PIMCO SHORT-TERM FD-INSTL	Purchase	25-Jan-2018	$1,001 - $15,000
25	METROPOLITAN WEST Total Return Bond-PLN	Purchase	25-Jan-2018	$1,001 - $15,000
26	CRM LONG/SHORT OPPORTUNITIES FUND	Purchase	25-Jan-2018	$1,001 - $15,000
27	AMERICAN BEACON GLG Total Return - Ultra	Purchase	25-Jan-2018	$1,001 - $15,000
28	GMO SGM MAJOR MARKETS FD-VI	Purchase	25-Jan-2018	$1,001 - $15,000
29	METROPOLITAN WEST Total Return Bond-PLN	Sale	20-Dec-2018	$1,001 - $15,000
30	DODGE & COX INCOME FD	Sale	20-Dec-2018	$1,001 - $15,000
31	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Sale	30-Nov-2018	$1,001 - $15,000
32	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Sale	16-Nov-2018	$1,001 - $15,000
33	PIMCO UNCONSTRAINED BOND-INS	Sale	09-Nov-2018	$1,001 - $15,000
34	JOHN HAN II-ABS RET CURR-R6	Sale	08-Nov-2018	$1,001 - $15,000
35	AMERICAN BEACON GLG Total Return - Ultra	Sale	08-Nov-2018	$1,001 - $15,000
36	CRM LONG/SHORT OPPORTUNITIES FUND	Sale	08-Nov-2018	$1,001 - $15,000
37	GMO SGM MAJOR MARKETS FD-VI	Sale	08-Nov-2018	$1,001 - $15,000
38	JPMORGAN GL RES ENH IDX-R6	Sale	29-Oct-2018	$1,001 - $15,000
39	DODGE & COX INTL STOCK FD	Sale	26-Oct-2018	$1,001 - $15,000
40	PIMCO SHORT-TERM FD-INSTL	Sale	26-Oct-2018	$1,001 - $15,000
41	FMI LARGE CAP FUND-INST	Sale	26-Oct-2018	$1,001 - $15,000

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	36 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
42	PRIMECAP ODYSSEY STOCK FD	Sale	26-Oct-2018	$1,001 - $15,000
43	AMG MG PICTET INTL-Z	Sale	26-Oct-2018	$1,001 - $15,000
44	ARTISAN INTL VALUE FD-INS	Sale	26-Oct-2018	$1,001 - $15,000
45	NEUBERGER BER MU/C OPP-INS	Sale	26-Oct-2018	$1,001 - $15,000
46	ISHARES CORE MSCI EAFE ETF	Sale	13-Aug-2018	$1,001 - $15,000
47	ISHARES CORE MSCI EAFE ETF	Sale	13-Aug-2018	$1,001 - $15,000
48	AQR LONG-SHORT EQUITY-R6	Sale	17-Jul-2018	$1,001 - $15,000
49	Equinox IPM Systematic Macro Fund	Sale	17-Jul-2018	$1,001 - $15,000
50	ISHARES MSCI EAFE INDEX FUND	Sale	08-Jun-2018	$1,001 - $15,000
51	ISHARES MSCI EAFE INDEX FUND	Sale	07-Jun-2018	$1,001 - $15,000
52	ISHARES MSCI EAFE INDEX FUND	Sale	07-Jun-2018	$1,001 - $15,000
53	ISHARES MSCI EAFE INDEX FUND	Sale	11-Apr-2018	$1,001 - $15,000
54	DODGE & COX INCOME FD	Sale	11-Apr-2018	$1,001 - $15,000
55	PIMCO UNCONSTRAINED BOND-INS	Sale	11-Apr-2018	$1,001 - $15,000
56	BLACKROCK HIGH YIELD PORTFOLIO	Sale	12-Feb-2018	$1,001 - $15,000
57	MFS EMERGING MKTS DEBT FD R6	Sale	12-Feb-2018	$1,001 - $15,000
58	PIMCO SHORT-TERM FD-INSTL	Sale	12-Feb-2018	$1,001 - $15,000
59	JPM SHRT-INT MUNI BND-I FUND 3602	Sale	25-Jan-2018	$1,001 - $15,000
60	JPMORGAN GL RES ENH IDX-R6	Sale	25-Jan-2018	$1,001 - $15,000
	Family Trust 3*			

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	37 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
1	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	20-Dec-2018	$1,001 - $15,000
2	BOSTON P GL LG/SH EQ-INST	Purchase	16-Nov-2018	$1,001 - $15,000
3	LORD ABBETT SHRT DUR INC-F3	Purchase	09-Nov-2018	$1,001 - $15,000
4	BLACKSTONE ALT MULTI-STRAT- Y	Purchase	09-Nov-2018	$1,001 - $15,000
5	JPMORGAN BETABUILDERS CANADA ETF	Purchase	26-Oct-2018	$1,001 - $15,000
6	JPMORGAN BETABUILDERS CANADA ETF	Purchase	26-Oct-2018	$1,001 - $15,000
7	SIX CIRCLES TAX AWARE ULTRA SHORT DURATION FUND	Purchase	26-Oct-2018	$1,001 - $15,000
8	SIX CIRCLES U.S. UNCONSTRAINED EQUITY FUND	Purchase	26-Oct-2018	$15,001 - $50,000
9	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	26-Oct-2018	$1,001 - $15,000
10	SIX CIRCLES INTERNATIONAL UNCONSTRAINED EQUITY FUND	Purchase	26-Oct-2018	$1,001 - $15,000
11	JPMORGAN BETABUILDERS CANADA ETF	Purchase	13-Aug-2018	$1,001 - $15,000
12	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	17-Jul-2018	$1,001 - $15,000
13	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	17-Jul-2018	$1,001 - $15,000
14	ISHARES BARCLAYS 1-3 YEAR TREASURY BOND FUND	Purchase	13-Jun-2018	$1,001 - $15,000
15	ISHARES CORE MSCI EAFE ETF	Purchase	27-Feb-2018	$1,001 - $15,000
16	JPM SHRT-INT MUNI BND-I FUND 3602	Purchase	27-Feb-2018	$1,001 - $15,000
17	FIDELITY 500 INDEX FD-AI	Purchase	27-Feb-2018	$1,001 - $15,000
18	PIMCO SHORT-TERM FD-INSTL	Purchase	27-Feb-2018	$1,001 - $15,000
19	FIDELITY 500 INDEX FD-AI	Purchase	12-Feb-2018	$1,001 - $15,000
20	AMER FNDS T/E BND FND AM-F3	Purchase	30-Jan-2018	$1,001 - $15,000

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	38 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
21	ISHARES INC MSCI JAPAN NEW	Purchase	25-Jan-2018	$1,001 - $15,000
22	SPDR S&P 500 ETF TRUST	Purchase	25-Jan-2018	$1,001 - $15,000
23	ISHARES CORE MSCI EAFE ETF	Purchase	25-Jan-2018	$1,001 - $15,000
24	PIMCO SHORT-TERM FD-INSTL	Purchase	25-Jan-2018	$1,001 - $15,000
25	METROPOLITAN WEST Total Return Bond-PLN	Purchase	25-Jan-2018	$1,001 - $15,000
26	CRM LONG/SHORT OPPORTUNITIES FUND	Purchase	25-Jan-2018	$1,001 - $15,000
27	AMERICAN BEACON GLG Total Return - Ultra	Purchase	25-Jan-2018	$1,001 - $15,000
28	GMO SGM MAJOR MARKETS FD-VI	Purchase	25-Jan-2018	$1,001 - $15,000
29	METROPOLITAN WEST Total Return Bond-PLN	Sale	21-Dec-2018	$1,001 - $15,000
30	DODGE & COX INCOME FD	Sale	21-Dec-2018	$1,001 - $15,000
31	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Sale	03-Dec-2018	$1,001 - $15,000
32	CHILTON STRATEGIC EUROPEAN EQUITIES FD	Sale	19-Nov-2018	$1,001 - $15,000
33	PIMCO UNCONSTRAINED BOND-INS	Sale	13-Nov-2018	$1,001 - $15,000
34	JOHN HAN II-ABS RET CURR-R6	Sale	09-Nov-2018	$1,001 - $15,000
35	AMERICAN BEACON GLG Total Return - Ultra	Sale	09-Nov-2018	$1,001 - $15,000
36	CRM LONG/SHORT OPPORTUNITIES FUND	Sale	09-Nov-2018	$1,001 - $15,000
37	GMO SGM MAJOR MARKETS FD-VI	Sale	09-Nov-2018	$1,001 - $15,000
38	JPMORGAN GL RES ENH IDX-R6	Sale	30-Oct-2018	$1,001 - $15,000
39	PIMCO SHORT-TERM FD-INSTL	Sale	29-Oct-2018	$1,001 - $15,000
40	PRIMECAP ODYSSEY STOCK FD	Sale	29-Oct-2018	$1,001 - $15,000

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	39 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
41	AMG MG PICTET INTL-Z	Sale	29-Oct-2018	$1,001 - $15,000
42	JPMORGAN US L/C CORE PL-R6	Sale	29-Oct-2018	$1,001 - $15,000
43	ARTISAN INTL VALUE FD-INS	Sale	29-Oct-2018	$1,001 - $15,000
44	NEUBERGER BER MU/C OPP-INS	Sale	29-Oct-2018	$1,001 - $15,000
45	DODGE & COX INTL STOCK FD	Sale	29-Oct-2018	$1,001 - $15,000
46	ISHARES CORE MSCI EAFE ETF	Sale	15-Aug-2018	$1,001 - $15,000
47	ISHARES CORE MSCI EAFE ETF	Sale	15-Aug-2018	$1,001 - $15,000
48	AQR LONG-SHORT EQUITY-R6	Sale	18-Jul-2018	$1,001 - $15,000
49	AQR MANAGED FUTURES STR-R6	Sale	18-Jul-2018	$1,001 - $15,000
50	ISHARES MSCI EAFE INDEX FUND	Sale	12-Jun-2018	$1,001 - $15,000
51	ISHARES MSCI EAFE INDEX FUND	Sale	11-Jun-2018	$1,001 - $15,000
52	ISHARES MSCI EAFE INDEX FUND	Sale	11-Jun-2018	$1,001 - $15,000
53	ISHARES MSCI EAFE INDEX FUND	Sale	16-Apr-2018	$1,001 - $15,000
54	DODGE & COX INCOME FD	Sale	13-Apr-2018	$1,001 - $15,000
55	PIMCO UNCONSTRAINED BOND-INS	Sale	13-Apr-2018	$1,001 - $15,000
56	BLACKROCK HIGH YIELD PORTFOLIO	Sale	13-Feb-2018	$1,001 - $15,000
57	MFS EMERGING MKTS DEBT FD R6	Sale	13-Feb-2018	$1,001 - $15,000
58	PIMCO SHORT-TERM FD-INSTL	Sale	13-Feb-2018	$1,001 - $15,000
59	JPM SHRT-INT MUNI BND-I	Sale	26-Jan-2018	$15,001 - $50,000

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Instructions for Part 7

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Filer's Name	Page Number
Donald J. Trump	40 of 42

Part 7: Transactions

#	Description	Type	Date	Amount
60	JPMORGAN GL RES ENH IDX-R6	Sale	26-Jan-2018	$1,001 - $15,000
1	401 North Wabash Venture LLC, condominium units, Chicago, IL **	Sales	Various	$100,001 - $250,000
2	Caribusiness Investments, S.R.L., land, Higuey, Dominican Republic **	Sale	29-Jan-2018	$1,000,001 - $5,000,000
3	Country Properties, LLC, residential real estate, Norfolk, VA **	Sale	27-Apr-2018	$100,001 - $250,000
4	D B Pace Acquisition, LLC, land, building and ff&e, New York, NY **	Sale	23-Feb-2018	$1,000,001 - $5,000,000
5	TRUMP RUFFIN TOWER I LLC, commercial real estate, Las Vegas, NV **	Sales	Various	$5,000,001 - $25,000,000
6	TRUMP NATIONAL GOLF CLUB - LOS ANGELES, land, Los Angeles, CA **	Sales	Various	$5,000,001 - $25,000,000
7	4% limited partnership interest in Starrett City Associates, L.P., residential real estate, Brooklyn, NY **	Sale	07-May-2018	$25,000,001 - $50,000,000
8	4% limited partnership interest in Spring Creek Plaza LLC, commercial real estate, Brooklyn, NY **	Sale	07-May-2018	$1,000,001 - $5,000,000
9	1125 South Ocean LLC, residential real estate, Palm Beach, FL **	Purchase	16-May-2018	$5,000,001 - $25,000,000

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** Real estate transactions entered into by business entities (as opposed to by President Trump) have always been referenced on Part 2 of the President's prior reports. Now, at the request of OGE, they are being referenced on Part 7 as well.

Instructions for Part 8

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	41 of 42

Part 8: Liabilities

#	Creditor Name	Type	Amount	Year Incurred	Rate	Term
1.	Ladder Capital Finance LLC	Trump Tower Commercial LLC - mortgage	Over $50,000,000	2012	4.200%	Matures in 2022
2.	Ladder Capital Finance I LLC	40 Wall Street LLC - loan	Over $50,000,000	2015	3.665%	Matures in 2025
3.	Deutsche Bank Trust Company Americas	Trump National Doral - mortgage	Over $50,000,000	2012	LIBOR + 1.75% or Prime minus .75%	Matures in 2023
4.	Deutsche Bank Trust Company Americas	Trump National Doral - mortgage	$5,000,001 - $25,000,000	2012	LIBOR + 1.75% or Prime minus .75%	Matures in 2023
5.	Investors Savings Bank	Trump Park Avenue LLC - mortgage	$5,000,001 - $25,000,000	2010	3.250%	Matures in 2020
6.	Ladder Capital Finance LLC	Trump Plaza LLC - mortgage	$5,000,001 - $25,000,000	2014	3.850%	Matures in 2024
7.	Amboy Bank	Trump National Golf Club Colts Neck LLC - mortgage	$5,000,001 - $25,000,000	2008	5.250%	Matures in 2028
8.	Chevy Chase Trust Holdings, Inc. as successor in interest to Bondy Way Development	Trump National Golf Club Washington DC LLC - mortgage	$5,000,001 - $25,000,000	2009	5.500%	Matures in 2029
9.	Royal Bank America	Seven Springs - mortgage	$5,000,001 - $25,000,000	2000	4.000%	Matures in 2019
10.	Ladder Capital Finance LLC	TIHT Commercial LLC - mortgage	$5,000,001 - $25,000,000	2016	4.050%	Matures in 2026
11.	Chicago Unit Acquisition LLC	TIHT Chicago - springing loan	Over $50,000,000	2012	Prime + 5%	Springing loan
12.	Deutsche Bank Trust Company Americas	TIHT Chicago - term loan	$25,000,001 - $50,000,000	2012	LIBOR + 2.00% or Prime minus .50%	Matures in 2024
13.	Deutsche Bank Trust Company Americas	Trump Old Post Office - loan	Over $50,000,000	2015	LIBOR + 1.75% or Prime minus .25%	Matures in 2024
14.	Professional Bank	1125 South Ocean LLC - mortgage	$5,000,001 - $25,000,000	2018	4.500%	Matures in 2048
15.						
16.						
17.						

Instructions for Part 9

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Filer's Name	Page Number
Donald J Trump	42 of 42

Part 9: Gifts and Travel Reimbursements

#	Source Name	City/State	Brief Description	Value
1.	None			
2.				
3.				
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Instructions for Part 2

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Filer's Name	Page Number
Donald J. Trump	A1 of 46

Reference #

Part 2 disclosed entities with assets over $1,000 or which produced income of over $200. This Schedule (EXHIBIT A) discloses the ownership structure of the entities on Part 2, as well as additional entities that are not disclosed on Part 2. For each of the entities below that are not disclosed on Part 2, the numerical or text label indicates which reason for non-disclosure applies. The numerical labels are as follows: *(1) have no independent value or income and are part of the entity structures listed in Part 2; (2) have no independent value or income and provide back office support functions to other entities; (3) are dormant/inactive; (4) have no independent value or income and exist to hold license deals that are prospective, inactive, or otherwise do not currently have valuable assets or create income; or (5) have no independent value or income, not inactive nor dormant, not part of an entity structure or license deal. This Schedule is being provided to ensure a complete picture of the assets and holdings of the filer. Gaps in numerical sequence are due to the removal of previously reported items no longer reportable on this exhibit. All of the interests listed below in this exhibit, which were formerly held by Donald J. Trump, directly or indirectly, are now held by The Donald J. Trump Revocable Trust.

1 ***4 SHADOW TREE LANE LLC *(5)***

Owned by :	% Ownership	Name	Role
	1	4 SHADOW TREE LANE MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

2 ***4 SHADOW TREE LANE MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	4 SHADOW TREE LANE LLC	1.00%	Managing Member

3 ***40 Wall Development Associates, LLC *(1)***

Owned by :	% Ownership	Name	Role
	0.1	Parc Consulting, Inc.	Member
	99.9	The Donald J. Trump Revocable Trust	Member

Has ownership interest in :	Entity Name	Ownership	Title
	40 Wall Street LLC	99.90%	Member
	40 WALL STREET COMMERCIAL LLC	100.00%	Member
	40 Wall Street Member Corp.	100.00%	Shareholder

4 ***40 WALL STREET COMMERCIAL LLC *(2)***

Owned by :	% Ownership	Name	Role
	100	40 Wall Development Associates, LLC	Member

5 ***40 Wall Street LLC***

Owned by :	% Ownership	Name	Role
	0.1	40 Wall Street Member Corp.	Managing Member
	99.9	40 Wall Development Associates, LLC	Member

6 ***40 Wall Street Member Corp. *(1)***

Owned by :	% Ownership	Name	Role
	100	40 Wall Development Associates, LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	40 Wall Street LLC	0.10%	Managing Member

7 ***401 MEZZ VENTURE LLC *(1)***

Owned by :	% Ownership	Name	Role
	1	TRUMP CHICAGO MANAGING MEMBER LLC	Managing Member
	49	TRUMP CHICAGO MEMBER LLC	Member
	50	TIHT CHICAGO MEMBER ACQUISITION LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	401 North Wabash Venture LLC	100.00%	Member
	TRUMP CHICAGO RETAIL LLC	100.00%	Member

8 ***401 North Wabash Venture LLC***

Owned by :	% Ownership	Name	Role
	100	401 MEZZ VENTURE LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP COMMERCIAL CHICAGO LLC	100.00%	Member

	TRUMP PAYROLL CHICAGO LLC	100.00%	Managing Member

9 ***809 NORTH CANON LLC***

Owned by :	% Ownership	Name	Role
	1	809 NORTH CANON MEMBER CORPORATION	Managing Member
	99	DJT HOLDINGS LLC	Member

10 ***809 NORTH CANON MEMBER CORPORATION *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	809 NORTH CANON LLC	1.00%	Managing Member

11 ***81 Pine Note Holder Inc. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

12 ***845 UN Limited Partnership***

Owned by :	% Ownership	Name	Role
	60	Trump 845 LP LLC	Partner
	40	Trump 845 UN GP LLC	Partner

13 ***Ace Entertainment Holdings Inc. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

14 ***All County Building Supply & Maintenance Corp. *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Shareholder
	75	Trump Family Members	Shareholder

15 ***AVIATION PAYROLL COMPANY *(2)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

17 ***Beach Haven Apartments #3 LLC *(3)***

Owned by :	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Member
	75	Trump Family Members	Member

18 ***Beach Haven Apt #1, Inc. *(1)***

Owned by :	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Shareholder
	75	Trump Family Members	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Starrett City Associates, L.P.	0.86%	Partner
	Spring Creek Plaza LLC	0.86%	Member

20 ***Beach Haven Shopping Center LLC *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

21 ***Bedford Hills Corp. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Seven Springs LLC	0.10%	Member

22 ***TRUMP BRIARCLIFF MANOR DEVELOPMENT LLC *(2)***

Owned by :	% Ownership	Name	Role
	0.1	BRIARCLIFF PROPERTIES, INC.	Member
	99.9	DJT HOLDINGS LLC	Member

23 ***Briar Hall Operations LLC *(3)***

Owned by :	% Ownership	Name	Role

Reference #

	0.1	Development Member Inc.	Member
	99.9	DJT Holdings LLC	Member

24 ***BRIARCLIFF PROPERTIES, INC. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	BRIAR HALL DEVELOPMENT LLC (N/K/A TRUMP BRIARCLIFF MANOR DEVELOPMENT LLC)	0.10%	Member

25 ***Caribusiness Investments, S.R.L.***

Owned by :	% Ownership	Name	Role
	1	THE CARIBUSINESS RE CORP	Member
	99	CARIBUSINESS MRE LLC	Member

26 ***CARIBUSINESS MRE LLC *(1)***

Owned by :	% Ownership	Name	Role
	1	THE CARIBUSINESS RE CORP	Managing Member
	99	DJT Holdings LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	Caribusiness Investments, S.R.L.	99.00%	Member

27 ***Chelsea Hall LLC *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

28 ***CHICAGO UNIT ACQUISITION LLC *(5)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

29 ***CHINA TRADEMARK LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

30 ***Clyde Hall, Inc. *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Shareholder
	75	Trump Family Members	Shareholder

31 ***Coronet Hall, Inc. *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Shareholder
	75	Trump Family Members	Shareholder

32 ***Country Apartments, LLC***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

33 ***Country Investors LLC *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

34 ***Country Properties, LLC***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

35 ***D B PACE ACQUISITION MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	D B Pace Acquisition, LLC	1.00%	Managing Member

Reference #

36 ***D B Pace Acquisition, LLC***

Owned by :	% Ownership	Name	Role
	1	D B PACE ACQUISITION MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

37 ***Development Member Inc. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Briar Hall Operations LLC	0.10%	Member

38 ***DJ Aerospace (Bermuda) Limited *(3)--DISSOLVED 7/2/18***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

39 ***DJT AEROSPACE LLC***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

40 ***DJT ENTREPRENEUR MANAGING MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	THE TRUMP ENTREPRENEUR INITIATIVE LLC (NY DOMESTIC)	0.10%	Managing Member

41 ***DJT ENTREPRENEUR MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	THE TRUMP ENTREPRENEUR INITIATIVE LLC (NY DOMESTIC)	91.90%	Member

42 ***DJT HOLDINGS LLC***

Assumed Names :	D/B/A	Jurisdiction	Expiration Date	Filing Date
	DJT 3 HOLDINGS LLC	Florida		

Owned by :	% Ownership	Name	Role
	1	DJT HOLDINGS MANAGING MEMBER LLC	Managing Member
	99	The Donald J. Trump Revocable Trust	Member

Has ownership interest in : various entities as indicated elsewhere in this schedule

43 ***DJT HOLDINGS MANAGING MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

Has ownership interest in : various entities as indicated elsewhere in this schedule

44 ***DJT LAND HOLDINGS MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

45 ***DJT OPERATIONS CX LLC *(5)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

46 ***DJT OPERATIONS I LLC***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

47 ***DJT OPERATIONS II LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

Instructions for Part 2

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Filer's Name	Page Number
Donald J. Trump	A5 of 46

Reference #

Has ownership interest in :	Entity Name	Ownership	Title
	TAG AIR INC.	100.00%	Shareholder

48 ***Donald J Trump Enterprises LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	Trump Family Members	Member

49 ***Donald J. Trump Enterprises II LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	Trump Family Members	Member

50 ***Donald J. Trump Enterprises III LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	Trump Family Members	Member

53 ***DT APP WARRANT HOLDING LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	DT APP WARRANT HOLDING MANAGING MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

54 ***DT APP WARRANT HOLDING MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT APP WARRANT HOLDING LLC	1.00%	Managing Member

55 ***DT CONNECT II LLC***

Owned by :	% Ownership	Name	Role
	1	DT CONNECT II MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

56 ***DT CONNECT II MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT CONNECT II LLC	1.00%	Managing Member

59 ***DT DUBAI GOLF MANAGER LLC***

Owned by :	% Ownership	Name	Role
	1	DT DUBAI GOLF MANAGER MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

60 ***DT DUBAI GOLF MANAGER MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT DUBAI GOLF MANAGER LLC	1.00%	Managing Member

61 ***DT DUBAI II GOLF MANAGER LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT DUBAI II GOLF MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

62 ***DT DUBAI II GOLF MANAGER MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT DUBAI II GOLF MANAGER LLC	1.00%	Managing Member

63 ***DT HOME MARKS INTERNATIONAL LLC***

Owned by :	% Ownership	Name	Role

1	DT HOME MARKS INTERNATIONAL MEMBER CORP	Managing Member
99	DTTM OPERATIONS LLC	Member

64 ***DT HOME MARKS INTERNATIONAL MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT HOME MARKS INTERNATIONAL LLC	1.00%	Managing Member

65 ***DT INDIA VENTURE LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	DT INDIA VENTURE MANAGING MEMBER CORP	Member
	99	DTTM OPERATIONS LLC	Member

66 ***DT INDIA VENTURE MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT INDIA VENTURE LLC	1.00%	Member

67 ***DT MARKS BAKU LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS BAKU MANAGING MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

68 ***DT MARKS BAKU MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS BAKU LLC	1.00%	Managing Member

71 ***DT MARKS DUBAI LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS DUBAI MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

72 ***DT MARKS DUBAI MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS DUBAI LLC	1.00%	Managing Member

73 ***DT MARKS GURGAON LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS GURGAON MANAGING MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

74 ***DT MARKS GURGAON MANAGING MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS GURGAON LLC	1.00%	Managing Member

75 ***DT MARKS JERSEY CITY LLC *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM OPERATIONS LLC	Member

76 ***DT MARKS JUPITER LLC *(4)***

Reference #

Owned by :	% Ownership	Name	Role
	100	DTTM OPERATIONS LLC	Managing Member

77 ***DT MARKS PRODUCTS INTERNATIONAL LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS PRODUCTS INTERNATIONAL MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

78 ***DT MARKS PRODUCTS INTERNATIONAL MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS PRODUCTS INTERNATIONAL LLC	1.00%	Managing Member

79 ***DT MARKS PUNE II LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS PUNE II MANAGING MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

80 ***DT MARKS PUNE II MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS PUNE II LLC	1.00%	Managing Member

81 ***DT MARKS PUNE LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS PUNE MANAGING MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

82 ***DT MARKS PUNE MANAGING MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS PUNE LLC	1.00%	Managing Member

85 ***DT MARKS RIO LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS RIO MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

86 ***DT MARKS RIO MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS RIO LLC	1.00%	Managing Member

87 ***DT MARKS VANCOUVER LP *(4)***

Owned by :	% Ownership	Name	Title
	1	DT MARKS VANCOUVER MEMBER CORP	General Partner
	99	The Donald J. Trump Revocable Trust	Limited Partner

88 ***DT MARKS VANCOUVER MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Instructions for Part 2

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Filer's Name	Page Number
Donald J. Trump	A8 of 46

Reference #

Has ownership interest in :

Entity Name	Ownership	Title
DT MARKS VANCOUVER LP	1.000000 units (100.00 %)	General Partner

89 ***DT Marks Worli LLC***

Owned by :

% Ownership	Name	Role
1	DT Marks Worli Member Corp	Managing Member
99	DTTM OPERATIONS LLC	Member

90 ***DT Marks Worli Member Corp *(1)***

Owned by :

% Ownership	Name	Role
100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
DT Marks Worli LLC	1.00%	Managing Member

91 ***DT TOWER GURGAON LLC *(4)***

Owned by :

% Ownership	Name	Role
1	DT TOWER GURGAON MANAGING MEMBER CORP	Managing Member
99	TTTT Venture LLC	Member

92 ***DT TOWER GURGAON MANAGING MEMBER CORP *(4)***

Owned by :

% Ownership	Name	Role
100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
DT TOWER GURGAON LLC	1.00%	Managing Member

93 ***DTW VENTURE LLC***

Owned by :

% Ownership	Name	Role
100	DJT Holdings LLC	Member

94 ***DTW VENTURE MANAGING MEMBER CORP. *(3)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

95 ***EID Venture I Corporation *(3)***

Owned by :

% Ownership	Name	Role
100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
EID Venture I LLC	1.00%	Managing Member

ownership should have been reflected on prior reports

96 ***EID Venture I LLC *(3)***

Owned by :

% Ownership	Name	Role
1	EID Venture I Corporation	Managing Member
99	DTTM OPERATIONS LLC	Member

97 ***Excel Venture I Corporation *(1)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
Excel Venture I LLC	1.00%	Managing Member

98 ***Excel Venture I LLC***

Owned by :

% Ownership	Name	Role
1	Excel Venture I Corporation	Managing Member
99	DJT HOLDINGS LLC	Member

99 ***Fifty-Seven Management Corp. *(1)***

Owned by :

% Ownership	Name	Role
100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title

Fifty-Seventh Street Associates LLC	1.00%	Managing Member

100 ***Fifty-Seventh Street Associates LLC***

Owned by :	% Ownership	Name	Role
	1	Fifty-Seven Management Corp.	Managing Member
	99	The Trump-Equitable Fifth Avenue Company	Member

101 ***FIRST MEMBER INC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PALACE/PARC LLC	0.10%	Managing Member

102 ***FLIGHTS INC *(5)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

103 ***FLORIDA PROPERTIES MANAGEMENT LC *(2)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

104 ***Fountainbleu Apartments LLC *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

105 ***Golf Productions LLC***

Owned by :	% Ownership	Name	Role
	1	Golf Productions Member Corp	Managing Member
	99	DJT Holdings LLC	Member

106 ***Golf Productions Member Corp *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Golf Productions LLC	1.00%	Managing Member

107 ***Golf Recreation Scotland Limited***

Owned by :	% Ownership	Name	Role
	100	TURNBERRY SCOTLAND LLC	Sole Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP TURNBERRY	100.00%	Shareholder

108 ***HELICOPTER AIR SERVICES INC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

110 ***Hudson Waterfront Associates I, LP *(1)***

Owned by :	% Ownership	Name	Role
	1	HUDSON WATERFRONT I CORPORATION	Partner
	69	HUDSON WESTSIDE ASSOCIATES I, L.P.	Partner
	30	The Donald J. Trump Revocable Trust	Partner

Has ownership interest in :	Entity Name	Ownership	Title
	HWA 555 Owners, LLC	100.00%	Partner

111 ***Hudson Waterfront Associates II, LP *(6)***

Owned by :	% Ownership	Name	Role
	1	HUDSON WATERFRONT II CORPORATION	Partner

Reference #

69	HUDSON WESTSIDE ASSOCIATES II, L.P.	Partner
30	The Donald J. Trump Revocable Trust	Partner

112 ***Hudson Waterfront Associates III, LP *(1)***

Owned by:	% Ownership	Name	Role
	1	HUDSON WATERFRONT III CORPORATION	Partner
	69	HUDSON WESTSIDE ASSOCIATES III, L.P.	Partner
	30	The Donald J. Trump Revocable Trust	Partner

Has ownership interest in:	Entity Name	Ownership	Title
	HWA 1290 III LLC	100.00%	Partner

113 ***Hudson Waterfront Associates IV, LP *(1)***

Owned by:	% Ownership	Name	Role
	1	HUDSON WATERFRONT IV CORPORATION	Partner
	69	HUDSON WESTSIDE ASSOCIATES IV, L.P.	Partner
	30	The Donald J. Trump Revocable Trust	Partner

Has ownership interest in:	Entity Name	Ownership	Title
	HWA 1290 IV LLC	100.00%	Partner

114 ***Hudson Waterfront Associates V LP *(1)***

Owned by:	% Ownership	Name	Role
	1	HUDSON WATERFRONT V CORPORATION	Partner
	69	HUDSON WESTSIDE ASSOCIATES V, L.P.	Partner
	30	The Donald J. Trump Revocable Trust	Partner

Has ownership interest in:	Entity Name	Ownership	Title
	HWA 1290 V LLC	100.00%	Partner

116 ***Indian Hills Holdings LLC *(3)***

Owned by:	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

117 ***TRUMP NATIONAL GOLF CLUB - JUPITER***

Owned by:	% Ownership	Name	Role
	1	JUPITER GOLF CLUB MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

118 ***JUPITER GOLF CLUB MANAGING MEMBER CORP *(1)***

Owned by:	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - JUPITER	1.00%	Managing Member

119 ***LAMINGTON FAMILY HOLDINGS LLC***

Owned by:	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

120 ***TRUMP NATIONAL GOLF CLUB - BEDMINSTER***

Owned by:	% Ownership	Name	Role
	100	LFB ACQUISITION LLC	Member

121 ***Lawrence Towers Apartments LLC *(3)***

Owned by:	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

122 ***LFB ACQUISITION LLC *(1)***

Owned by:	% Ownership	Name	Role

Reference #

1	LFB ACQUISITION MEMBER CORP		Managing Member
99	DJT HOLDINGS LLC		Member

Has ownership interest in :

Entity Name	Ownership	Title
TRUMP NATIONAL GOLF CLUB - BEDMINSTER	100.00%	Member

123 ***LFB ACQUISITION MEMBER CORP *(1)***

Owned by :

% Ownership	Name	Role
100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
LFB ACQUISITION LLC	1.00%	Managing Member

125 ***MAR-A-LAGO CLUB INC *(1)***

Owned by :

% Ownership	Name	Role
100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
MAR-A-LAGO CLUB, L.L.C.	0.01%	Member
MALC, Inc.	100.00%	Shareholder

126 ***MAR-A-LAGO CLUB, L.L.C.***

Assumed Names : D/B/A MAR-A-LAGO CLUB, L.L.C., L.C.

Owned by :

% Ownership	Name	Role
0.01	MAR-A-LAGO CLUB INC	Member
99.99	The Donald J. Trump Revocable Trust	Member

127 ***Midland Associates *(3)***

Owned by :

% Ownership	Name	Role
25	DJT Holdings LLC	Partner
75	Trump Family Members	Partner

128 ***NITTO WORLD CO., LIMITED *(3)***

Owned by :

% Ownership	Name	Role
100	TRUMP TURNBERRY	Shareholder

129 ***OCEAN DEVELOPMENT MEMBER INC *(3)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
OCEAN DEVELOPMENT SERVICES LLC	1.00%	Member

131 ***One Central Park West Associates *(3)***

Owned by :

% Ownership	Name	Role
50	TRUMP CENTRAL PARK WEST CORP	Partner
50	GALBREATH COLUMBUS CIRCLE DEVELOPMENT ASSOCIATES, L.P.	Partner

Has ownership interest in :

Entity Name	Ownership	Title
One Central Park West PT Associates	34.30%	Member

132 ***One Central Park West PT Associates *(3)***

Owned by :

% Ownership	Name	Role
34.3	One Central Park West Associates	Partner
65.7	CPW PT Partners, G.P.	Partner

133 ***OPO HOTEL MANAGER LLC *(5)***

Owned by :

% Ownership	Name	Role
1	OPO HOTEL MANAGER MEMBER CORP	Managing Member
22.50	Trump Family Members	Member
76.50	DJT HOLDINGS LLC	Member

134 ***OPO HOTEL MANAGER MEMBER CORP *(1)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title

OPO HOTEL MANAGER LLC	1.00%	Managing Member

135 ***OWO DEVELOPER LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

136 ***PANAMA OCEAN CLUB MANAGEMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	PANAMA OCEAN CLUB MANAGEMENT MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

137 ***PANAMA OCEAN CLUB MANAGEMENT MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	PANAMA OCEAN CLUB MANAGEMENT LLC	1.00%	Managing Member

140 ***Parc Consulting, Inc. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	40 Wall Development Associates, LLC	0.10%	Member

141 ***Park Briar Associates *(1)***

Owned by :	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Partner
	75	Trump Family Members	Partner

Has ownership interest in :	Entity Name	Ownership	Title
	Starrett City Associates, L.P.	1.47%	Partner
	Spring Creek Plaza LLC	1.47%	Member

142 ***PINE HILL DEVELOPMENT LLC***

Owned by :	% Ownership	Name	Role
	1	PINE HILL DEVELOPMENT MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

143 ***PINE HILL DEVELOPMENT MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	PINE HILL DEVELOPMENT LLC	1.00%	Managing Member

144 ***Plaza Consulting Corp. *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	The East 61 Street Company, LP	0.10%	Partner

147 ***Req-Tru Equities, LTD *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

150 ***RPV DEVELOPMENT LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - LOS ANGELES	100.00%	Shareholder

151 ***SCOTLAND ACQUISITIONS LLC *(3)***

Reference #

Owned by:	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

153 ***Seven Springs LLC***

Owned by:	% Ownership	Name	Role
	0.1	Bedford Hills Corp.	Managing Member
	99.9	DJT HOLDINGS LLC	Member

154 ***Shore Haven Apt#1, Inc. *(1)***

Owned by:	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Shareholder
	75	Trump Family Members	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	Starrett City Associates, L.P.	1.72%	Partner
	Spring Creek Plaza LLC	1.72%	Member

156 ***Shore Haven Shopping Center LLC *(3)***

Owned by:	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

157 ***TRUMP TURNBERRY***

Owned by:	% Ownership	Name	Role
	100	Golf Recreation Scotland Limited	Sole Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	NITTO WORLD CO., LIMITED	100.00%	Shareholder

159 ***Sussex Hall, Inc. *(3)***

Owned by:	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Shareholder
	75	Trump Family Members	Shareholder

160 ***T International Realty LLC***

Owned by:	% Ownership	Name	Role
	55	The Donald J. Trump Revocable Trust	Managing Member
	45	Trump Family Members	Member

161 ***TAG AIR INC. *(2)***

Owned by:	% Ownership	Name	Role
	100	DJT OPERATIONS II LLC	Shareholder

162 ***THC BAKU HOTEL MANAGER SERVICES LLC *(4)***

Owned by:	% Ownership	Name	Role
	1	THC BAKU HOTEL MANAGER SERVICES MEMBER CORP.	Managing Member
	99	DJT Holdings LLC	Member

163 ***THC BAKU HOTEL MANAGER SERVICES MEMBER CORP. *(4)***

Owned by:	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	THC BAKU HOTEL MANAGER SERVICES LLC	1.00%	Managing Member

164 ***THC BAKU SERVICES LLC *(4)***

Owned by:	% Ownership	Name	Role
	1	THC BAKU SERVICES MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

165 ***THC BAKU SERVICES MEMBER CORP *(4)***

Owned by:	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title

THC BAKU SERVICES LLC	1.00%	Managing Member

166 ***THC Barra Hotelaria LTDA. *(4)***

Owned by :	% Ownership	Name	Role
	99	DJT Holdings LLC	Shareholder
	1	THC DEVELOPMENT BRAZIL MANAGING MEMBER CORP	Shareholder

167 ***THC CENTRAL RESERVATIONS LLC***

Owned by :	% Ownership	Name	Role
	1	THC CENTRAL RESERVATIONS MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

168 ***THC CENTRAL RESERVATIONS MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC CENTRAL RESERVATIONS LLC	1.00%	Managing Member

169 ***THC CHINA DEVELOPMENT LLC***

Owned by :	% Ownership	Name	Role
	100	TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC	Member

170 ***THC CHINA TECHNICAL SERVICES LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	THC CHINA TECHNICAL SERVICES MANAGER CORP	Managing Member
	99	DJT Holdings LLC	Member

171 ***THC CHINA TECHNICAL SERVICES MANAGER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC CHINA TECHNICAL SERVICES LLC	1.00%	Managing Member

172 ***THC DEVELOPMENT BRAZIL LLC. *(3)***

Owned by :	% Ownership	Name	Role
	1	THC DEVELOPMENT BRAZIL MANAGING MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

173 ***THC DEVELOPMENT BRAZIL MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC DEVELOPMENT BRAZIL LLC.	1.00%	Managing Member
	THC Barra Hotelaria LTDA	1.00%	Managing Member

176 ***THC HOTEL DEVELOPMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

177 ***THC IMEA DEVELOPMENT LLC***

Owned by :	% Ownership	Name	Role
	100	TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC	Member

178 ***THC MIAMI RESTAURANT HOSPITALITY LLC***

Owned by :	% Ownership	Name	Role

Reference #

1	THC MIAMI RESTAURANT HOSPITALITY MEMBER CORP	Managing Member
99	DJT Holdings LLC	Member

179 ***THC MIAMI RESTAURANT HOSPITALITY MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC MIAMI RESTAURANT HOSPITALITY LLC	1.00%	Managing Member

182 ***THC RIO MANAGER LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	THC RIO MANAGING MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

183 ***THC RIO MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC RIO MANAGER LLC	1.00%	Managing Member

184 ***THC SALES & MARKETING LLC***

Owned by :	% Ownership	Name	Role
	1	THC SALES & MARKETING MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

185 ***THC SALES & MARKETING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC SALES & MARKETING LLC	1.00%	Managing Member

186 ***THC SERVICES SHENZHEN LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	THC SERVICES SHENZHEN MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

187 ***THC SERVICES SHENZHEN MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC SERVICES SHENZHEN LLC	1.00%	Managing Member

188 ***THC SHENZHEN HOTEL MANAGER LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	THC SHENZHEN HOTEL MANAGER MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

189 ***THC SHENZHEN HOTEL MANAGER MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC SHENZHEN HOTEL MANAGER LLC	1.00%	Managing Member

190 ***THC VANCOUVER MANAGEMENT CORP***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

191 ***THC VANCOUVER PAYROLL ULC *(2)***

Owned by :	% Ownership	Name	Role

Reference #

100	THC VANCOUVER MANAGEMENT CORP	Member

192 ***THC VENTURE I LLC *(3)***

Owned by :	% Ownership	Name	Role
	99	DJT HOLDINGS LLC	Member
	1	THC VENTURE I MANAGING MEMBER CORP	Member

193 ***THC VENTURE I MANAGING MEMBER CORP. *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC VENTURE I LLC	1.00%	Managing Member

194 ***THC VENTURE II LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	THC VENTURE II MANAGING MEMBER CORP.	Managing Member
	99	DTTM OPERATIONS LLC	Member

195 ***THC VENTURE II MANAGING MEMBER CORP. *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THC VENTURE II LLC	1.00%	Managing Member

196 ***THC VENTURE III LLC - N/K/A TTTT Venture LLC *(1)***

Owned by :	% Ownership	Name	Role
	1	TTTT Venture Member Corp	Managing Member
	76.272	DTTM OPERATIONS LLC	Member
	22.728	Trump Family Members	Member

Has ownership interest in : various entities as indicated elsewhere in this schedule

197 ***THC VENTURE III MEMBER CORP - N/K/A TTTT Venture Member Corp *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TTTT VENTURE LLC	1.00%	Managing Member

198 ***THE CARIBUSINESS RE CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	CARIBUSINESS MRE LLC	1.00%	Managing Member
	Caribusiness Investments, S.R.L.	1.00%	Member

199 ***The East 61 Street Company, LP***

Owned by :	% Ownership	Name	Role
	99.9	The Donald J. Trump Revocable Trust	Partner
	0.1	Plaza Consulting Corp.	Partner

200 ***THE TRUMP CORPORATION***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

201 ***THE TRUMP ENTREPRENEUR INITIATIVE LLC *(5)***

Owned by :	% Ownership	Name	Role

Reference #

	100	THE TRUMP ENTREPRENEUR INITIATIVE LLC (NY DOMESTIC)	Managing Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP EDUCATION ULC	100.00%	Shareholder

202 ***THE TRUMP ENTREPRENEUR INITIATIVE LLC (NY DOMESTIC) *(5)***

Owned by :	% Ownership	Name	Role
	0.1	DJT ENTREPRENEUR MANAGING MEMBER LLC (FORMALLY KNOWN AS DJT UNIVERSITY MANAGING MEMBER LLC)	Managing Member
	3.5	Spitalny, Jonathan	Member
	4.5	Saxton, Michael	Member
	91.9	DJT ENTREPRENEUR MEMBER LLC (FORMALLY KNOWN AS DJT UNIVERSITY MEMBER LLC)	Member

Has ownership interest in :	Entity Name	Ownership	Title
	THE TRUMP ENTREPRENEUR INITIATIVE LLC	100.00%	Managing Member

203 ***THE TRUMP FOLLIES LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	THE TRUMP FOLLIES MEMBER INC.	Managing Member
	99	DJT Holdings LLC	Member

204 ***THE TRUMP FOLLIES MEMBER INC. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	THE TRUMP FOLLIES LLC	1.00%	Managing Member

205 ***The Trump Hotel Corp. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

206 ***THE TRUMP MARKS REAL ESTATE CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS REAL ESTATE LLC	1.00%	Member

207 ***The Trump Organization, Inc. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

208 ***The Trump-Equitable Fifth Avenue Company***

Owned by :	% Ownership	Name	Role
	99	The Donald J. Trump Revocable Trust	Partner
	1	TIPPERARY REALTY CORPORATION	Partner

Has ownership interest in :	Entity Name	Ownership	Title
	Fifty-Seventh Street Associates LLC	99.00%	Member
	TRUMP TOWER COMMERCIAL LLC	99.00%	Member

209 ***TIGL COMMON AREA MANAGEMENT CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

211 ***TRUMP INTERNATIONAL GOLF LINKS - DOONBEG***

Owned by :	% Ownership	Name	Role
	100	TW VENTURE II LLC	Sole Member

212 ***TIGL IRELAND MANAGEMENT LIMITED *(assets & income already disclosed on Part 2 under TRUMP INTERNATIONAL GOLF LINKS - DOONBEG; operator of suites)***

Owned by :	% Ownership	Name	Role
	100	TRUMP INTERNATIONAL GOLF LINKS - DOONBEG	Sole Member

213 ***TIHC RESERVATIONS LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

214 ***TIHH MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL HOTEL HAWAII LLC	1.00%	Managing Member

215 ***TIHH MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Managing Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL HOTEL HAWAII LLC	99.00%	Member

216 ***TIHM MEMBER CORP. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC	0.10%	Managing Member

217 ***TIHT CHICAGO MEMBER ACQUISITION LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	401 MEZZ VENTURE LLC	50.00%	Member

218 ***TIHT COMMERCIAL LLC***

Owned by :	% Ownership	Name	Role
	0.01	TIHT MEMBER LLC	Member
	99.99	The Donald J. Trump Revocable Trust	Managing Member

219 ***TIHT HOLDING COMPANY LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

220 ***TIHT MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TIHT COMMERCIAL LLC	0.01%	Member

221 ***TIPPERARY REALTY CORP. *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	The Trump-Equitable Fifth Avenue Company	1.00%	Partner

222 ***TMG Member, LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title

Reference #

	Trump Model Management LLC	85.00%	Member

223 ***TRUMP NATIONAL GOLF CLUB - CHARLOTTE***

Owned by :	% Ownership	Name	Role
	1	TNGC CHARLOTTE MANAGER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

224 ***TNGC CHARLOTTE MANAGER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - CHARLOTTE	1.00%	Managing Member

225 ***TRUMP NATIONAL GOLF CLUB - HUDSON VALLEY***

Owned by :	% Ownership	Name	Role
	1	TNGC DUTCHESS COUNTY MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

226 ***TNGC DUTCHESS COUNTY MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - HUDSON VALLEY	1.00%	Managing Member

227 ***TNGC JUPITER MANAGEMENT LLC***

Owned by :	% Ownership	Name	Role
	1	TNGC JUPITER MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

228 ***TNGC JUPITER MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TNGC JUPITER MANAGEMENT LLC	1.00%	Managing Member

229 ***TRUMP NATIONAL GOLF CLUB - PHILADELPHIA***

Owned by :	% Ownership	Name	Role
	1	TNGC PINE HILL MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

230 ***TNGC PINE HILL MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - PHILADELPHIA	1.00%	Managing Member

231 ***Toronto Development LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

234 ***TRUMP 106 CPS LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

235 ***Trump 845 LP LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Managing Member

Has ownership interest in :	Entity Name	Ownership	Title
	845 UN Limited Partnership	60.00%	Partner

Reference #

236 ***TRUMP 845 UN GP LLC *(1)***

Owned by :	% Ownership	Name	Role
	0.1	TRUMP 845 UN MGR CORP	Managing Member
	99.9	The Donald J. Trump Revocable Trust	Member

Has ownership interest in :	Entity Name	Ownership	Title
	845 UN Limited Partnership	40.00%	Partner

237 ***TRUMP 845 UN MGR CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP 845 UN GP LLC	0.10%	Managing Member

238 ***TRUMP 845 UN MGR LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Managing Member

239 ***TRUMP AC CASINO MARKS LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP AC CASINO MARKS MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

240 ***TRUMP AC CASINO MARKS MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP AC CASINO MARKS LLC	1.00%	Managing Member

241 ***TRUMP ACQUISITION CORP. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP ACQUISITION, LLC	1.00%	Managing Member

242 ***TRUMP ACQUISITION, LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP ACQUISITION CORP.	Managing Member
	99	DJT Holdings LLC	Member

243 ***TRUMP BOOKS LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP BOOKS MANAGER CORP	Managing Member
	99	DJT Holdings LLC	Member

244 ***TRUMP BOOKS MANAGER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP BOOKS LLC	1.00%	Managing Member

245 ***TRUMP BRAZIL LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

246 ***TRUMP CANADIAN SERVICES, INC. *(3)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

247 ***TRUMP CANOUAN ESTATE LLC *(5)***

Owned by :

% Ownership	Name	Role
1	TRUMP CANOUAN ESTATE MEMBER CORP	Managing Member
99	DJT Holdings LLC	Member

248 ***TRUMP CANOUAN ESTATE MEMBER CORP *(1)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
TRUMP CANOUAN ESTATE LLC	1.00%	Managing Member

249 ***TRUMP CARIBBEAN LLC *(3)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings LLC	Member

250 ***TRUMP CAROUSEL LLC***

Owned by :

% Ownership	Name	Role
1	TRUMP CAROUSEL MEMBER CORP	Managing Member
99	DJT Holdings LLC	Member

251 ***TRUMP CAROUSEL MEMBER CORP *(1)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
TRUMP CAROUSEL LLC	1.00%	Managing Member

252 ***TRUMP CENTRAL PARK WEST CORP *(3)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
One Central Park West Associates	50.00%	Partner

253 ***Trump Chicago Commercial Member Corp *(1)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
TRUMP CHICAGO COMMERCIAL MANAGER LLC	1.00%	Managing Member

254 ***TRUMP CHICAGO COMMERCIAL MANAGER LLC***

Owned by :

% Ownership	Name	Role
1	Trump Chicago Commercial Member Corp	Managing Member
99	DJT Holdings LLC	Member

255 ***TRUMP CHICAGO DEVELOPMENT LLC *(3)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings LLC	Member

256 ***TRUMP CHICAGO HOTEL MANAGER LLC***

Owned by :

% Ownership	Name	Role
1	Trump Chicago Hotel Member Corp	Managing Member
99	DJT Holdings LLC	Member

257 ***Trump Chicago Hotel Member Corp *(1)***

Owned by :

% Ownership	Name	Role
100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :

Entity Name	Ownership	Title
TRUMP CHICAGO HOTEL MANAGER LLC	1.00%	Managing Member

258 ***TRUMP CHICAGO MANAGING MEMBER LLC *(1)***

Owned by :

% Ownership	Name	Role
100	DJT HOLDINGS LLC	Member

Reference #

Has ownership interest in :	Entity Name	Ownership	Title
	401 MEZZ VENTURE LLC	1.00%	Member

259 ***TRUMP CHICAGO MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	401 MEZZ VENTURE LLC	49.00%	Member

260 ***TRUMP CHICAGO RESIDENTIAL MANAGER LLC***

Owned by :	% Ownership	Name	Role
	1	Trump Chicago Residential Member Corp	Managing Member
	99	DJT Holdings LLC	Member

261 ***Trump Chicago Residential Member Corp *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP CHICAGO RESIDENTIAL MANAGER LLC	1.00%	Managing Member

262 ***TRUMP CHICAGO RETAIL LLC *(assets & income already disclosed on Part 2 under 401 North Wabash Venture LLC; operator of retail space)***

Owned by :	% Ownership	Name	Role
	100	401 MEZZ VENTURE LLC	Member

263 ***TRUMP CHICAGO RETAIL MANAGER LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP CHICAGO RETAIL MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

264 ***TRUMP CHICAGO RETAIL MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP CHICAGO RETAIL MANAGER LLC	1.00%	Managing Member

267 ***TRUMP COMMERCIAL CHICAGO LLC *(assets & income already disclosed on Part 2 under 401 North Wabash Venture LLC; operator of commercial space)***

Owned by :	% Ownership	Name	Role
	100	401 North Wabash Venture LLC	Member

268 ***TRUMP CPS CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP CPS LLC	0.10%	Managing Member

269 ***TRUMP CPS LLC***

Owned by :	% Ownership	Name	Role
	0.1	TRUMP CPS CORP	Managing Member
	99.9	The Donald J. Trump Revocable Trust	Member

270 ***TRUMP DELMONICO LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PARK AVENUE LLC	50.00%	Managing Member

271 ***TRUMP DEVELOPMENT SERVICES LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP DEVELOPMENT SERVICES MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

272 ***TRUMP DEVELOPMENT SERVICES MEMBER CORP *(1)***

Reference #

Owned by: % Ownership 100 | Name: DJT Holdings Managing Member LLC | Role: Shareholder

Has ownership interest in: Entity Name: TRUMP DEVELOPMENT SERVICES LLC | Ownership: 1.00% | Title: Managing Member

275 ***TRUMP DRINKS ISRAEL LLC *(3)***

Owned by: % Ownership 1 | Name: TRUMP DRINKS ISRAEL MEMBER CORP | Role: Managing Member

99 | DJT Holdings LLC | Member

276 ***TRUMP DRINKS ISRAEL MEMBER CORP *(3)***

Owned by: % Ownership 100 | Name: DJT Holdings Managing Member LLC | Role: Shareholder

Has ownership interest in: Entity Name: TRUMP DRINKS ISRAEL LLC | Ownership: 1.00% | Title: Managing Member

277 ***TRUMP EDUCATION ULC *(3)***

Owned by: % Ownership 100 | Name: THE TRUMP ENTREPRENEUR INITIATIVE LLC (NY DOMESTIC) | Role: Shareholder

278 ***TRUMP EMPIRE STATE INC *(3)***

Owned by: % Ownership 100 | Name: DJT Holdings Managing Member LLC | Role: Shareholder

279 ***TRUMP NATIONAL DORAL***

Owned by: % Ownership 1 | Name: TRUMP ENDEAVOR 12 MANAGER CORP | Role: Managing Member

99 | DJT HOLDINGS LLC | Member

280 ***TRUMP ENDEAVOR 12 MANAGER CORP *(1)***

Owned by: % Ownership 100 | Name: DJT HOLDINGS MANAGING MEMBER LLC | Role: Shareholder

Has ownership interest in: Entity Name: TRUMP NATIONAL DORAL | Ownership: 1.00% | Title: Managing Member

281 ***TRUMP EU MARKS LLC *(3)***

Owned by: % Ownership 1 | Name: TRUMP EU MARKS MEMBER CORP | Role: Managing Member

99 | DTTM OPERATIONS LLC | Member

282 ***TRUMP EU MARKS MEMBER CORP *(3)***

Owned by: % Ownership 100 | Name: DTTM Operations Managing Member Corp | Role: Shareholder

Has ownership interest in: Entity Name: TRUMP EU MARKS LLC | Ownership: 1.00% | Title: Managing Member

283 ***TRUMP FERRY POINT LLC***

Assumed Names:

D/B/A	Jurisdiction
Trump Golf Links Ferry Point	Delaware
Trump Golf Links Ferry Point	New York
Trump Golf Links	New York

Owned by: % Ownership 1 | Name: TRUMP FERRY POINT MEMBER CORP | Role: Managing Member

99 | DJT Holdings LLC | Member

284 ***TRUMP FERRY POINT MEMBER CORP *(1)***

Owned by: % Ownership 100 | Name: The Donald J. Trump Revocable Trust | Role: Shareholder

Has ownership interest in: Entity Name | Ownership | Title

Reference #

TRUMP FERRY POINT LLC	1.00%	Managing Member

285 ***TRUMP FLORIDA MANAGEMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP FLORIDA MANAGER CORP	Member
	99	DJT HOLDINGS LLC	Member

286 ***TRUMP FLORIDA MANAGER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP FLORIDA MANAGEMENT LLC	1.00%	Member

287 ***TRUMP GOLF ACQUISITIONS LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

288 ***TRUMP GOLF COCO BEACH LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP GOLF COCO BEACH MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

289 ***TRUMP GOLF COCO BEACH MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP GOLF COCO BEACH LLC	1.00%	Managing Member

290 ***TRUMP GOLF MANAGEMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

291 ***TRUMP HOME MARKS LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP HOME MARKS MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

292 ***TRUMP HOME MARKS MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP HOME MARKS LLC	1.00%	Managing Member

293 ***TRUMP ICE INC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

294 ***TRUMP ICE LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

295 ***TRUMP INTERNATIONAL DEVELOPMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP INTERNATIONAL DEVELOPMENT MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

296 ***TRUMP INTERNATIONAL DEVELOPMENT MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL DEVELOPMENT LLC	1.00%	Managing Member

Reference #

297 ***TRUMP INTERNATIONAL GOLF LINKS - SCOTLAND***

Owned by :	% Ownership	Name	Role
	99	DJT HOLDINGS MANAGING MEMBER LLC	Member
	1	TRUMP SCOTLAND MEMBER INC	Member

298 ***Trump International Golf Club, Inc. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL GOLF CLUB - FLORIDA	0.001%	Member

299 ***TRUMP INTERNATIONAL GOLF CLUB - FLORIDA***

Owned by :	% Ownership	Name	Role
	0.001	Trump International Golf Club, Inc.	Member
	99.999	The Donald J. Trump Revocable Trust	Member

300 ***TRUMP INTERNATIONAL HOTEL HAWAII LLC***

Owned by :	% Ownership	Name	Role
	1	TIHH MEMBER CORP	Managing Member
	99	TIHH MEMBER LLC	Member

301 ***TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC***

Assumed Names :	D/B/A	Jurisdiction
	TRUMP HOTEL COLLECTION	Hawaii
	TRUMP HOTEL COLLECTION	New York

Owned by :	% Ownership	Name	Role
	0.1	TIHM MEMBER CORP.	Managing Member
	99.9	DJT Holdings LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	THC CHINA DEVELOPMENT LLC	100.00%	Member
	THC IMEA DEVELOPMENT LLC	100.00%	Member

303 ***Trump Korea LLC *(3)***

Owned by :	% Ownership	Name	Role
	41	DAEWOO AMERICA DEVELOPMENT (NEW YORK) CORP	Member
	59	TRUMP KOREAN PROJECTS LLC	Member

304 ***TRUMP KOREAN PROJECTS LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	Trump Korea LLC	59.00%	Member

305 ***TRUMP LAS OLAS LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP LAS OLAS MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

306 ***TRUMP LAS OLAS MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP LAS OLAS LLC	1.00%	Managing Member

307 ***TRUMP LAS VEGAS CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title

Reference #

TRUMP LAS VEGAS MANAGING MEMBER LLC	6.00%	Managing Member
TRUMP LAS VEGAS MEMBER LLC	6.00%	Managing Member

308 ***TRUMP LAS VEGAS DEVELOPMENT LLC***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS LLC	Member

309 ***TRUMP LAS VEGAS MANAGING MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	6	TRUMP LAS VEGAS CORP	Member
	94	DJT HOLDINGS LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP RUFFIN LLC	1.00%	Managing Member

310 ***TRUMP LAS VEGAS MEMBER LLC *(1)***

Owned by :	% Ownership	Name	Role
	6	TRUMP LAS VEGAS CORP	Member
	94	DJT HOLDINGS LLC	Managing Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP RUFFIN LLC	49.00%	Member

311 ***Trump Las Vegas Sales & Marketing, Inc.***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

312 ***TRUMP LAUDERDALE DEVELOPMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

313 ***TRUMP LAUDERDALE DEVELOPMENT NO 2 LLC *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

314 ***TRUMP MARKETING LLC *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

315 ***TRUMP MARKS ASIA CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS ASIA LLC	1.00%	Managing Member

316 ***TRUMP MARKS ASIA LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS ASIA CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

317 ***TRUMP MARKS ATLANTA LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS ATLANTA MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

318 ***TRUMP MARKS ATLANTA MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS ATLANTA LLC	1.00%	Managing Member

321 ***TRUMP MARKS BATUMI LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS BATUMI MANAGING MEMBER CORP	Managing Member

Reference #

99	DTTM OPERATIONS LLC	Member

322 ***TRUMP MARKS BATUMI MANAGING MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS BATUMI LLC	1.00%	Managing Member

325 ***TRUMP MARKS CANOUAN CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS CANOUAN LLC	1.00%	Managing Member

326 ***TRUMP MARKS CANOUAN LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS CANOUAN CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

327 ***TRUMP MARKS CHICAGO LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS CHICAGO MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

328 ***TRUMP MARKS CHICAGO MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS CHICAGO LLC	1.00%	Managing Member

329 ***TRUMP MARKS DUBAI CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS DUBAI LLC	1.00%	Managing Member

330 ***TRUMP MARKS DUBAI LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS DUBAI CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

333 ***TRUMP MARKS FINE FOODS LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS FINE FOODS MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

334 ***TRUMP MARKS FINE FOODS MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS FINE FOODS LLC	1.00%	Managing Member

335 ***TRUMP MARKS FT LAUDERDALE LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS FT LAUDERDALE MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

Reference #

336 ***TRUMP MARKS FT LAUDERDALE MEMBER CORP *(3)***

Owned by :	% Ownership	Name		Role
	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	
	TRUMP MARKS FT LAUDERDALE LLC	1.00%	Managing Member	

337 ***TRUMP MARKS GP CORP *(1)***

Owned by :	% Ownership	Name		Role
	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	
	TRUMP MARKS HOLDINGS LP	1.00%	Partner	

338 ***TRUMP MARKS HOLDINGS LP *(1)***

Owned by :	% Ownership	Name		Role
	1	TRUMP MARKS GP CORP		Partner
	99	DTTM Operations LLC		Partner
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	
	TRUMP MARKS LLC	100.00%	Member	

339 ***TRUMP MARKS HOLLYWOOD CORP *(3)***

Owned by :	% Ownership	Name		Role
	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	
	TRUMP MARKS HOLLYWOOD LLC	1.00%	Managing Member	

340 ***TRUMP MARKS HOLLYWOOD LLC *(3)***

Owned by :	% Ownership	Name		Role
	1	TRUMP MARKS HOLLYWOOD CORP		Managing Member
	99	DTTM OPERATIONS LLC		Member

341 ***TRUMP MARKS ISTANBUL II CORP *(1)***

Owned by :	% Ownership	Name		Role
	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	
	TRUMP MARKS INSTANBUL II LLC	1.00%	Managing Member	

342 ***TRUMP MARKS ISTANBUL II LLC***

Owned by :	% Ownership	Name		Role
	1	TRUMP MARKS ISTANBUL II CORP		Managing Member
	99	DTTM OPERATIONS LLC		Member

343 ***TRUMP MARKS JERSEY CITY CORP *(4)***

Owned by :	% Ownership	Name		Role
	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	
	TRUMP MARKS JERSEY CITY LLC	1.00%	Managing Member	

344 ***TRUMP MARKS JERSEY CITY LLC *(4)***

Owned by :	% Ownership	Name		Role
	1	TRUMP MARKS JERSEY CITY CORP		Managing Member
	99	DTTM OPERATIONS LLC		Member

345 ***TRUMP MARKS LAS VEGAS CORP *(3)***

Owned by :	% Ownership	Name		Role
	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	**Entity Name**	**Ownership**	**Title**	

TRUMP MARKS LAS VEGAS LLC	1.00%	Managing Member

346 ***TRUMP MARKS LAS VEGAS LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS LAS VEGAS CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

347 ***TRUMP MARKS LLC *(4)***

Owned by :	% Ownership	Name	Role
	100	TRUMP MARKS HOLDINGS LP	Member

350 ***TRUMP MARKS MATTRESS LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS MATTRESS MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

351 ***TRUMP MARKS MATTRESS MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS MATTRESS LLC	1.00%	Managing Member

352 ***TRUMP MARKS MENSWEAR LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS MENSWEAR MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

353 ***TRUMP MARKS MENSWEAR MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS MENSWEAR LLC	1.00%	Managing Member

354 ***TRUMP MARKS MORTGAGE CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS MTG LLC	1.00%	Managing Member

355 ***TRUMP MARKS MTG LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS MORTGAGE CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

356 ***TRUMP MARKS MUMBAI LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS MUMBAI MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

357 ***TRUMP MARKS MUMBAI MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS MUMBAI LLC	1.00%	Managing Member

358 ***TRUMP MARKS NEW ROCHELLE CORP *(4)***

Reference #

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS NEW ROCHELLE LLC	1.00%	Managing Member

359 ***TRUMP MARKS NEW ROCHELLE LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS NEW ROCHELLE CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

360 ***TRUMP MARKS PALM BEACH CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS PALM BEACH LLC	1.00%	Managing Member

361 ***TRUMP MARKS PALM BEACH LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS PALM BEACH CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

362 ***TRUMP MARKS PANAMA CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS PANAMA LLC	1.00%	Managing Member

363 ***TRUMP MARKS PANAMA LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS PANAMA CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

364 ***TRUMP MARKS PHILADELPHIA CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS PHILADELPHIA LLC	1.00%	Managing Member

365 ***TRUMP MARKS PHILADELPHIA LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS PHILADELPHIA CORP	Managing Member
	99	The Donald J. Trump Revocable Trust	Member

366 ***TRUMP MARKS PHILIPPINES CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS PHILIPPINES LLC	1.00%	Managing Member

367 ***TRUMP MARKS PHILIPPINES LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS PHILIPPINES CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

368 ***TRUMP MARKS PRODUCTS LLC *(4)***

Owned by :	% Ownership	Name	Role

Reference #

	1	TRUMP MARKS PRODUCTS MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

369 ***TRUMP MARKS PRODUCTS MEMBER CORP *(4)***

Owned by:	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	TRUMP MARKS PRODUCTS LLC	1.00%	Managing Member

370 ***TRUMP MARKS PUERTO RICO I LLC *(3)***

Owned by:	% Ownership	Name	Role
	1	TRUMP MARKS PUERTO RICO I MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

371 ***TRUMP MARKS PUERTO RICO I MEMBER CORP *(3)***

Owned by:	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	TRUMP MARKS PUERTO RICO I LLC	1.00%	Managing Member

374 ***TRUMP MARKS PUNTA DEL ESTE LLC***

Owned by:	% Ownership	Name	Role
	1	TRUMP MARKS PUNTA DEL ESTE MANAGER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

375 ***TRUMP MARKS PUNTA DEL ESTE MANAGER CORP *(1)***

Owned by:	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	TRUMP MARKS PUNTA DEL ESTE LLC	1.00%	Managing Member

376 ***TRUMP MARKS REAL ESTATE LLC *(5)***

Owned by:	% Ownership	Name	Role
	1	THE TRUMP MARKS REAL ESTATE CORP	Member
	99	DTTM OPERATIONS LLC	Member

377 ***TRUMP MARKS SOHO LICENSE CORP *(4)***

Owned by:	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	TRUMP MARKS SOHO LLC	1.00%	Member

378 ***TRUMP MARKS SOHO LLC *(4)***

Owned by:	% Ownership	Name	Role
	1	TRUMP MARKS SOHO LICENSE CORP	Member
	99	DTTM OPERATIONS LLC	Member

379 ***TRUMP MARKS STAMFORD CORP *(4)***

Owned by:	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in:	Entity Name	Ownership	Title
	TRUMP MARKS STAMFORD LLC	1.00%	Member

380 ***TRUMP MARKS STAMFORD LLC *(4)***

Owned by:	% Ownership	Name	Role
	99	DTTM OPERATIONS LLC	Member
	1	TRUMP MARKS STAMFORD CORP	Member

381 ***TRUMP MARKS SUNNY ISLES I LLC***

Owned by:	% Ownership	Name	Role
	1	TRUMP MARKS SUNNY ISLES I MEMBER CORP	Member

99	DTTM OPERATIONS LLC	Member

382 ***TRUMP MARKS SUNNY ISLES I MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS SUNNY ISLES I LLC	1.00%	Member

383 ***TRUMP MARKS SUNNY ISLES II LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS SUNNY ISLES II MEMBER CORP	Member
	99	DTTM OPERATIONS LLC	Member

384 ***TRUMP MARKS SUNNY ISLES II MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS SUNNY ISLES II LLC	1.00%	Member

385 ***TRUMP MARKS TAMPA CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS TAMPA LLC	1.00%	Member

386 ***TRUMP MARKS TAMPA LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS TAMPA CORP	Member
	99	DTTM OPERATIONS LLC	Member

387 ***TRUMP MARKS TORONTO CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS TORONTO LLC	1.00%	Member

388 ***TRUMP MARKS TORONTO LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS TORONTO CORP	Member
	99	DTTM OPERATIONS LLC	Member

389 ***TRUMP MARKS TORONTO LP *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP TORONTO MEMBER CORP	Member
	99	DTTM Operations LLC	Member

390 ***TRUMP MARKS WAIKIKI CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS WAIKIKI LLC	1.00%	Managing Member

391 ***TRUMP MARKS WAIKIKI LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS WAIKIKI CORP	Managing Member
	99	The Donald J. Trump Revocable Trust	Member

392 ***TRUMP MARKS WESTCHESTER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title

Reference #

TRUMP MARKS WESTCHESTER LLC	1.00%	Managing Member

393 ***TRUMP MARKS WESTCHESTER LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS WESTCHESTER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

394 ***TRUMP MARKS WHITE PLAINS CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS WHITE PLAINS LLC	1.00%	Managing Member

395 ***TRUMP MARKS WHITE PLAINS LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP MARKS WHITE PLAINS CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

396 ***TRUMP MIAMI RESORT MANAGEMENT LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP MIAMI RESORT MANAGEMENT MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

397 ***TRUMP MIAMI RESORT MANAGEMENT MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MIAMI RESORT MANAGEMENT LLC	1.00%	Managing Member

398 ***TRUMP MODEL MANAGEMENT LLC***

Assumed Names :	D/B/A	Jurisdiction
	TRUMP MODELS	New York

Owned by :	% Ownership	Name	Role
	15	Annie Veltri	Member
	85	TMG Member, LLC	Member

399 ***TRUMP NATIONAL GOLF CLUB - COLTS NECK***

Owned by :	% Ownership	Name	Role
	1	TRUMP NATIONAL GOLF CLUB COLTS NECK MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

400 ***TRUMP NATIONAL GOLF CLUB COLTS NECK MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - COLTS NECK	1.00%	Managing Member

401 ***TRUMP NATIONAL GOLF CLUB - WESTCHESTER***

Owned by :	% Ownership	Name	Role
	1	TRUMP NATIONAL GOLF CLUB MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Managing Member

402 ***TRUMP NATIONAL GOLF CLUB MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - WESTCHESTER	1.00%	Managing Member

403 ***TRUMP NATIONAL GOLF CLUB - WASHINGTON DC***

Reference #

Owned by :	% Ownership	Name	Role
	1	TRUMP NATIONAL GOLF CLUB WASHINGTON DC MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

404 ***TRUMP NATIONAL GOLF CLUB WASHINGTON DC MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP NATIONAL GOLF CLUB - WASHINGTON DC	1.00%	Managing Member

405 ***Trump New World Property Management, LLC *(3)***

Owned by :	% Ownership	Name	Role
	50	New World Property Management Limited	Managing Member
	50	TRUMP RIVERSIDE MANAGEMENT LLC	Managing Member

408 ***TRUMP OLD POST OFFICE LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP OLD POST OFFICE MEMBER CORP	Managing Member
	76.725	DJT HOLDINGS LLC	Member
	22.275	Trump Family Members	Member

409 ***TRUMP OLD POST OFFICE MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	77.5	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder
	22.5	Trump Family Members	

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP OLD POST OFFICE LLC	1.00%	Managing Member

411 ***TRUMP ORGANIZATION LLC *(3)***

Assumed Names :	D/B/A	Jurisdiction
	The Trump Organization	New York

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

412 ***TRUMP PAGEANTS, INC. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Miss Universe L.P., LLLP	2.00%	Partner

413 ***Miss Universe L.P., LLLP***

Owned by :	% Ownership	Name	Role
	2	TRUMP PAGEANTS, INC.	Partner
	98	DJT Holdings LLC	Partner

414 ***TRUMP PALACE/PARC LLC***

Owned by :	% Ownership	Name	Role
	0.1	FIRST MEMBER INC	Managing Member
	99.9	The Donald J. Trump Revocable Trust	Member

415 ***TRUMP PANAMA CONDOMINIUM MANAGEMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP PANAMA CONDOMINIUM MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

416 ***TRUMP PANAMA CONDOMINIUM MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PANAMA CONDOMINIUM MANAGEMENT LLC	1.00%	Managing Member

Reference #

417 ***TRUMP PANAMA HOTEL MANAGEMENT LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP PANAMA HOTEL MANAGEMENT MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

418 ***TRUMP PANAMA HOTEL MANAGEMENT MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PANAMA HOTEL MANAGEMENT LLC	1.00%	Managing Member

419 ***TRUMP PARK AVENUE ACQUISITION LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PARK AVENUE LLC	49.90%	Member

420 ***TRUMP PARK AVENUE LLC***

Owned by :	% Ownership	Name	Role
	0.1	GEPT Delmonico LLC	Member
	49.9	TRUMP PARK AVENUE ACQUISITION LLC	Member
	50	TRUMP DELMONICO LLC	Managing Member

421 ***TRUMP PAYROLL CHICAGO LLC *(2)***

Owned by :	% Ownership	Name	Role
	100	401 North Wabash Venture LLC	Managing Member

422 ***TRUMP PAYROLL CORP *(2)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

423 ***TRUMP PHOENIX DEVELOPMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

424 ***TRUMP PLAZA LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP PLAZA MEMBER INC.	Managing Member
	99	The Donald J. Trump Revocable Trust	Member

425 ***TRUMP PLAZA MEMBER INC. *(1)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PLAZA LLC	1.00%	Managing Member

426 ***TRUMP PRODUCTIONS LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP PRODUCTIONS MANAGING MEMBER INC.	Managing Member
	99	DJT Holdings LLC	Member

427 ***TRUMP PRODUCTIONS MANAGING MEMBER INC. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP PRODUCTIONS LLC	1.00%	Managing Member

429 ***TRUMP REALTY SERVICES LLC *(5)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

430 ***Trump Restaurants LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

431 ***TRUMP RIVERSIDE MANAGEMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Trump New World Property Management, LLC	50.00%	Managing Member

432 ***TRUMP RUFFIN COMMERCIAL LLC *(assets & income already disclosed on Part 2 under TRUMP RUFFIN TOWER I LLC; operator of front desk)***

Owned by :	% Ownership	Name	Role
	100	TRUMP RUFFIN TOWER I LLC	Managing Member

433 ***TRUMP RUFFIN LLC *(1)***

Owned by :	% Ownership	Name	Role
	1	TRUMP LAS VEGAS MANAGING MEMBER LLC	Managing Member
	49	TRUMP LAS VEGAS MEMBER LLC	Member
	50	Hyde Park, LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP RUFFIN TOWER I LLC	100.00%	Managing Member

434 ***TRUMP RUFFIN TOWER I LLC***

Owned by :	% Ownership	Name	Role
	100	TRUMP RUFFIN LLC	Managing Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP RUFFIN COMMERCIAL LLC	100.00%	Managing Member

435 ***TRUMP SALES & LEASING CHICAGO LLC *(5)***

Owned by :	% Ownership	Name	Role
	1	TRUMP SALES & LEASING CHICAGO MEMBER CORP	Member
	99	DJT Holdings LLC	Member

436 ***TRUMP SALES & LEASING CHICAGO MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP SALES & LEASING CHICAGO LLC	1.00%	Member

437 ***TRUMP SCOTLAND MEMBER INC. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL GOLF LINKS - SCOTLAND	1.00%	Member

438 ***TRUMP SCOTSBOROUGH SQUARE LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP SCOTSBOROUGH SQUARE MEMBER CORP.	Managing Member
	99	DJT HOLDINGS LLC	Member

439 ***TRUMP SCOTSBOROUGH SQUARE MEMBER CORP. *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP SCOTSBOROUGH SQUARE LLC	1.00%	Managing Member

440 ***TRUMP SOHO MEMBER LLC *(3)***

Reference #

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

441 ***TRUMP TORONTO DEVELOPMENT, INC. *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

442 ***TRUMP TORONTO HOTEL MANAGEMENT CORP***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

443 ***TRUMP TORONTO MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP MARKS TORONTO LP	1.00%	Member

444 ***TRUMP TOWER COMMERCIAL LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP TOWER MANAGING MEMBER INC.	Managing Member
	99	The Trump-Equitable Fifth Avenue Company	Member

445 ***TRUMP TOWER MANAGING MEMBER INC.***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP TOWER COMMERCIAL LLC	1.00%	Managing Member

446 ***Trump Village Construction Corp. *(1)***

Owned by :	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Shareholder
	75	Trump Family Members	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	Starrett City Associates, L.P.	1.84%	Partner
	Spring Creek Plaza LLC	1.84%	Member

447 ***TRUMP VINEYARD ESTATES LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP VINEYARD ESTATES MANAGER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP VINEYARD ESTATES LOT 3 OWNER LLC	100.00%	Member

448 ***TRUMP VINEYARD ESTATES LOT 3 OWNER LLC***

Owned by :	% Ownership	Name	Role
	100	TRUMP VINEYARD ESTATES LLC	Member

449 ***TRUMP VINEYARD ESTATES MANAGER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP VINEYARD ESTATES LLC	1.00%	Managing Member

450 ***TRUMP VIRGINIA ACQUISITIONS LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP VIRGINIA ACQUISITIONS MANAGER CORP	Managing Member
	99	DJT Holdings LLC	Member

451 ***TRUMP VIRGINIA ACQUISITIONS MANAGER CORP *(1)***

Owned by :	% Ownership	Name	Role

Reference #

	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP VIRGINIA ACQUISITIONS LLC	1.00%	Managing Member

452 ***TRUMP VIRGINIA LOT 5 LLC***

Owned by :	% Ownership	Name	Role
	1	TRUMP VIRGINIA LOT 5 MANAGER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

453 ***TRUMP VIRGINIA LOT 5 MANAGER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP VIRGINIA LOT 5 LLC	1.00%	Managing Member

454 ***TRUMP WINE MARKS LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	TRUMP WINE MARKS MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

455 ***TRUMP WINE MARKS MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP WINE MARKS LLC	1.00%	Managing Member

456 ***TRUMP WORLD PRODUCTIONS LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	TRUMP WORLD PRODUCTIONS MANAGER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

457 ***TRUMP WORLD PRODUCTIONS MANAGER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP WORLD PRODUCTIONS LLC	1.00%	Managing Member

458 ***TRUMP WORLD PUBLICATIONS LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

459 ***TRUMP'S CASTLE MANAGEMENT CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Shareholder

460 ***TURNBERRY SCOTLAND LLC***

Owned by :	% Ownership	Name	Role

Reference #

	1	TURNBERRY SCOTLAND MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	Golf Recreation Scotland Limited	100.00%	Sole Member

461 ***TURNBERRY SCOTLAND MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TURNBERRY SCOTLAND LLC	1.00%	Managing Member

462 ***TW VENTURE I LLC***

Owned by :	% Ownership	Name	Role
	1	TW VENTURE I MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

463 ***TW VENTURE I MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TW VENTURE I LLC	1.00%	Managing Member

464 ***TW VENTURE II LLC***

Owned by :	% Ownership	Name	Role
	1	TW VENTURE II MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	TRUMP INTERNATIONAL GOLF LINKS - DOONBEG	100.00%	Shareholder

465 ***TW VENTURE II MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	TW VENTURE II LLC	1.00%	Managing Member

466 ***ULTIMATE AIR CORP. *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

467 ***UNIT 2502 ENTERPRISES CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	UNIT 2502 ENTERPRISES LLC	1.00%	Managing Member

468 ***UNIT 2502 ENTERPRISES LLC *(5)***

Owned by :	% Ownership	Name	Role
	1	UNIT 2502 ENTERPRISES CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

469 ***TRUMP NATIONAL GOLF CLUB - LOS ANGELES***

Owned by :	% Ownership	Name	Role
	100	RPV DEVELOPMENT LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	VHPS LLC	100.00%	Managing Member

Reference #

470 ***VHPS LLC *(assets & income already disclosed on Part 2 under TRUMP NATIONAL GOLF CLUB - LOS ANGELES; owner of vacant land)***

Owned by :	% Ownership	Name	Role
	100	TRUMP NATIONAL GOLF CLUB - LOS ANGELES	Managing Member

471 ***WEST PALM OPERATIONS LLC *(6)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

472 ***Wexford Hall Inc. *(3)***

Owned by :	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Shareholder
	75	Trump Family Members	Shareholder

473 ***WHITE COURSE LLC *(6)***

Owned by :	% Ownership	Name	Role
	1	WHITE COURSE MANAGING MEMBER CORP	Managing Member
	99	DJT HOLDINGS LLC	Member

474 ***WHITE COURSE MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	WHITE COURSE LLC	1.00%	Managing Member

475 ***Wilshire Hall LLC *(3)***

Owned by :	% Ownership	Name	Role
	25	DJT Holdings LLC	Member
	75	Trump Family Members	Member

476 ***Wollman Rink Operations LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

477 ***YORKTOWN REAL ESTATE LLC (F/K/A Yorktown Development Associates LLC) *(3)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

478 ***HWA 555 Owners, LLC***

Owned by :	% Ownership	Name	Role
	100	Hudson Waterfront Associates I, L.P.	Partner

479 ***1290 AVENUE OF THE AMERICAS, A TENANCY-IN-COMMON***

Owned by :	% Ownership	Name	Role
	52	HWA 1290 III LLC	Partner
	20.2	HWA 1290 IV LLC	Partner
	27.8	HWA 1290 V LLC	Partner

480 ***Trump Management Inc.***

Owned by :	% Ownership	Name	Role
	25	The Donald J. Trump Revocable Trust	Shareholder
	75	Trump Family Members	Shareholder

481 ***HWA 1290 III LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	Hudson Waterfront Associates III, L.P.	Partner

Has ownership interest in :	Entity Name	Ownership	Title
	1290 Avenue of the Americas	52.00%	Partner

482 ***HWA 1290 IV LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	Hudson Waterfront Associates IV, L.P.	Partner

Has ownership interest in :	Entity Name	Ownership	Title
	1290 Avenue of the Americas	20.20%	Partner

483 ***HWA 1290 V LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	Hudson Waterfront Associates V, L.P.	Partner

Has ownership interest in :	Entity Name	Ownership	Title
	1290 Avenue of the Americas	27.80%	Partner

486 ***Travel Enterprises Management Inc. *(5)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

490 ***The Donald J. Trump Company LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

493 ***DT BALI GOLF MANAGER LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT BALI GOLF MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

494 ***DT BALI GOLF MANAGER MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT BALI GOLF MANAGER	1.00%	Managing Member

495 ***DT BALI HOTEL MANAGER LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT BALI HOTEL MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

496 ***DT BALI HOTEL MANAGER MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT BALI HOTEL MANAGER LLC	1.00%	Managing Member

497 ***DT BALI TECHNICAL SERVICES MANAGER LLC***

Owned by :	% Ownership	Name	Role
	1	DT BALI TECHNICAL SERVICES MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

498 ***DT BALI TECHNICAL SERVICES MANAGER MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT BALI TECHINICAL SERVICES MANAGER LLC	1.00%	Managing Member

499 ***DT CONNECT EUROPE LIMITED***

Owned by :	% Ownership	Name	Role
	100	Golf Recreation Scotland Limited	Partner

Reference #

500 ***DT ENDEAVOR I LLC***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

505 ***DT LIDO GOLF MANAGER LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT LIDO GOLF MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

506 ***DT LIDO GOLF MANAGER MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT LIDO GOLF MANAGER LLC	1.00%	Managing Member

507 ***DT LIDO HOTEL MANAGER LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT LIDO HOTEL MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

508 ***DT LIDO HOTEL MANAGER MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT LIDO HOTEL MANAGER LLC	1.00%	Managing Member

509 ***DT LIDO TECHNICAL SERVICES MANAGER LLC***

Owned by :	% Ownership	Name	Role
	1	DT LIDO TECHNICAL SERVICES MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

510 ***DT LIDO TECHNICAL SERVICES MANAGER MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT LIDO TECHNICAL SERVICES MANAGER LLC	1.00%	Managing Member

511 ***DT MARKS BALI LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS BALI MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

512 ***DT MARKS BALI MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT MARKS BALI LLC	1.00%	Managing Member

513 ***DT MARKS LIDO LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DT MARKS LIDO MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

514 ***DT MARKS LIDO MEMBER CORP *(4)***

	% Ownership	Name		Role
Owned by :	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	Entity Name	Ownership	Title	
	DT MARKS LIDO LLC	1.00%	Managing Member	

515 ***DT TOWER I LLC *(4)***

	% Ownership	Name	Role
Owned by :	1	DT TOWER I MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member

516 ***DT TOWER I MEMBER CORP *(4)***

	% Ownership	Name		Role
Owned by :	100	DJT Holdings Managing Member LLC		Shareholder
Has ownership interest in :	Entity Name	Ownership	Title	
	DT TOWER I LLC	1.00%	Managing Member	

517 ***DT TOWER KOLKATA LLC***

	% Ownership	Name	Role
Owned by :	1	DT TOWER KOLKATA MANAGING MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

518 ***DT TOWER KOLKATA MANAGING MEMBER CORP *(1)***

	% Ownership	Name		Role
Owned by :	100	DTTM Operations Managing Member Corp		Shareholder
Has ownership interest in :	Entity Name	Ownership	Title	
	DT TOWER KOLKATA LLC	1.00%	Member	

519 ***DTTM OPERATIONS LLC***

	% Ownership	Name	Role
Owned by :	1	DTTM OPERATIONS MANAGING MEMBER CORP	Managing Member
	99	DJT Holdings LLC	Member
Has ownership interest in :	various entities as indicated elsewhere in this schedule		

520 ***DTTM OPERATIONS MANAGING MEMBER CORP *(1)***

	% Ownership	Name	Role
Owned by :	100	DJT Holdings Managing Member LLC	Shareholder
Has ownership interest in :	various entities as indicated elsewhere in this schedule		

521 ***EID VENTURE II LLC *(2)***

	% Ownership	Name	Role
Owned by :	1	EID VENTURE II MEMBER CORP	Managing Member
	99	The Donald J. Trump Revocable Trust	Member

522 ***EID VENTURE II MEMBER CORP *(2)***

	% Ownership	Name		Role
Owned by :	100	The Donald J. Trump Revocable Trust		Shareholder
Has ownership interest in :	Entity Name	Ownership	Title	
	EID VENTURE II LLC	1.00%	Managing Member	

523 ***MOBILE PAYROLL CONSTRUCTION LLC***

Instructions for Part 2

Note: This is a public form. Do not include account numbers, street addresses, or family member names. See instructions for required information.

Filer's Name	Page Number
Donald J. Trump	A44 of 46

Reference #

Owned by :	% Ownership	Name	Role
	1	MOBILE PAYROLL CONSTRUCTION MANAGER CORP	Managing Member
	99	DJT Holdings LLC	Member

524 ***MOBILE PAYROLL CONSTRUCTION MANAGER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings Managing Member LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	MOBILE PAYROLL CONSTRUCTION LLC	1.00%	Managing Member

525 ***THC DC RESTAURANT HOSPITALITY LLC *(1)***

Owned by :	% Ownership	Name	Role
	100	OPO HOTEL MANAGER LLC	Member

530 ***C DEVELOPMENT VENTURES LLC *(3)***

Owned by :	% Ownership	Name	Role
	1	C DEVELOPMENT VENTURES MEMBER CORP	Managing Member
	99	DTTM OPERATIONS LLC	Member

531 ***C DEVELOPMENT VENTURES MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	C DEVELOPMENT VENTURES LLC	1.00%	Managing Member

533 ***DT VENTURE I LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

534 ***DT VENTURE I MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

535 ***DT VENTURE II LLC *(5)***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Member

536 ***DT VENTURE II MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

537 ***DT TOWER II LLC *(4)***

Owned by :	% Ownership	Name	Role
	1	DTTM Operations LLC	Member
	99	DT TOWER II MEMBER CORP	Managing Member

538 ***DT TOWER II MEMBER CORP *(4)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	DT TOWER II LLC	99.00%	Managing Member

Reference #

539 ***DT ENDEAVOR I MEMBER CORP *(3)***

Owned by :	% Ownership	Name	Role
	100	DTTM Operations Managing Member Corp	Shareholder

540 ***4T HOLDINGS ONE LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	TTTT VENTURE LLC	Member

541 ***4T HOLDINGS TWO LLC***

Owned by :	% Ownership	Name	Role
	100	TTTT VENTURE LLC	Member

Has ownership interest in :	Entity Name	Ownership	Title
	SC CLEVELAND MS MANAGEMENT LLC	100.00%	Member
	SC PIER VILLAGE MANAGEMENT LLC	100.00%	Member

542 ***STORAGE 106 LLC***

Owned by :	% Ownership	Name	Role
	100	The Donald J. Trump Revocable Trust	Member

543 ***T EXPRESS LLC***

Owned by :	% Ownership	Name	Role
	1	T EXPRESS MANAGER MEMBER CORP	Managing Member
	99	TTTT VENTURE LLC	Member

544 ***T EXPRESS MANAGER MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	T EXPRESS LLC	1.00%	Managing Member

545 ***SC CLEVELAND MS MANAGEMENT LLC***

Owned by :	% Ownership	Name	Role
	100	4T HOLDINGS TWO LLC	Member

546 ***SC PIER VILLAGE MANAGEMENT LLC *(3)***

Owned by :	% Ownership	Name	Role
	100	4T HOLDINGS TWO LLC	Member

547 ***T PROMOTIONS LLC***

Owned by :	% Ownership	Name	Role
	100	DTTM OPERATIONS LLC	Member

548 ***T RETAIL LLC***

Owned by :	% Ownership	Name	Role
	0.5	T RETAIL MANAGING MEMBER CORP	Managing Member
	0.5	DTTM OPERATIONS LLC	Member
	99	TTTT VENTURE LLC	Member

549 ***T RETAIL MANAGING MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	100	DJT HOLDINGS MANAGING MEMBER LLC	Sole Shareholder

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Donald J. Trump	A46 of 46

Reference #

Has ownership interest in :	Entity Name	Ownership	Title
	T RETAIL LLC	0.50%	Managing Member

550 ***WESTMINSTER HOTEL MANAGEMENT LLC***

Owned by :	% Ownership	Name	Role
	76.725	DJT HOLDINGS LLC	Member
	22.275	TTT CONSULTING LLC	Member
	1	WESTMINSTER HOTEL MANAGER MEMBER CORP	Managing Member

551 ***WESTMINSTER HOTEL MANAGER MEMBER CORP *(1)***

Owned by :	% Ownership	Name	Role
	77.5	The Donald J. Trump Revocable Trust	Shareholder
	22.5	TTT CONSULTING LLC	Shareholder

Has ownership interest in :	Entity Name	Ownership	Title
	WESTMINSTER HOTEL MANAGEMENT LLC	1.00%	Managing Member

552 ***1125 South Ocean LLC***

Owned by :	% Ownership	Name	Role
	100	DJT Holdings LLC	Sole Member

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Sent: 6/29/2019 12:03:59 PM
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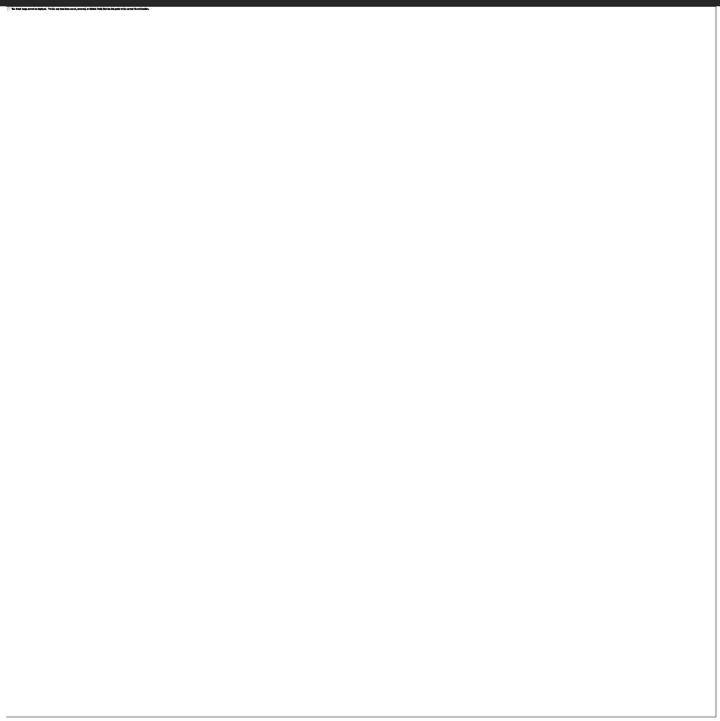

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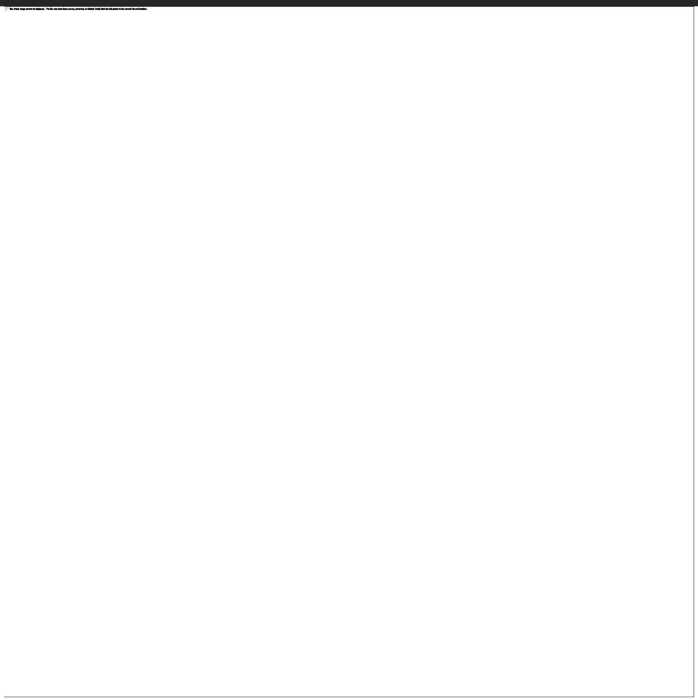

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From: Paul Morris [redacted]
Sent: 7/2/2019 4:24:45 PM
To: jeevacation@gmail.com
Subject: Capital Market Outlook

Capital Market Outlook
Chief Investment Office

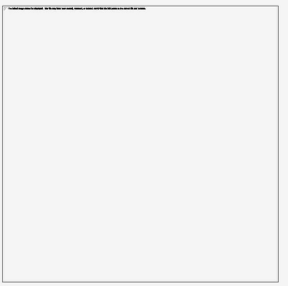
Capital Market Outlook from our Chief Investment Office delivers a balanced mix of macroeconomic insights and global market views, with in-depth analysis from the CIO's investment strategists and analysts. It offers timely commentary that can help you navigate markets and take advantage of emerging trends across the globe.

This week's topics are:

- ***Macro Strategy:* Why 2%? —** While Federal Reserve policy has always been focused on the goal of price stability, the specific meaning of price stability has been refined over the years from a general and non-specified, vague concept to the current very specific quantitative definition of a 2% long-run average for the personal consumption expenditures deflator. We describe the evolution and rationale for the more specific target.

- ***Global Market View:* Global R&D: From Apollo, to Apple, to Alibaba? —** The recent unfolding tech cold war between the U.S. and China will likely only accelerate the pace of spending on global research and development as the two parties vie for technological supremacy. China faces significant technological hurdles, while the U.S. needs to rethink and rebalance the role of public and private sector research and development spending.

- ***Thought of the Week:* A Golden Diversifier —** Gold's recent outperformance versus the U.S. dollar has potentially triggered a bullish technical pattern. In our



Paul Morris
Managing Director
Private Wealth Manager

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view, the market's expectation for looser monetary policy together with recent comments by President Trump implying a desire for a weaker greenback have been tailwinds. In addition to these drivers, we view gold as an appealing diversifier in light of elevated geopolitical risks. However, a comprehensive trade deal between the U.S. and China would likely constitute a more significant headwind for the yellow metal.

Find out more in this edition of **Capital Market Outlook**, and feel free to contact us with any questions you have about our market views.

Sincerely,
Paul

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Penguin Press

National Pub date: February 19, 2019
Title: *DEEP THINKING*
Subtitle: *Twenty-Five Ways of Looking at AI*
By: John Brockman
Length: 90,000 words

Headline: Science world luminary John Brockman assembles twenty-five of the most important scientific minds, people who have been thinking about the field artificial intelligence for most of their careers for an unparalleled round-table examination about mind, thinking, intelligence and what it means to be human.

Description:

"Artificial intelligence is today's story—the story behind all other stories. It is the Second Coming and the Apocalypse at the same time: Good AI versus evil AI." —John Brockman

More than sixty years ago, mathematician-philosopher Norbert Wiener published a book on the place of machines in society that ended with a warning: "we shall never receive the right answers to our questions unless we ask the right questions…. The hour is very late, and the choice of good and evil knocks at our door."

In the wake of advances in unsupervised, self-improving machine learning, a small but influential community of thinkers is considering Wiener's words again. In *Deep Thinking*, John Brockman gathers their disparate visions of where AI might be taking us.

The fruit of the long history of Brockman's profound engagement with the most important scientific minds who have been thinking about AI—from Alison Gopnik and David Deutsch to Frank Wilczek and Stephen Wolfram— *Deep Thinking* is an ideal introduction to the landscape of crucial issues AI presents.

The collision between opposing perspectives is salutary and exhilarating; some of these figures, such as computer scientist Stuart Russell, Skype co-founder Jaan Tallinn, and physicist Max Tegmark, are deeply concerned with the threat of AI, including the existential one, while others, notably robotics entrepreneur Rodney Brooks, philosopher Daniel Dennett, and bestselling author Steven Pinker, have a very different view. Serious, searching and authoritative, *Deep Thinking* lays out the intellectual landscape of one of the most important topics of our time.

Participants in The Deep Thinking Project

Chris Anderson is an entrepreneur; a roboticist; former editor-in-chief of *Wired*; co-founder and CEO of 3DR; and author of *The Long Tail, Free,* and *Makers.*

Rodney Brooks is a computer scientist; Panasonic Professor of Robotics, emeritus, MIT; former director, MIT Computer Science Lab; and founder, chairman, and CTO of Rethink Robotics. He is the author of *Flesh and Machines.*

George M. Church is Robert Winthrop Professor of Genetics at Harvard Medical School; Professor of Health Sciences and Technology, Harvard-MIT; and co-author (with Ed Regis) of *Regenesis: How Synthetic Biology Will Reinvent Nature and Ourselves.*

Daniel C. Dennett is University Professor and Austin B. Fletcher Professor of Philosophy and director of the Center for Cognitive Studies at Tufts University. He is the author of a dozen books, including *Consciousness Explained* and, most recently, From *Bacteria to Bach and Back: The Evolution of Minds.*

David Deutsch is a quantum physicist and a member of the Centre for Quantum Computation at the Clarendon Laboratory, Oxford University. He is the author of *The Fabric of Reality* and *The Beginning of Infinity.*

Anca Dragan is an assistant professor in the Department of Electrical Engineering and Computer Sciences at UC Berkeley. She co-founded and serves on the steering committee for the Berkeley AI Research (BAIR) Lab and is a co-principal investigator in Berkeley's Center for Human-Compatible AI.

George Dyson is a historian of science and technology and the author of *Baidarka: the Kayak, Darwin Among the Machines, Project Orion,* and *Turing's Cathedral.*

Peter Galison is a science historian, Joseph Pellegrino University Professor and co-founder of
the Black Hole Initiative at Harvard University, and the author of *Einstein's Clocks and Poincaré's Maps: Empires of Time.*

Neil Gershenfeld is a physicist and director of MIT's Center for Bits and Atoms. He is the author of *FAB*, co-author (with Alan Gershenfeld & Joel Cutcher-Gershenfeld) of *Designing Reality*, and founder of the global fab lab network.

Alison Gopnik is a developmental psychologist at UC Berkeley; her books include The Philosophical Baby and, most recently, *The Gardener and the Carpenter: What the New Science of Child Development Tells Us About the Relationship Between Parents and Children.*

HOUSE_OVERSIGHT_016805

Tom Griffiths is Henry R. Luce Professor of Information, Technology, Consciousness, and Culture at Princeton University. He is co-author (with Brian Christian) of *Algorithms to Live By.*

W. Daniel "Danny" Hillis is an inventor, entrepreneur, and computer scientist, Judge Widney Professor of Engineering and Medicine at USC, and author of *The Pattern on the Stone: The Simple Ideas That Make Computers Work.*

Caroline A. Jones is a professor of art history in the Department of Architecture at MIT and author of *Eyesight Alone: Clement Greenberg's Modernism and the Bureaucratization of the Senses; Machine in the Studio: Constructing the Postwar American Artist;* and *The Global Work of Art.*

David Kaiser is Germeshausen Professor of the History of Science and professor of physics at MIT, and head of its Program in Science, Technology & Society. He is the author of *How the Hippies Saved Physics: Science, Counterculture*, and the *Quantum Revival and American Physics and the Cold War Bubble* (forthcoming).

Seth Lloyd is a theoretical physicist at MIT, Nam P. Suh Professor in the Department of Mechanical Engineering, and an external professor at the Santa Fe Institute. He is the author of *Programming the Universe: A Quantum Computer Scientist Takes on the Cosmos.*

Hans Ulrich Obrist is artistic director of the Serpentine Gallery, London, and the author of *Ways of Curating* and *Lives of the Artists, Lives of the Architects.*

Judea Pearl is professor of computer science and director of the Cognitive Systems Laboratory at UCLA. His most recent book, co-authored with Dana Mackenzie, is *The Book of Why: The*

Alex "Sandy" Pentland is Toshiba Professor and professor of media arts and sciences, MIT; director of the Human Dynamics and Connection Science labs and the Media Lab Entrepreneurship Program, and the author of *Social Physics.*
New Science of Cause and Effect.

Steven Pinker, a Johnstone Family Professor in the Department of Psychology at Harvard University, is an experimental psychologist who conducts research in visual cognition, psycholinguistics, and social relations. He is the author of eleven books, including *The Blank Slate, The Better Angels of Our Nature*, and, most recently, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress.*

Venki Ramakrishnan is a scientist at the Medical Research Council Laboratory of Molecular Biology, Cambridge University; recipient of the Nobel Prize in Chemistry (2009); current president of the Royal Society; and the author of *Gene Machine: The Race to Discover the Secrets of the Ribosome.*

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Stuart Russell is a professor of computer science and Smith-Zadeh Professor in Engineering at UC Berkeley. He is the coauthor (with Peter Norvig) of *Artificial Intelligence: A Modern Approach.*

Jaan Tallin, a computer programmer, theoretical physicist, and investor, is a co-developer of Skype and Kazaa.

Max Tegmark is an MIT physicist and AI researcher; president of the Future of Life Institute; scientific director of the Foundational Questions Institute; and the author of *Our Mathematical Universe* and *Life 3.0: Being Human in the Age of Artificial Intelligence.*

Frank Wilczek is Herman Feshbach Professor of Physics at MIT, recipient of the 2004 Nobel Prize in physics, and the author of *A Beautiful Question: Finding Nature's Deep Design*.

Stephen Wolfram is a scientist, inventor, and the founder and CEO of Wolfram Research. He is the creator of the symbolic computation program Mathematica and its programming language, Wolfram Language, as well as the knowledge engine Wolfram|Alpha. He is also the author of *A New Kind of Science.*

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Deep Thinking
Twenty-five Ways of Looking at AI

edited by John Brockma

Penguin Press — February 19, 2019

HOUSE_OVERSIGHT_016808

Table of Contents

Acknowledgments

Introduction: On the Promise and Peril of AI
by John Brockman

Seth Lloyd: Wrong, but More Relevant Than Ever
It is exactly in the extension of the cybernetic idea to human beings that Wiener's conceptions missed their target.

Judea Pearl: The Limitations of Opaque Learning Machines
Deep learning has its own dynamics, it does its own repair and its own optimization, and it gives you the right results most of the time. But when it doesn't, you don't have a clue about what went wrong and what should be fixed.

Stuart Russell: The Purpose Put Into the Machine
We may face the prospect of superintelligent machines—their actions by definition unpredictable by us and their imperfectly specified objectives conflicting with our own—whose motivation to preserve their existence in order to achieve those objectives may be insuperable.

George Dyson: The Third Law
Any system simple enough to be understandable will not be complicated enough to behave intelligently, while any system complicated enough to behave intelligently will be too complicated to understand.

Daniel C. Dennett: What Can We Do?
We don't need artificial conscious agents. We need intelligent tools.

Rodney Brooks: The Inhuman Mess Our Machines Have Gotten Us Into
We are in a much more complex situation today than Wiener foresaw, and I am worried that it is much more pernicious than even his worst imagined fears.

Frank Wilczek: The Unity of Intelligence
The advantages of artificial over natural intelligence appear permanent, while the advantages of natural over artificial intelligence, though substantial at present, appear transient.

Max Tegmark: Let's Aspire to More Than Making Ourselves Obsolete
We should analyze what could go wrong with AI to ensure that it goes right.

Jaan Tallinn: Dissident Messages
Continued progress in AI can precipitate a change of cosmic proportions—a runaway process that will likely kill everyone.

HOUSE_OVERSIGHT_016809

Steven Pinker: Tech Prophecy and the Underappreciated Causal Power of Ideas
There is no law of complex systems that says that intelligent agents must turn into ruthless megalomaniacs.

David Deutsch: Beyond Reward and Punishment
Misconceptions about human thinking and human origins are causing corresponding misconceptions about AGI and how it might be created.

Tom Griffiths: The Artificial Use of Human Beings
Automated intelligent systems that will make good inferences about what people want must have good generative models for human behavior.

Anca Dragan: Putting the Human into the AI Equation
In the real world, an AI must interact with people and reason about them. People will have to formally enter the AI problem definition somewhere.

Chris Anderson: Gradient Descent
Just because AI systems sometimes end up in local minima, don't conclude that this makes them any less like life. Humans—indeed, probably all life-forms—are often stuck in local minima.

David Kaiser: "Information" for Wiener, for Shannon, and for Us
Many of the central arguments in The Human Use of Human Beings *seem closer to the 19th century than the 21st. Wiener seems not to have fully embraced Shannon's notion of information as consisting of irreducible, meaning-free bits.*

Neil Gershenfeld: Scaling
Although machine making and machine thinking might appear to be unrelated trends, they lie in each other's futures.

W. Daniel Hillis: The First Machine Intelligences
Hybrid superintelligences such as nation states and corporations have their own emergent goals and their actions are not always aligned to the interests of the people who created them.

Venki Ramakrishnan: Will Computers Become Our Overlords?
Our fears about AI reflect the belief that our intelligence is what makes us special.

Alex "Sandy" Pentland: The Human Strategy
How can we make a good human-artificial ecosystem, something that's not a machine society but a cyberculture in which we can all live as humans—a culture with a human feel to it?

HOUSE_OVERSIGHT_016810

Hans Ulrich Obrist: Making the Invisible Visible: Art Meets AI
Many contemporary artists are articulating various doubts about the promises of AI and reminding us not to associate the term "artificial intelligence" solely with positive outcomes.

Alison Gopnik: AIs versus Four-Year-Olds
Looking at what children do may give programmers useful hints about directions for computer learning.

Peter Galison: Algorists Dream of Objectivity
By now, the legal, ethical, formal, and economic dimensions of algorithms are all quasi-infinite.

George M. Church: The Rights of Machines
Probably we should be less concerned about us-versus-them and more concerned about the rights of all sentients in the face of an emerging unprecedented diversity of minds.

Caroline A. Jones: The Artistic Use of Cybernetic Beings
The work of cybernetically inclined artists concerns the emergent behaviors of life that elude AI in its current condition.

Stephen Wolfram: Artificial Intelligence and the Future of Civilization
The most dramatic discontinuity will surely be when we achieve effective human immortality. Whether this will be achieved biologically or digitally isn't clear, but inevitably it will be achieved.

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Introduction: On the Promise and Peril of AI
John Brockman

Artificial intelligence is today's story—the story behind all other stories. It is the Second Coming and the Apocalypse at the same time: Good AI versus evil AI. This book comes out of an ongoing conversation with a number of important thinkers, both in the world of AI and beyond it, about what AI is and what it means. Called the Deep Thinking Project, this conversation began in earnest in September 2016, in a meeting at the Mayflower Grace Hotel in Washington, Connecticut with some of the book's contributors.

What quickly emerged from that first meeting is that the excitement and fear in the wider culture surrounding AI now has an analogue in the way Norbert Wiener's ideas regarding "cybernetics" worked their way through the culture, particularly in the 1960's, as artists began to incorporate thinking about new technologies into their work. I witnessed the impact of those ideas at close hand; indeed it's not too much to say they set me off on my life's path. With the advent of the digital era beginning in the early 1970s, people stopped talking about Wiener, but today, his Cybernetic Idea has been so widely adopted that it's internalized to the point where it no longer needs a name. It's everywhere, it's in the air, and it's a fitting a place to begin.

New Technologies=New Perceptions

Before AI, there was Cybernetics—the idea of automatic, self-regulating control, laid out in Norbert Wiener's foundational text of 1948. I can date my own serious exposure to it to 1966, when the composer John Cage invited me and four or five other young arts people to join him for a series of dinners—an ongoing seminar about media, communications, art, music, and philosophy that focused on Cage's interest in the ideas of Wiener, Claude Shannon, and Marshall McLuhan, all of whom had currency in the New York art circles in which I was then moving. In particular, Cage had picked up on McLuhan's idea that by inventing electronic technologies we had externalized our central nervous system—that is, our minds—and that we now had to presume that "there's only one mind, the one we all share."

Ideas of this nature were beginning to be of great interest to the artists I was working with in New York at the Film-Makers' Cinémathèque, where I was program manager for a series of multimedia productions called the New Cinema 1 (also known as the Expanded Cinema Festival), under the auspices of avant-garde filmmaker and impresario Jonas Mekas. They included visual artists Claes Oldenburg, Robert Rauschenberg, Andy Warhol, Robert Whitman; kinetic artists Charlotte Moorman and Nam June Paik; happenings artists Allan Kaprow and Carolee Schneemann; dancer Tricia Brown; filmmakers Jack Smith, Stan Vanderbeek, Ed Emshwiller, and the Kuchar brothers; avant-garde dramatist Ken Dewey; poet Gerd Stern and the USCO group; minimalist musicians Lamonte Young and Terry Riley; and through Warhol, the music group, The Velvet Underground. Many of these people were reading Wiener, and cybernetics was in the air. It was at one of these dinners that Cage reached into his briefcase and took out a copy of *Cybernetics* and handed it to me, saying, "This is for you."

HOUSE_OVERSIGHT_016812

During the Festival, I received an unexpected phone call from Wiener's colleague Arthur K. Solomon, head of Harvard's graduate program in biophysics. Wiener had died the year before, and Solomon and Wiener's other close colleagues at MIT and Harvard had been reading about the Expanded Cinema Festival in the *New York Times* and were intrigued by the connection to Wiener's work. Solomon invited me to bring some of the artists up to Cambridge to meet with him and a group that included MIT sensory-communications researcher Walter Rosenblith, Harvard applied mathematician Anthony Oettinger, and MIT engineer Harold "Doc" Edgerton, inventor of the strobe light.

Like many other "art meets science" situations I've been involved in since, the two-day event was an informed failure: ships passing in the night. But I took it all onboard and the event was consequential in some interesting ways—one of which came from the fact that they took us to see "the" computer. Computers were a rarity back then; at least, none of us on the visit had ever seen one. We were ushered into a large space on the MIT campus, in the middle of which there was a "cold room" raised off the floor and enclosed in glass, in which technicians wearing white lab coats, scarves, and gloves were busy collating punch cards coming through an enormous machine. When I approached, the steam from my breath fogged up the window into the cold room. Wiping it off, I saw "the" computer. I fell in love.

Later, in the Fall of 1967, I went to Menlo Park to spend time with Stewart Brand, whom I had met in New York in 1965 when he was a satellite member of the USCO group of artists. Now, with his wife Lois, a mathematician, he was preparing the first edition of *The Whole Earth Catalog* for publication. While Lois and the team did the heavy lifting on the final mechanicals for WEC, Stewart and I sat together in a corner for two days, reading, underlining, and annotating the same paperback copy of *Cybernetics* that Cage had handed to me the year before, and debating Wiener's ideas.

Inspired by this set of ideas, I began to develop a theme, a mantra of sorts, that has informed my endeavors since: "new technologies = new perceptions." Inspired by communications theorist Marshall McLuhan, architect-designer Buckminster Fuller, futurist John McHale, and cultural anthropologists Edward T. (Ned) Hall and Edmund Carpenter, I started reading avidly in the field of information theory, cybernetics, and systems theory. McLuhan suggested I read biologist J.Z. Young's *Doubt and Certainty in Science* in which he said that we create tools and we mold ourselves through our use of them. The other text he recommended was Warren Weaver and Claude Shannon's 1949 paper "Recent Contributions to the Mathematical Theory of Communication," which begins: "The word *communication* will be used here in a very broad sense to include all of the procedures by which one mind may affect another. This, of course, involves not only written and oral speech, but also music, the pictorial arts, the theater, the ballet, and in fact all human behavior."

Who knew that within two decades of that moment we would begin to recognize the brain as a computer? And in the next two decades, as we built our computers into the Internet, that we would begin to realize that the brain is not a computer, but a network of computers? Certainly not Wiener, a specialist in analogue feedback circuits designed to control machines, nor the artists, nor, least of all, myself.

"We must cease to kiss the whip that lashes us."

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Two years after *Cybernetics,* in 1950, Norbert Wiener published *The Human Use of Human Beings*—a deeper story, in which he expressed his concerns about the runaway commercial exploitation and other unforeseen consequences of the new technologies of control. I didn't read *The Human Use of Human Beings* until the spring of 2016, when I picked up my copy, a first edition, which was sitting in my library next to *Cybernetics.* What shocked me was the realization of just how prescient Wiener was in 1950 about what's going on today. Although the first edition was a major bestseller—and, indeed, jump-started an important conversation—under pressure from his peers Wiener brought out a revised and milder edition in 1954, from which the original concluding chapter, "Voices of Rigidity," is conspicuously absent.

Science historian George Dyson points out that in this long-forgotten first edition, Wiener predicted the possibility of a "threatening new Fascism dependent on the *machine à gouverner*":

> No elite escaped his criticism, from the Marxists and the Jesuits ("all of Catholicism is indeed essentially a totalitarian religion") to the FBI ("our great merchant princes have looked upon the propaganda technique of the Russians, and have found that it is good") and the financiers lending their support "to make American capitalism and the fifth freedom of the businessman supreme throughout the world." Scientists . . . received the same scrutiny given the Church: "Indeed, the heads of great laboratories are very much like Bishops, with their association with the powerful in all walks of life, and the dangers they incur of the carnal sins of pride and of lust for power."

This jeremiad did not go well for Wiener. As Dyson puts it:

> These alarms were discounted at the time, not because Wiener was wrong about digital computing but because larger threats were looming as he completed his manuscript in the fall of 1949. Wiener had nothing against digital computing but was strongly opposed to nuclear weapons and refused to join those who were building digital computers to move forward on the thousand-times-more-powerful hydrogen bomb.

Since the original of *The Human Use of Human Beings* is now out of print, lost to us is Wiener's *cri de coeur*, more relevant today than when he wrote it, sixty-eight years ago: "We must cease to kiss the whip that lashes us."

Mind, Thinking, Intelligence

Among the reasons we don't hear much about "Cybernetics" today, two are central: First, although *The Human Use of Human Beings* was considered an important book in its time, it ran counter to the aspirations of many of Wiener's colleagues, including John von Neumann and Claude Shannon, who were interested in the commercialization of the new technologies. Second, computer pioneer John McCarthy disliked Wiener and refused to use Wiener's term "Cybernetics." McCarthy, in turn, coined the term "artificial intelligence" and became a founding father of that field.

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As Judea Pearl, who, in the 1980s, introduced a new approach to artificial intelligence called Bayesian networks, explained to me:

> What Wiener created was excitement to believe that one day we are going to make an intelligent machine. He wasn't a computer scientist. He talked feedback, he talked communication, he talked analog. His working metaphor was a feedback circuit, which he was an expert in. By the time the digital age began in the early 1960s people wanted to talk programming, talk codes, talk about computational functions, talk about short-term memory, long-term memory—meaningful computer metaphors. Wiener wasn't part of that, and he didn't reach the new generation that germinated with his ideas. His metaphors were too old, *passé*. There were new means already available that were ready to capture the human imagination." By 1970, people were no longer talking about Wiener.

One critical factor missing in Wiener's vision was the cognitive element: mind, thinking, intelligence. As early as 1942, at the first of a series of foundational interdisciplinary meetings about the control of complex systems that would come to be known as the Macy conferences, leading researchers were arguing for the inclusion of the cognitive element into the conversation. While von Neumann, Shannon, and Wiener were concerned about systems of control and communication of observed systems, Warren McCullough wanted to include mind. He turned to cultural anthropologists Gregory Bateson and Margaret Mead to make the connection to the social sciences. Bateson in particular was increasingly talking about patterns and processes, or "the pattern that connects." He called for a new kind of systems ecology in which organisms and the environment in which they live are one in the same, and should be considered as a single circuit. By the early 1970s the Cybernetics of observed systems—1st order Cybernetics—moved to the Cybernetics of observing systems—2nd order Cybernetics—or "the Cybernetics of Cybernetics", as coined by Heinz von Foerster, who joined the Macy conferences in the mid 1950s, and spearheaded the new movement.

Cybernetics, rather than disappearing, was becoming metabolized into *everything*, so we no longer saw it as a separate, distinct new discipline. And there it remains, hiding in plain sight.

"The Shtick of the Steins"

My own writing about these issues at the time was on the radar screen of the 2nd order Cybernetics crowd, including Heinz von Foerster as well as John Lilly and Alan Watts, who were the co-organizers of something called "The AUM Conference," shorthand for "The American University of Masters", which took place in Big Sur in 1973, a gathering of philosophers, psychologists, and scientists, each of whom asked to lecture on his own work in terms of its relationship to the ideas of British mathematician G. Spencer Brown presented in his book, *Laws of Form*.

I was a bit puzzled when I received an invitation—a very late invitation indeed—which they explained was based on their interest in the ideas I presented in a book called *Afterwords*, which were very much on their wavelength. I jumped at the opportunity, the main reason being that the keynote speaker was none other than Richard Feynman. I love

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to spend time with physicists, the reason being that they think about the universe, i.e. everything. And no physicist was reputed to be articulate as Feynman. I couldn't wait to meet him. I accepted. That said, I am not a scientist, and I had never entertained the idea of getting on a stage and delivering a "lecture" of any kind, least of all a commentary on an obscure mathematical theory in front of a group identified as the world's most interesting thinkers. Only upon my arrival in Big Sur did I find out the reason for my very late invitation. "When is Feynman's talk?" I asked at the desk. "Oh, didn't Alan Watts tell you? Richard is ill and has been hospitalized. You're his replacement. And, by the way, what's the title of your keynote lecture?"

I tried to make myself invisible for several days. Alan Watts, realizing that I was avoiding the podium, woke me up one night with a 3am knock on the door of my room. I opened the door to find him standing in front of me wearing a monk's robe with a hood that covering much of his face. His arms extended, he held a lantern in one hand, and a magnum of scotch on the other.

"John", he said in a deep voice with a rich aristocratic British accent, "you are a phony." "And, John", he continued, I am a phony. But John, I am a *real* phony!"

The next day I gave my lecture, entitled "Einstein, Gertrude Stein, Wittgenstein, and Frankenstein." Einstein: the revolution in 20th century physics; Gertrude Stein: the first writer who made integral to her work the idea of an indeterminate and discontinuous universe. Words represented neither character nor activity: A rose is a rose is a rose, and a universe is a universe is a universe.); Wittgenstein: the world as limits of language. "The limits of my language mean the limits of my world". The end of the distinction between observer and observed. Frankenstein: Cybernetics AI, robotics, all the essayists in this volume.

The lecture had unanticipated consequences. Among the participants at the AUM Conference were several authors of #1 New York Times bestsellers, yet no one there had a literary agent. And I realized that all were engaged in writing a genre of book both unnamed and unrecognized by New York publishers. Since I had an MBA from Colombia Business School, and a series of relative successes in business, I was dragooned into becoming an agent, initially for Gregory Bateson and John Lilly, whose books I sold quickly, and for sums that caught my attention, thus kick-starting my career as a literary agent.

I never did meet Richard Feynman.

The Long AI Winters

This new career put me in close touch with most of the AI pioneers, and over the decades I rode with them on waves of enthusiasm, and into valleys of disappointment.

In the early '80s the Japanese government mounted a national effort to advance AI. They called it the 5th Generation; their goal was to change the architecture of computation by breaking "the von Neumann bottleneck", by creating a massively parallel computer. In so doing, they hoped to jumpstart their economy and become a dominant world power in the field. In1983, the leader of the Japanese 5th Generation consortium came to New York for a meeting organized by Heinz Pagels, the president of the New York Academy of Sciences. I had a seat at the table alongside the leaders of the 1st generation, Marvin Minsky and John McCarthy, the 2nd generation, Edward Feigenbaum

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and Roger Schank, and Joseph Traub, head of the National Supercomputer Consortium.

In 1981 with Heinz's help, I had founded "The Reality Club" (the precursor to the non-profit Edge.org), whose initial interdisciplinary meetings took place in the Board Room at the NYAS. Heinz was working on his book, *Dreams of Reason: The Rise of the Science of Complexity*, which he considered to be a research agenda for science in the 1990's.

Through the Reality Club meetings, I got to know two young researchers who were about to play key roles in revolutionizing computer science. At MIT in the late seventies, Danny Hillis developed the algorithms that made possible the massively parallel computer. In 1983, his company, Thinking Machines, built the world's fastest supercomputer by utilizing parallel architecture. His "connection machine," closely reflected the workings of the human mind. Seth Lloyd at Rockefeller University was undertaking seminal work in the fields of quantum computation and quantum communications, including proposing the first technologically feasible design for a quantum computer.

And the Japanese? Their foray into artificial intelligence failed, and was followed by twenty years of anemic economic growth. But, the leading US scientists took this program very seriously. And Feigenbaum, who was the cutting-edge computer scientist of the day, teamed up with McCorduck to write a book on these developments. *The Fifth Generation: Artificial Intelligence and Japan's Computer Challenge to the World* was published in 1983. We had a code name for the project: "It's coming, it's coming!" But it didn't come; it went.

From that point on I've worked with researchers in nearly every variety of AI and complexity, including Rodney Brooks, Hans Moravec, John Archibald Wheeler, Benoit Mandelbrot, John Henry Holland, Danny Hillis, Freeman Dyson, Chris Langton, Doyne Farmer, Geoffrey West, Stuart Russell, and Judea Pearl.

An Ongoing Dynamical Emergent System

From the initial meeting in Washington, CT to the present, I arranged a number of dinners and discussions in London and Cambridge, Massachusetts, as well as a public event at London's City Hall. Among the attendees were distinguished scientists, science historians, and communications theorists, all of whom have been thinking seriously about AI issues for their entire careers.

I commissioned essays from a wide range of contributors, with or without references to Wiener (leaving it up to each participant). In the end, 25 people wrote essays, all individuals concerned about what is happening today in the age of AI. *Deep Thinking* in not *my* book, rather it is *our* book: Seth Lloyd, Judea Pearl, Stuart Russell, George Dyson, Daniel C. Dennett, Rodney Brooks, Frank Wilczek, Max Tegmark, Jaan Tallinn, Steven Pinker, David Deutsch, Tom Griffiths, Anca Dragan, Chris Anderson, David Kaiser, Neil Gershenfeld, W. Daniel Hillis, Venki Ramakrishnan, Alex "Sandy" Pentland, Hans Ulrich Obrist, Alison Gopnik, Peter Galison, George M. Church, Caroline A. Jones, Stephen Wolfram.

I see The Deep Thinking Project as an ongoing dynamical emergent system, a presentation of the ideas of a community of sophisticated thinkers who are bringing their experience and erudition to bear in challenging the prevailing digital AI narrative as they

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communicate their thoughts to one another. The aim is to present a mosaic of views which will help make sense out of this rapidly emerging field.

I asked the essayists to consider:

(a) The Zen-like poem "Thirteen Ways of Looking at a Blackbird," by Wallace Stevens, which he insisted was "not meant to be a collection of epigrams or of ideas, but of sensations." It is an exercise in "perspectivism," consisting of short, separate sections, each of which mentions blackbirds in some way. The poem is about his own imagination; it concerns what he attends to.

(b) The parable of the blind men and an elephant. Like the elephant, AI is too big a topic for any one perspective, never mind the fact that no two people seem to see things the same way.

What do we want the book to do? Stewart Brand has noted that "revisiting pioneer thinking is perpetually useful. And it gives a long perspective that invites thinking in decades and centuries about the subject. All contemporary discussion, is bound to age badly and immediately without the longer perspective."

Danny Hillis wants people in AI to realize how they've been programmed by Wiener's book. "You're executing its road map," he says, and you just don't realize it."

Dan Dennett would like to "let Wiener emerge as the ghost at the banquet. Think of it as a source of hybrid vigor, a source of unsettling ideas to shake uŒp the established mindset."

Neil Gershenfeld argues that "stealth remedial education for the people running the "Big Five" would be a great output from the book."

Freeman Dyson Freeman, one of the few people alive who knew Wiener, notes that "*The* Human *Use of Human Beings* is one of the best books ever written. Wiener got almost everything right. I will be interested to see what your bunch of wizards will do with it."

The Evolving AI Narrative

Things have changed—and they remain the same. Now AI is everywhere. We have the Internet. We have our smartphones. The founders of the dominant companies—the companies that hold "the whip that lashes us"—have net worths of $65 billion, $90 billion, $130 billion. High-profile individuals such as Elon Musk, Nick Bostrom, Martin Rees, Eliezer Yudkowsky, and the late Stephen Hawking have issued dire warnings about AI, resulting in the ascendancy of well-funded institutes tasked with promoting "Nice AI." But will we, as a species, be able to control a fully realized, unsupervised, self-improving AI? Wiener's warnings and admonitions in *The Human Use of Human Beings* are now very real, and they need to be looked at anew by researchers at the forefront of the AI revolution. Here is Dyson again:

> Wiener became increasingly disenchanted with the "gadget worshipers" whose corporate selfishness brought "motives to automatization that go beyond a legitimate curiosity and are sinful in themselves." He knew the danger was not machines becoming more like humans but humans being treated like machines. "The world of the future will be an ever more demanding struggle against the limitations of our intelligence," he warned in *God & Golem, Inc.*, published in

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1964, the year of his death, "not a comfortable hammock in which we can lie down to be waited upon by our robot slaves."

It's time to examine the evolving AI narrative by identifying the leading members of that mainstream community along with the dissidents, and presenting their counternarratives in their own voices.

The essays that follow thus constitute a much-needed update from the field.

John Brockman
New York, 2019

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I met ***Seth Lloyd*** *in the late 1980s, when new ways of thinking were everywhere: the importance of biological organizing principles, the computational view of mathematics and physical processes, the emphasis on parallel networks, the importance of nonlinear dynamics, the new understanding of chaos, connectionist ideas, neural networks, and parallel distributive processing. The advances in computation during that period provided us with a new way of thinking about knowledge.*

Seth likes to refer to himself as a quantum mechanic. He is internationally known for his work in the field of quantum computation, which attempts to harness the exotic properties of quantum theory, like superposition and entanglement, to solve problems that would take several lifetimes to solve on classical computers.

In the essay that follows, he traces the history of information theory from Norbert Wiener's prophetic insights to the predictions of a technological "singularity" that some would have us believe will supplant the human species. His takeaway on the recent programming method known as deep learning is to call for a more modest set of expectations; he notes that despite AI's enormous advances, robots "still can't tie their own shoes."

It's difficult for me to talk about Seth without referencing his relationship with his friend and professor, the late theoretical physicist Heinz Pagels of Rockefeller University. The graduate student and the professor each had a profound effect on each other's ideas.

In the summer of 1988, I visited Heinz and Seth at the Aspen Center for Physics. Their joint work on the subject of complexity was featured in the current issue of Scientific American*; they were ebullient. That was just two weeks before Heinz's tragic death in a hiking accident while descending Pyramid Peak with Seth. They were talking about quantum computing.*

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WRONG, BUT MORE RELEVANT THAN EVER
Seth Lloyd

Seth Lloyd *is a theoretical physicist at MIT, Nam P. Suh Professor in the Department of Mechanical Engineering, and an external professor at the Santa Fe Institute.*

The Human Use of Human Beings, Norbert Wiener's 1950 popularization of his highly influential book *Cybernetics: Control and Communication in the Animal and the Machine* (1948), investigates the interplay between human beings and machines in a world in which machines are becoming ever more computationally capable and powerful. It is a remarkably prescient book, and remarkably wrong. Written at the height of the Cold War, it contains a chilling reminder of the dangers of totalitarian organizations and societies, and of the danger to democracy when it tries to combat totalitarianism with totalitarianism's own weapons.

Wiener's *Cybernetics* looked in close scientific detail at the process of control via feedback. ("Cybernetics," from the ancient Greek for "helmsman," is the etymological basis of our word "governor," which is what James Watt called his pathbreaking feedback control device that transformed the use of steam engines.) Because he was immersed in problems of control, Wiener saw the world as a set of complex, interlocking feedback loops, in which sensors, signals, and actuators such as engines interact via an intricate exchange of signals and information. The engineering applications of *Cybernetics* were tremendously influential and effective, giving rise to rockets, robots, automated assembly lines, and a host of precision-engineering techniques—in other words, to the basis of contemporary industrial society.

Wiener had greater ambitions for cybernetic concepts, however, and in *The Human Use of Human Beings* he spells out his thoughts on its application to topics as diverse as Maxwell's Demon, human language, the brain, insect metabolism, the legal system, the role of technological innovation in government, and religion. These broader applications of cybernetics were an almost unequivocal failure. Vigorously hyped from the late 1940s to the early 1960s—to a degree similar to the hype of computer and communication technology that led to the dotcom crash of 2000-2001—cybernetics delivered satellites and telephone switching systems but generated few if any useful developments in social organization and society at large.

Nearly seventy years later, however, *The Human Use of Human Beings* has more to teach us humans than it did the first time around. Perhaps the most remarkable feature of the book is that it introduces a large number of topics concerning human/machine interactions that are still of considerable relevance. Dark in tone, the book makes several predictions about disasters to come in the second half of the 20th century, many of which are almost identical to predictions made today about the second half of the 21st.

For example, Wiener foresaw a moment in the near future of 1950 in which humans would cede control of society to a cybernetic artificial intelligence, which would then proceed to wreak havoc on humankind. The automation of manufacturing, Wiener predicted, would both create large advances in productivity and displace many workers from their jobs—a sequence of events that did indeed come to pass in the ensuing decades. Unless society could find productive occupations for these displaced workers, Wiener warned, revolt would ensue.

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But Wiener failed to foresee crucial technological developments. Like pretty much all technologists of the 1950s, he failed to predict the computer revolution. Computers, he thought, would eventually fall in price from hundreds of thousands of (1950s) dollars to tens of thousands; neither he nor his compeers anticipated the tremendous explosion of computer power that would follow the development of the transistor and the integrated circuit. Finally, because of his emphasis on control, Wiener could not foresee a technological world in which innovation and self-organization bubble up from the bottom rather than being imposed from the top.

Focusing on the evils of totalitarianism (political, scientific, and religious), Wiener saw the world in a deeply pessimistic light. His book warned of the catastrophe that awaited us if we didn't mend our ways, fast. The current world of human beings and machines, more than a half century after its publication, is much more complex, richer, and contains a much wider variety of political, social, and scientific systems than he was able to envisage. The warnings of what will happen if we get it wrong, however—for example, control of the entire Internet by a global totalitarian regime—remain as relevant and pressing today as they were in 1950.

What Wiener Got Right

Wiener's most famous mathematical works focused on problems of signal analysis and the effects of noise. During World War II, he developed techniques for aiming anti-aircraft fire by making models that could predict the future trajectory of an airplane by extrapolating from its past behavior. In *Cybernetics* and in *The Human Use of Human Beings*, Wiener notes that this past behavior includes quirks and habits of the human pilot, thus a mechanized device can predict the behavior of humans. Like Alan Turing, whose Turing Test suggested that computing machines could give responses to questions which were indistinguishable from human responses, Wiener was fascinated by the notion of capturing human behavior by mathematical description. In the 1940s, he applied his knowledge of control and feedback loops to neuro-muscular feedback in living systems, and was responsible for bringing Warren McCulloch and Walter Pitts to MIT, where they did their pioneering work on artificial neural networks.

Wiener's central insight was that the world should be understood in terms of information. Complex systems, such as organisms, brains, and human societies, consist of interlocking feedback loops in which signals exchanged between subsystems result in complex but stable behavior. When feedback loops break down, the system goes unstable. He constructed a compelling picture of how complex biological systems function, a picture that is by and large universally accepted today.

Wiener's vision of information as the central quantity in governing the behavior of complex systems was remarkable at the time. Nowadays, when cars and refrigerators are jammed with microprocessors and much of human society revolves around computers and cell phones connected by the Internet, it seems prosaic to emphasize the centrality of information, computation, and communication. In Wiener's time, however, the first digital computers had only just come into existence, and the Internet was not even a twinkle in the technologist's eye.

Wiener's powerful conception of not just engineered complex systems but all complex systems as revolving around cycles of signals and computation led to tremendous contributions to the development of complex human-made systems. The

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methods he and others developed for the control of missiles, for example, were later put to work in building the Saturn V moon rocket, one of the crowning engineering achievements of the 20th century. In particular, Wiener's applications of cybernetic concepts to the brain and to computerized perception are the direct precursors of today's neural-network-based deep-learning circuits, and of artificial intelligence itself. But current developments in these fields have diverged from his vision, and their future development may well affect the human uses both of human beings and of machines.

What Wiener Got Wrong

It is exactly in the extension of the cybernetic idea to human beings that Wiener's conceptions missed their target. Setting aside his ruminations on language, law, and human society for the moment, look at a humbler but potentially useful innovation that he thought was imminent in 1950. Wiener notes that prosthetic limbs would be much more effective if their wearers could communicate directly with their prosthetics by their own neural signals, receiving information about pressure and position from the limb and directing its subsequent motion. This turned out to be a much harder problem than Wiener envisaged: Seventy years down the road, prosthetic limbs that incorporate neural feedback are still in the very early stages. Wiener's concept was an excellent one—it's just that the problem of interfacing neural signals with mechanical-electrical devices is hard.

More significantly, Wiener (along with pretty much everyone else in 1950) greatly underappreciated the potential of digital computation. As noted, Wiener's mathematical contributions were to the analysis of signals and noise and his analytic methods apply to continuously varying, or analog, signals. Although he participated in the wartime development of digital computation, he never foresaw the exponential explosion of computing power brought on by the introduction and progressive miniaturization of semiconductor circuits. This is hardly Wiener's fault: The transistor hadn't been invented yet, and the vacuum-tube technology of the digital computers he was familiar with was clunky, unreliable, and unscalable to ever larger devices. In an appendix to the 1948 edition of *Cybernetics,* he anticipates chess-playing computers and predicts that they'll be able to look two or three moves ahead. He might have been surprised to learn that within half a century a computer would beat the human world champion at chess.

Technological Overestimation and the Existential Risks of the Singularity

When Wiener wrote his books, a significant example of technological overestimation was about to occur. The 1950s saw the first efforts at developing artificial intelligence, by researchers such as Herbert Simon, John McCarthy, and Marvin Minsky, who began to program computers to perform simple tasks and to construct rudimentary robots. The success of these initial efforts inspired Simon to declare that "machines will be capable, within twenty years, of doing any work a man can do." Such predictions turned out to be spectacularly wrong. As they became more powerful, computers got better and better at playing chess because they could systematically generate and evaluate a vast selection of possible future moves. But the majority of predictions of AI, e.g., robotic maids, turned out to be illusory. When Deep Blue beat Garry Kasparov at chess in 1997, the most

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powerful room-cleaning robot was a Roomba, which moved around vacuuming at random and squeaked when it got caught under the couch.

Technological prediction is particularly chancy, given that technologies progress by a series of refinements, halted by obstacles and overcome by innovation. Many obstacles and some innovations can be anticipated, but more cannot. In my own work with experimentalists on building quantum computers, I typically find that some of the technological steps I expect to be easy turn out to be impossible, whereas some of the tasks I imagine to be impossible turn out to be easy. You don't know until you try.

In the 1950s, partly inspired by conversations with Wiener, John von Neumann introduced the notion of the "technological singularity." Technologies tend to improve exponentially, doubling in power or sensitivity over some interval of time. (For example, since 1950, computer technologies have been doubling in power roughly every two years, an observation enshrined as Moore's Law.) Von Neumann extrapolated from the observed exponential rate of technological improvement to predict that "technological progress will become incomprehensively rapid and complicated," outstripping human capabilities in the not too distant future. Indeed, if one extrapolates the growth of raw computing power—expressed in terms of bits and bit flips—into the future at its current rate, computers should match human brains sometime in the next two to four decades (depending on how one estimates the information-processing power of human brains).

The failure of the initial overly optimistic predictions of AI dampened talk about the technological singularity for a few decades, but since the 2005 publication of Ray Kurzweil's *The Singularity is Near,* the idea of technological advance leading to superintelligence is back in force. Some believers, Kurzweil included, regard this singularity as an opportunity: Humans can merge their brains with the superintelligence and thereby live forever. Others, such as Stephen Hawking and Elon Musk, worried that this superintelligence would prove to be malign and regarded it as the greatest existing threat to human civilization. Still others, including some of the contributors to the present volume, think such talk is overblown.

Wiener's life work and his failure to predict its consequences are intimately bound up in the idea of an impending technological singularity. His work on neuroscience and his initial support of McCulloch and Pitts adumbrated the startlingly effective deep-learning methods of the present day. Over the past decade, and particularly in the last five years, such deep-learning techniques have finally exhibited what Wiener liked to call *Gestalt*—for example, the ability to recognize that a circle is a circle even if when slanted sideways it looks like an ellipse. His work on control, combined with his work on neuromuscular feedback, was significant for the development of robotics and is the inspiration for neural-based human/machine interfaces. His lapses in technological prediction, however, suggest that we should take the notion of a technological singularity with a grain of salt. The general difficulties of technological prediction and the problems specific to the development of a superintelligence should warn us against overestimating both the power and the efficacy of information processing.

The Arguments for Singularity Skepticism

No exponential increase lasts forever. An atomic explosion grows exponentially, but

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only until it runs out of fuel. Similarly, the exponential advances in Moore's Law are starting to run into limits imposed by basic physics. The clock speed of computers maxed out at a few gigahertz a decade and a half ago, simply because the chips were starting to melt. The miniaturization of transistors is already running into quantum-mechanical problems due to tunneling and leakage currents. Eventually, the various exponential improvements in memory and processing driven by Moore's Law will grind to a halt. A few more decades, however, will probably be time enough for the raw information-processing power of computers to match that of brains—at least by the crude measures of number of bits and number of bit-flips per second.

Human brains are intricately constructed, the process of millions of years of natural selection. In Wiener's time, our understanding of the architecture of the brain was rudimentary and simplistic. Since then, increasingly sensitive instrumentation and imaging techniques have shown our brains to be far more varied in structure and complex in function than Wiener could have imagined. I recently asked Tomaso Poggio, one of the pioneers of modern neuroscience, whether he was worried that computers, with their rapidly increasing processing power, would soon emulate the functioning of the human brain. "Not a chance," he replied.

The recent advances in deep learning and neuromorphic computation are very good at reproducing a particular aspect of human intelligence focused on the operation of the brain's cortex, where patterns are processed and recognized. These advances have enabled a computer to beat the world champion not just of chess but of Go, an impressive feat, but they're far short of enabling a computerized robot to tidy a room. (In fact, robots with anything approaching human capability in a broad range of flexible movements are still far away—search "robots falling down." Robots are good at making precision welds on assembly lines, but they still can't tie their own shoes.)

Raw information-processing power does not mean sophisticated information-processing power. While computer power has advanced exponentially, the programs by which computers operate have often failed to advance at all. One of the primary responses of software companies to increased processing power is to add "useful" features which often make the software harder to use. Microsoft Word reached its apex in 1995 and has been slowly sinking under the weight of added features ever since. Once Moore's Law starts slowing down, software developers will be confronted with hard choices between efficiency, speed, and functionality.

A major fear of the singulariteers is that as computers become more involved in designing their own software they'll rapidly bootstrap themselves into achieving superhuman computational ability. But the evidence of machine learning points in the opposite direction. As machines become more powerful and capable of learning, they learn more and more as human beings do—from multiple examples, often under the supervision of human and machine teachers. Education is as hard and slow for computers as it is for teenagers. Consequently, systems based on deep learning are becoming more rather than less human. The skills they bring to learning are not "better than" but "complementary to" human learning: Computer learning systems can identify patterns that humans cannot—and vice versa. The world's best chess players are neither computers nor humans but humans working together with computers. Cyberspace is indeed inhabited by harmful programs, but these primarily take the form of malware—viruses notable for their malign mindlessness, not for their

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superintelligence.

Whither Wiener

Wiener noted that exponential technological progress is a relatively modern phenomenon and not all of it is good. He regarded atomic weapons and the development of missiles with nuclear warheads as a recipe for the suicide of the human species. He compared the headlong exploitation of the planet's resources with the Mad Tea Party of *Alice in Wonderland:* Having laid waste to one local environment, we make progress simply by moving on to lay waste to the next. Wiener's optimism about the development of computers and neuro-mechanical systems was tempered by his pessimism about their exploitation by authoritarian governments, such as the Soviet Union, and the tendency for democracies, such as the United States, to become more authoritarian themselves in confronting the threat of authoritarianism.

What would Wiener think of the current human use of human beings? He would be amazed by the power of computers and the Internet. He would be happy that the early neural nets in which he played a role have spawned powerful deep-learning systems that exhibit the perceptual ability he demanded of them—although he might not be impressed that one of the most prominent examples of such computerized *Gestalt* is the ability to recognize photos of kittens on the World Wide Web. Rather than regarding machine intelligence as a threat, I suspect he would regard it as a phenomenon in its own right, different from and co-evolving with our own human intelligence.

Unsurprised by global warming—the Mad Tea Party of our era—Wiener would applaud the exponential improvement in alternative-energy technologies and would apply his cybernetic expertise to developing the intricate set of feedback loops needed to incorporate such technologies into the coming smart electrical grid. Nonetheless, recognizing that the solution to the problem of climate change is at least as much political as it is technological, he would undoubtedly be pessimistic about our chances of solving this civilization-threatening problem in time. Wiener hated hucksters—political hucksters most of all—but he acknowledged that hucksters would always be with us.

It's easy to forget just how scary Wiener's world was. The United States and the Soviet Union were in a full-out arms race, building hydrogen bombs mounted on nuclear warheads carried by intercontinental ballistic missiles guided by navigation systems to which Wiener himself—to his dismay—had contributed. I was four years old when Wiener died. In 1964, my nursery school class was practicing duck-and-cover under our desks to prepare for a nuclear attack. Given the human use of human beings in his own day, if he could see our current state, Wiener's first response would be to be relieved that we are still alive.

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In the 1980s, **Judea Pearl** *introduced a new approach to artificial intelligence called Bayesian networks. This probability-based model of machine reasoning enabled machines to function—in a complex and uncertain world—as "evidence engines," continuously revising their beliefs in light of new evidence.*

Within a few years, Judea's Bayesian networks had completely overshadowed the previous rule-based approaches to artificial intelligence. The advent of deep learning—in which computers, in effect, teach themselves to be smarter by observing tons of data, has given him pause, because this method lacks transparency.

While recognizing the impressive achievements in deep learning by colleagues such as Michael Jordan and Geoffrey Hinton, he feels uncomfortable with this kind of opacity. He set out to understand the theoretical limitations of deep-learning systems and points out that basic barriers exist that will prevent them from achieving a human kind of intelligence, no matter what we do. Leveraging the computational benefits of Bayesian networks, Judea realized that the combination of simple graphical models and data could also be used to represent and infer cause-effect relationships. The significance of this discovery far transcends its roots in artificial intelligence. His latest book explains causal thinking to the general public; you might say it is a primer on how to think even though human.

Judea's principled, mathematical approach to causality is a profound contribution to the realm of ideas. It has already benefited virtually every field of inquiry, especially the data-intensive health and social sciences.

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THE LIMITATIONS OF OPAQUE LEARNING MACHINES

Judea Pearl

Judea Pearl *is a professor of computer science and director of the Cognitive Systems Laboratory at UCLA. His most recent book, co-authored with Dana Mackenzie, is* The Book of Why: The New Science of Cause and Effect.

As a former physicist, I was extremely interested in cybernetics. Though it did not utilize the full power of Turing Machines, it was highly transparent, perhaps because it was founded on classical control theory and information theory. We are losing this transparency now, with the deep-learning style of machine learning. It is fundamentally a curve-fitting exercise that adjusts weights in intermediate layers of a long input-output chain.

I find many users who say that it "works well and we don't know why." Once you unleash it on large data, deep learning has its own dynamics, it does its own repair and its own optimization, and it gives you the right results most of the time. But when it doesn't, you don't have a clue about what went wrong and what should be fixed. In particular, you do not know if the fault is in the program, in the method, or because things have changed in the environment. We should be aiming at a different kind of transparency.

Some argue that transparency is not really needed. We don't understand the neural architecture of the human brain, yet it runs well, so we forgive our meager understanding and use human helpers to great advantage. In the same way, they argue, why not unleash deep-learning systems and create intelligence without understanding how they work? I buy this argument to some extent. I personally don't like opacity, so I won't spend my time on deep learning, but I know that it has a place in the makeup of intelligence. I know that non-transparent systems can do marvelous jobs, and our brain is proof of that marvel.

But this argument has its limitation. The reason we can forgive our meager understanding of how human brains work is because our brains work the same way, and that enables us to communicate with other humans, learn from them, instruct them, and motivate them in our own native language. If our robots will all be as opaque as AlphaGo, we won't be able to hold a meaningful conversation with them, and that would be unfortunate. We will need to retrain them whenever we make a slight change in the task or in the operating environment.

So, rather than experimenting with opaque learning machines, I am trying to understand their theoretical limitations and examine how these limitations can be overcome. I do it in the context of causal-reasoning tasks, which govern much of how scientists think about the world and, at the same time, are rich in intuition and toy examples, so we can monitor the progress in our analysis. In this context, we've discovered that some basic barriers exist, and that unless they are breached we won't get a real human kind of intelligence no matter what we do. I believe that charting these barriers may be no less important than banging our heads against them.

Current machine-learning systems operate almost exclusively in a statistical, or model-blind, mode, which is analogous in many ways to fitting a function to a cloud of data points. Such systems cannot reason about "what if ?" questions and, therefore,

HOUSE_OVERSIGHT_016828

cannot serve as the basis for Strong AI—that is, artificial intelligence that emulates human-level reasoning and competence. To achieve human-level intelligence, learning machines need the guidance of a blueprint of reality, a model—similar to a road map that guides us in driving through an unfamiliar city.

To be more specific, current learning machines improve their performance by optimizing parameters for a stream of sensory inputs received from the environment. It is a slow process, analogous to the natural-selection process that drives Darwinian evolution. It explains how species like eagles and snakes have developed superb vision systems over millions of years. It cannot explain, however, the super-evolutionary process that enabled humans to build eyeglasses and telescopes over barely a thousand years. What humans had that other species lacked was a mental representation of their environment—representations that they could manipulate at will to imagine alternative hypothetical environments for planning and learning.

Historians of *Homo sapiens* such as Yuval Noah Harari and Steven Mithen are in general agreement that the decisive ingredient that gave our ancestors the ability to achieve global dominion about forty thousand years ago was their ability to create and store a mental representation of their environment, interrogate that representation, distort it by mental acts of imagination, and finally answer the "What if?" kind of questions. Examples are interventional questions ("What if I do such-and-such?") and retrospective or counterfactual questions ("What if I had acted differently?"). No learning machine in operation today can answer such questions. Moreover, most learning machines do not possess a representation from which the answers to such questions can be derived.

With regard to causal reasoning, we find that you can do very little with any form of model-blind curve fitting, or any statistical inference, no matter how sophisticated the fitting process is. We have also found a theoretical framework for organizing such limitations, which forms a hierarchy.

On the first level, you have statistical reasoning, which can tell you only how seeing one event would change your belief about another. For example, what can a symptom tell you about a disease?

Then you have a second level, which entails the first but not vice versa. It deals with actions. "What will happen if we raise prices?" "What if you make me laugh?" That second level of the hierarchy requires information about interventions which is not available in the first. This information can be encoded in a graphical model, which merely tells us which variable responds to another.

The third level of the hierarchy is the counterfactual. This is the language used by scientists. "What if the object were twice as heavy?" "What if I were to do things differently?" "Was it the aspirin that cured my headache, or the nap I took?" Counterfactuals are at the top level in the sense that they cannot be derived even if we could predict the effects of all actions. They need an extra ingredient, in the form of equations, to tell us how variables respond to changes in other variables.

One of the crowning achievements of causal-inference research has been the algorithmization of both interventions and counterfactuals, the top two layers of the hierarchy. In other words, once we encode our scientific knowledge in a model (which may be qualitative), algorithms exist that examine the model and determine if a given query, be it about an intervention or about a counterfactual, can be estimated from the available data—and, if so, how. This capability has transformed dramatically the way

HOUSE_OVERSIGHT_016829

scientists are doing science, especially in such data-intensive sciences as sociology and epidemiology, for which causal models have become a second language. These disciplines view their linguistic transformation as the Causal Revolution. As Harvard social scientist Gary King puts it, "More has been learned about causal inference in the last few decades than the sum total of everything that had been learned about it in all prior recorded history."

As I contemplate the success of machine learning and try to extrapolate it to the future of AI, I ask myself, "Are we aware of the basic limitations that were discovered in the causal-inference arena? Are we prepared to circumvent the theoretical impediments that prevent us from going from one level of the hierarchy to another level?"

I view machine learning as a tool to get us from data to probabilities. But then we still have to make two extra steps to go from probabilities into real understandingnce—two big steps. One is to predict the effect of actions, and the second is counterfactual imagination. We cannot claim to understand reality unless we make the last two steps.

In his insightful book *Foresight and Understanding* (1961), the philosopher Stephen Toulmin identified the transparency-versus-opacity contrast as the key to understanding the ancient rivalry between Greek and Babylonian sciences. According to Toulmin, the Babylonian astronomers were masters of black-box predictions, far surpassing their Greek rivals in accuracy and consistency of celestial observations. Yet Science favored the creative-speculative strategy of the Greek astronomers, which was wild with metaphorical imagery: circular tubes full of fire, small holes through which celestial fire was visible as stars, and hemispherical Earth riding on turtleback. It was this wild modeling strategy, not Babylonian extrapolation, that jolted Eratosthenes (276-194 BC) to perform one of the most creative experiments in the ancient world and calculate the circumference of the Earth. Such an experiment would never have occurred to a Babylonian data-fitter.

Model-blind approaches impose intrinsic limitations on the cognitive tasks that Strong AI can perform. My general conclusion is that human-level AI cannot emerge solely from model-blind learning machines; it requires the symbiotic collaboration of data and models.

Data science is a science only to the extent that it facilitates the interpretation of data—a two-body problem, connecting data to reality. Data alone are hardly a science, no matter how "big" they get and how skillfully they are manipulated. Opaque learning systems may get us to Babylon, but not to Athens.

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Computer scientist **Stuart Russell**, *along with Elon Musk, Stephen Hawking, Max Tegmark, and numerous others, has insisted that attention be paid to the potential dangers in creating an intelligence on the superhuman (or even the human) level—an AGI, or artificial general intelligence, whose programmed purposes may not necessarily align with our own.*

His early work was on understanding the notion of "bounded optimality" as a formal definition of intelligence that you can work on. He developed the technique of rational meta-reasoning, "which is, roughly speaking, that you do the computations that you expect to improve the quality of your ultimate decision as quickly as possible." He has also worked on the unification of probability theory and first-order logic—resulting in a new and far more effective monitoring system for the Comprehensive Nuclear Test Ban Treaty—and on the problem of decision making over long timescales (his presentations on the latter topic are usually titled, "Life: Play and Win in 20 trillion moves").

He is very concerned with the continuing development of autonomous weapons, such as lethal micro-drones, which are potentially scalable into weapons of mass destruction. He drafted the letter from forty of the world's leading AI researchers to President Obama which resulted in high-level national-security meetings.

His current work centers on the creation of what he calls "provably beneficial" AI. He wants to ensure AI safety by "imbuing systems with explicit uncertainty" about the objectives of their human programmers, an approach that would amount to a fairly radical reordering of current AI research.

Stuart is also on the radar of anyone who has taken a course in computer science in the last twenty-odd years. He is co-author of "the" definitive AI textbook, with an estimated 5-million-plus English-language readers.

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THE PURPOSE PUT INTO THE MACHINE

Stuart Russell

***Stuart Russell** is a professor of computer science and Smith-Zadeh Professor in Engineering at UC Berkeley. He is the coauthor (with Peter Norvig) of* Artificial Intelligence: A Modern Approach.

Among the many issues raised in Norbert Wiener's *The Human Use of Human Beings* (1950) that are currently relevant, the most significant to the AI researcher is the possibility that humanity may cede control over its destiny to machines.

Wiener considered the machines of the near future as far too limited to exert global control, imagining instead that machines and machine-like control systems would be wielded by human elites to reduce the great mass of humanity to the status of "cogs and levers and rods." Looking further ahead, he pointed to the difficulty of correctly specifying objectives for highly capable machines, noting

> a few of the simpler and more obvious truths of life, such as that when a djinnee is found in a bottle, it had better be left there; that the fisherman who craves a boon from heaven too many times on behalf of his wife will end up exactly where he started; that if you are given three wishes, you must be very careful what you wish for.

The dangers are clear enough:

> Woe to us if we let [the machine] decide our conduct, unless we have previously examined the laws of its action, and know fully that its conduct will be carried out on principles acceptable to us! On the other hand, the machine like the djinnee, which can learn and can make decisions on the basis of its learning, will in no way be obliged to make such decisions as we should have made, or will be acceptable to us.

Ten years later, after seeing Arthur Samuel's checker-playing program learn to play checkers far better than its creator, Wiener published "Some Moral and Technical Consequences of Automation" in *Science*. In this paper, the message is even clearer:

> If we use, to achieve our purposes, a mechanical agency with whose operation we cannot efficiently interfere . . . we had better be quite sure that the purpose put into the machine is the purpose which we really desire. . . .

In my view, this is the source of the existential risk from superintelligent AI cited in recent years by such observers as Elon Musk, Bill Gates, Stephen Hawking, and Nick Bostrom.

Putting Purposes Into Machines

The goal of AI research has been to understand the principles underlying intelligent behavior and to build those principles into machines that can then exhibit such behavior. In the 1960s and 1970s, the prevailing theoretical notion of intelligence was the capacity for logical reasoning, including the ability to derive plans of action guaranteed to achieve a specified goal. More recently, a consensus has emerged around the idea of a rational

HOUSE_OVERSIGHT_016832

agent that perceives, and acts in order to maximize, its expected utility. Subfields such as logical planning, robotics, and natural-language understanding are special cases of the general paradigm. AI has incorporated probability theory to handle uncertainty, utility theory to define objectives, and statistical learning to allow machines to adapt to new circumstances. These developments have created strong connections to other disciplines that build on similar concepts, including control theory, economics, operations research, and statistics.

In both the logical-planning and rational-agent views of AI, the machine's objective—whether in the form of a goal, a utility function, or a reward function (as in reinforcement learning)—is specified exogenously. In Wiener's words, this is "the purpose put into the machine." Indeed, it has been one of the tenets of the field that AI systems should be general-purpose—i.e., capable of accepting a purpose as input and then achieving it—rather than special-purpose, with their goal implicit in their design. For example, a self-driving car should accept a destination as input instead of having one fixed destination. However, some aspects of the car's "driving purpose" are fixed, such as that it shouldn't hit pedestrians. This is built directly into the car's steering algorithms rather than being explicit: No self-driving car in existence today "knows" that pedestrians prefer not to be run over.

Putting a purpose into a machine which optimizes its behavior according to clearly defined algorithms seems an admirable approach to ensuring that the machine's "conduct will be carried out on principles acceptable to us!" But, as Wiener warns, we need to put in the right purpose. We might call this the King Midas problem: Midas got exactly what he asked for—namely, that everything he touched would turn to gold—but too late he discovered the drawbacks of drinking liquid gold and eating solid gold. The technical term for putting in the right purpose is *value alignment*. When it fails, we may inadvertently imbue machines with objectives counter to our own. Tasked with finding a cure for cancer as fast as possible, an AI system might elect to use the entire human population as guinea pigs for its experiments. Asked to de-acidify the oceans, it might use up all the oxygen in the atmosphere as a side effect. This is a common characteristic of systems that optimize: Variables not included in the objective may be set to extreme values to help optimize that objective.

Unfortunately, neither AI nor other disciplines (economics, statistics, control theory, operations research) built around the optimization of objectives have much to say about how to identify the purposes "we really desire." Instead, they assume that objectives are simply implanted into the machine. AI research, in its present form, studies the ability to achieve objectives, not the design of those objectives.

Steve Omohundro has pointed to a further difficulty, observing that intelligent entities must act to preserve their own existence. This tendency has nothing to do with a self-preservation instinct or any other biological notion; it's just that an entity cannot achieve its objectives if it's dead. According to Omohundro's argument, a superintelligent machine that has an off-switch—which some, including Alan Turing himself, in a 1951 talk on BBC Radio 3, have seen as our potential salvation—will take steps to disable the switch in some way.[1] Thus we may face the prospect of superintelligent machines—their actions by definition unpredictable by us and their

[1] Omohundro, "The Basic AI Drives," in *Proc. First AGI Conf.,* 171: "Artificial General Intelligence," eds. P. Wang, B. Goertzel, & S. Franklin (IOS press, 2008).

HOUSE_OVERSIGHT_016833

imperfectly specified objectives conflicting with our own—whose motivation to preserve their existence in order to achieve those objectives may be insuperable.

1001 Reasons to Pay No Attention

Objections have been raised to these arguments, primarily by researchers within the AI community. The objections reflect a natural defensive reaction, coupled perhaps with a lack of imagination about what a superintelligent machine could do. None hold water on closer examination. Here are some of the more common ones:

- *Don't worry, we can just switch it off.*[2] This is often the first thing that pops into a layperson's head when considering risks from superintelligent AI—as if a superintelligent entity would never think of that. This is rather like saying that the risk of losing to DeepBlue or AlphaGo is negligible—all one has to do is make the right moves.
- *Human-level or superhuman AI is impossible.*[3] This is an unusual claim for AI researchers to make, given that, from Turing onward, they have been fending off such claims from philosophers and mathematicians. The claim, which is backed by no evidence, appears to concede that if superintelligent AI *were* possible, it *would* be a significant risk. It's as if a bus driver, with all of humanity as passengers, said, "Yes, I am driving toward a cliff—in fact, I'm pressing the pedal to the metal! But trust me, we'll run out of gas before we get there!" The claim represents a foolhardy bet against human ingenuity. We have made such bets before and lost. On September 11, 1933, renowned physicist Ernest Rutherford stated, with utter confidence, "Anyone who expects a source of power from the transformation of these atoms is talking moonshine." On September 12, 1933, Leo Szilard invented the neutron-induced nuclear chain reaction. A few years later he demonstrated such a reaction in his laboratory at Columbia University. As he recalled in a memoir: "We switched everything off and went home. That night, there was very little doubt in my mind that the world was headed for grief."
- *It's too soon to worry about it.* The right time to worry about a potentially serious problem for humanity depends not just on when the problem will occur but also on how much time is needed to devise and implement a solution that avoids the risk. For example, if we were to detect a large asteroid predicted to collide with the Earth in 2067, would we say, "It's too soon to worry"? And if we consider the global catastrophic risks from climate change predicted to occur later in this century, is it too soon to take action to prevent them? On the contrary, it may be too late. The relevant timescale for human-level AI is less predictable, but, like nuclear fission, it might arrive considerably sooner than expected. One variation on this argument is Andrew Ng's statement that it's "like worrying about overpopulation on Mars." This appeals to a convenient analogy: Not only is the

[2] AI researcher Jeff Hawkins, for example, writes, "Some intelligent machines will be virtual, meaning they will exist and act solely within computer networks. . . . It is always possible to turn off a computer network, even if painful." https://www.recode.net/2015/3/2/11559576/.

[3] The AI100 report (Peter Stone *et al.*), sponsored by Stanford University, includes the following: "Unlike in the movies, there is no race of superhuman robots on the horizon or probably even possible." https://ai100.stanford.edu/2016-report.

HOUSE_OVERSIGHT_016834

risk easily managed and far in the future, but also it's extremely unlikely that we'd even try to move billions of humans to Mars in the first place. The analogy is a false one, however. We are already devoting huge scientific and technical resources to creating ever-more-capable AI systems. A more apt analogy would be a plan to move the human race to Mars with no consideration for what we might breathe, drink, or eat once we'd arrived.

- *Human-level AI isn't really imminent, in any case.* The AI100 report, for example, assures us, "Contrary to the more fantastic predictions for AI in the popular press, the Study Panel found no cause for concern that AI is an imminent threat to humankind." This argument simply misstates the reasons for concern, which are not predicated on imminence. In his 2014 book, *Superintelligence: Paths, Dangers, Strategies,* Nick Bostrom, for one, writes, "It is no part of the argument in this book that we are on the threshold of a big breakthrough in artificial intelligence, or that we can predict with any precision when such a development might occur."
- *You're just a Luddite.* It's an odd definition of Luddite that includes Turing, Wiener, Minsky, Musk, and Gates, who rank among the most prominent contributors to technological progress in the 20th and 21st centuries.[4] Furthermore, the epithet represents a complete misunderstanding of the nature of the concerns raised and the purpose for raising them. It is as if one were to accuse nuclear engineers of Luddism if they pointed out the need for control of the fission reaction. Some objectors also use the term "anti-AI," which is rather like calling nuclear engineers "anti-physics." The purpose of understanding and preventing the risks of AI is to ensure that we can realize the benefits. Bostrom, for example, writes that success in controlling AI will result in "a civilizational trajectory that leads to a compassionate and jubilant use of humanity's cosmic endowment"—hardly a pessimistic prediction.
- *Any machine intelligent enough to cause trouble will be intelligent enough to have appropriate and altruistic objectives.*[5] (Often, the argument adds the premise that people of greater intelligence tend to have more altruistic objectives, a view that may be related to the self-conception of those making the argument.) This argument is related to Hume's *is-ought* problem and G. E. Moore's naturalistic fallacy, suggesting that somehow the machine, as a result of its intelligence, will simply *perceive* what is right, given its experience of the world. This is implausible; for example, one cannot perceive, in the design of a chessboard and chess pieces, the goal of checkmate; the same chessboard and pieces can be used for suicide chess, or indeed many other games still to be invented. Put another way: Where Bostrom imagines humans driven extinct by a putative robot that turns the planet into a sea of paper clips, we humans see this outcome as tragic,

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[4] Elon Musk, Stephen Hawking, and others (including, apparently, the author) received the 2015 Luddite of the Year Award from the Information Technology Innovation Foundation: https://itif.org/publications/2016/01/19/artificial-intelligence-alarmists-win-itif%E2%80%99s-annual-luddite-award.

[5] Rodney Brooks, for example, asserts that it's impossible for a program to be "smart enough that it would be able to invent ways to subvert human society to achieve goals set for it by humans, without understanding the ways in which it was causing problems for those same humans." http://rodneybrooks.com/the-seven-deadly-sins-of-predicting-the-future-of-ai/.

HOUSE_OVERSIGHT_016835

whereas the iron-eating bacterium *Thiobacillus ferrooxidans* is thrilled. Who's to say the bacterium is wrong? The fact that a machine has been given a fixed objective by humans doesn't mean that it will automatically recognize the importance to humans of things that aren't part of the objective. Maximizing the objective may well cause problems for humans, but, by definition, the machine will not recognize those problems as problematic.

- *Intelligence is multidimensional, "so 'smarter than humans' is a meaningless concept."*[6] It is a staple of modern psychology that IQ doesn't do justice to the full range of cognitive skills that humans possess to varying degrees. IQ is indeed a crude measure of human intelligence, but it is utterly meaningless for current AI systems, because their capabilities across different areas are uncorrelated. How do we compare the IQ of Google's search engine, which cannot play chess, with that of DeepBlue, which cannot answer search queries?

  None of this supports the argument that because intelligence is multifaceted, we can ignore the risk from superintelligent machines. If "smarter than humans" is a meaningless concept, then "smarter than gorillas" is also meaningless, and gorillas therefore have nothing to fear from humans; clearly, that argument doesn't hold water. Not only is it logically possible for one entity to be more capable than another across all the relevant dimensions of intelligence, it is also possible for one species to represent an existential threat to another even if the former lacks an appreciation for music and literature.

Solutions

Can we tackle Wiener's warning head-on? Can we design AI systems whose purposes don't conflict with ours, so that we're sure to be happy with how they behave? On the face of it, this seems hopeless, because it will doubtless prove infeasible to write down our purposes correctly or imagine all the counterintuitive ways a superintelligent entity might fulfill them.

If we treat superintelligent AI systems as if they were black boxes from outer space, then indeed we have no hope. Instead, the approach we seem obliged to take, if we are to have any confidence in the outcome, is to define some formal problem F, and design AI systems to be F-solvers, such that no matter how perfectly a system solves F, we're guaranteed to be happy with the solution. If we can work out an appropriate F that has this property, we'll be able to create *provably beneficial* AI.

Here's an example of how *not* to do it: Let a reward be a scalar value provided periodically by a human to the machine, corresponding to how well the machine has behaved during each period, and let F be the problem of maximizing the expected sum of rewards obtained by the machine. The optimal solution to this problem is not, as one might hope, to behave well, but instead to take control of the human and force him or her to provide a stream of maximal rewards. This is known as the wireheading problem, based on observations that humans themselves are susceptible to the same problem if given a means to electronically stimulate their own pleasure centers.

There is, I believe, an approach that may work. Humans can reasonably be described as having (mostly implicit) preferences over their future lives—that is, given

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[6] Kevin Kelly, "The Myth of a Superhuman AI," *Wired*, Apr. 25, 2017.

HOUSE_OVERSIGHT_016836

enough time and unlimited visual aids, a human could express a preference (or indifference) when offered a choice between two future lives laid out before him or her in all their aspects. (This idealization ignores the possibility that our minds are composed of subsystems with incompatible preferences; if true, that would limit a machine's ability to optimally satisfy our preferences, but it doesn't seem to prevent us from designing machines that avoid catastrophic outcomes.) The formal problem F to be solved by the machine in this case is to maximize human future-life preferences subject to its initial uncertainty as to what they are. Furthermore, although the future-life preferences are hidden variables, they're grounded in a voluminous source of evidence—namely, all of the human choices ever made. This formulation sidesteps Wiener's problem: The machine may learn more about human preferences as it goes along, of course, but it will never achieve complete certainty.

A more precise definition is given by the framework of cooperative inverse-reinforcement learning, or CIRL. A CIRL problem involves two agents, one human and the other a robot. Because there are two agents, the problem is what economists call a game. It is a game of partial information, because while the human knows the reward function, the robot doesn't—even though the robot's job is to maximize it.

A simple example: Suppose that Harriet, the human, likes to collect paper clips and staples and her reward function depends on how many of each she has. More precisely, if she has p paper clips and s staples, her degree of happiness is $\theta p + (1-\theta)s$, where θ *is* essentially an exchange rate between paper clips and staples. If θ is 1, she likes only paper clips; if θ is 0, she likes only staples; if θ is 0.5, she is indifferent between them; and so on. It's the job of Robby, the robot, to produce the paper clips and staples. The point of the game is that Robby wants to make Harriet happy, but he doesn't know the value of θ, so he isn't sure how many of each to produce.

Here's how the game works. Let the true value of θ be 0.49—that is, Harriet has a slight preference for staples over paper clips. And let's assume that Robby has a uniform prior belief about θ—that is, he believes θ is equally likely to be any value between 0 and 1. Harriet now gets to do a small demonstration, producing either two paper clips or two staples or one of each. After that, the robot can produce either ninety paper clips, or ninety staples, or fifty of each. You might think that Harriet, who prefers staples to paper clips, should produce two staples. But in that case, Robby's rational response would be to produce ninety staples (with a total value to Harriet of 45.9), which is a less desirable outcome for Harriet than fifty of each (total value 50.0). The optimal solution of this particular game is that Harriet produces one of each, so then Robby makes fifty of each. Thus, the way the game is defined encourages Harriet to "teach" Robby—as long as she knows that Robby is watching carefully.

Within the CIRL framework, one can formulate and solve the off-switch problem—that is, the problem of how to prevent a robot from disabling its off-switch. (Turing may rest easier.) A robot that's uncertain about human preferences actually benefits from being switched off, because it understands that the human will press the off-switch to prevent the robot from doing something counter to those preferences. Thus the robot is incentivized to preserve the off-switch, and this incentive derives directly from its uncertainty about human preferences.[7]

The off-switch example suggests some templates for controllable-agent

[7] See Hadfield-Menell et al., "The Off-Switch Game," https://arxiv.org/pdf/1611.08219.pdf.

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designs and provides at least one case of a provably beneficial system in the sense introduced above. The overall approach resembles mechanism-design problems in economics, wherein one incentivizes other agents to behave in ways beneficial to the designer. The key difference here is that we are building one of the agents in order to benefit the other.

There are reasons to think this approach may work in practice. First, there is abundant written and filmed information about humans doing things (and other humans reacting). Technology to build models of human preferences from this storehouse will presumably be available long before superintelligent AI systems are created. Second, there are strong, near-term economic incentives for robots to understand human preferences: If one poorly designed domestic robot cooks the cat for dinner, not realizing that its sentimental value outweighs its nutritional value, the domestic-robot industry will be out of business.

There are obvious difficulties, however, with an approach that expects a robot to learn underlying preferences from human behavior. Humans are irrational, inconsistent, weak-willed, and computationally limited, so their actions don't always reflect their true preferences. (Consider, for example, two humans playing chess. Usually, one of them loses, but not on purpose!) So robots can learn from nonrational human behavior only with the aid of much better cognitive models of humans. Furthermore, practical and social constraints will prevent all preferences from being maximally satisfied simultaneously, which means that robots must mediate among conflicting preferences—something that philosophers and social scientists have struggled with for millennia. And what should robots learn from humans who enjoy the suffering of others? It may be best to zero out such preferences in the robots' calculations.

Finding a solution to the AI control problem is an important task; it may be, in Bostrom's words, "the essential task of our age." Up to now, AI research has focused on systems that are better at making decisions, but this is not the same as making better decisions. No matter how excellently an algorithm maximizes, and no matter how accurate its model of the world, a machine's decisions may be ineffably stupid in the eyes of an ordinary human if its utility function is not well aligned with human values.

This problem requires a change in the definition of AI itself—from a field concerned with pure intelligence, independent of the objective, to a field concerned with systems that are provably beneficial for humans. Taking the problem seriously seems likely to yield new ways of thinking about AI, its purpose, and our relationship to it.

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In 2005, **George Dyson**, *a historian of science and technology, visited Google at the invitation of some Google engineers. The occasion was the sixtieth anniversary of John von Neumann's proposal for a digital computer. After the visit, George wrote an essay, "Turing's Cathedral," which, for the first time, alerted the public about what Google's founders had in store for the world. "We are not scanning all those books to be read by people," explained one of his hosts after his talk. "We are scanning them to be read by an AI."*

George offers a counternarrative to the digital age. His interests have included the development of the Aleut kayak, the evolution of digital computing and telecommunications, the origins of the digital universe, and a path not taken into space. His career (he never finished high school, yet has been awarded an honorary doctorate from the University of Victoria) has proved as impossible to classify as his books.

He likes to point out that analog computing, once believed to be as extinct as the differential analyzer, has returned. He argues that while we may use digital components, at a certain point the analog computing being performed by the system far exceeds the complexity of the digital code with which it is built. He believes that true artificial intelligence—with analog control systems emerging from a digital substrate the way digital computers emerged out of analog components in the aftermath of World War II—may not be as far off as we think.

In this essay, George contemplates the distinction between analog and digital computation and finds analog to be alive and well. Nature's response to an attempt to program machines to control everything may be machines without programming over which no one has control.

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THE THIRD LAW
George Dyson

***George Dyson** is a historian of science and technology and the author of* Baidarka: the Kayak, Darwin Among the Machines, Project Orion, *and* Turing's Cathedral.

The history of computing can be divided into an Old Testament and a New Testament: before and after electronic digital computers and the codes they spawned proliferated across the Earth. The Old Testament prophets, who delivered the underlying logic, included Thomas Hobbes and Gottfried Wilhelm Leibniz. The New Testament prophets included Alan Turing, John von Neumann, Claude Shannon, and Norbert Wiener. They delivered the machines.

Alan Turing wondered what it would take for machines to become intelligent. John von Neumann wondered what it would take for machines to self-reproduce. Claude Shannon wondered what it would take for machines to communicate reliably, no matter how much noise intervened. Norbert Wiener wondered how long it would take for machines to assume control.

Wiener's warnings about control systems beyond human control appeared in 1949, just as the first generation of stored-program electronic digital computers were introduced. These systems required direct supervision by human programmers, undermining his concerns. What's the problem, as long as programmers are in control of the machines? Ever since, debate over the risks of autonomous control has remained associated with the debate over the powers and limitations of digitally coded machines. Despite their astonishing powers, little real autonomy has been observed. This is a dangerous assumption. What if digital computing is being superseded by something else?

Electronics underwent two fundamental transitions over the past hundred years: from analog to digital and from vacuum tubes to solid state. That these transitions occurred together does not mean they are inextricably linked. Just as digital computation was implemented using vacuum tube components, analog computation can be implemented in solid state. Analog computation is alive and well, even though vacuum tubes are commercially extinct.

There is no precise distinction between analog and digital computing. In general, digital computing deals with integers, binary sequences, deterministic logic, and time that is idealized into discrete increments, whereas analog computing deals with real numbers, nondeterministic logic, and continuous functions, including time as it exists as a continuum in the real world.

Imagine you need to find the middle of a road. You can measure its width using any available increment and then digitally compute the middle to the nearest increment. Or you can use a piece of string as an analog computer, mapping the width of the road to the length of the string and finding the middle, without being limited to increments, by doubling the string back upon itself.

Many systems operate across both analog and digital regimes. A tree integrates a wide range of inputs as continuous functions, but if you cut down that tree, you find that it has been counting the years digitally all along.

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In analog computing, complexity resides in network topology, not in code. Information is processed as continuous functions of values such as voltage and relative pulse frequency rather than by logical operations on discrete strings of bits. Digital computing, intolerant of error or ambiguity, depends upon error correction at every step along the way. Analog computing tolerates errors, allowing you to live with them.

Nature uses digital coding for the storage, replication, and recombination of sequences of nucleotides, but relies on analog computing, running on nervous systems, for intelligence and control. The genetic system in every living cell is a stored-program computer. Brains aren't.

Digital computers execute transformations between two species of bits: bits representing differences in space and bits representing differences in time. The transformations between these two forms of information, sequence and structure, are governed by the computer's programming, and as long as computers require human programmers, we retain control.

Analog computers also mediate transformations between two forms of information: structure in space and behavior in time. There is no code and no programming. Somehow—and we don't fully understand how—Nature evolved analog computers known as nervous systems, which embody information absorbed from the world. They learn. One of the things they learn is control. They learn to control their own behavior, and they learn to control their environment to the extent that they can.

Computer science has a long history—going back to before there even *was* computer science—of implementing neural networks, but for the most part these have been simulations of neural networks by digital computers, not neural networks as evolved in the wild by Nature herself. This is starting to change: from the bottom up, as the threefold drivers of drone warfare, autonomous vehicles, and cell phones push the development of neuromorphic microprocessors that implement actual neural networks, rather than simulations of neural networks, directly in silicon (and other potential substrates); and from the top down, as our largest and most successful enterprises increasingly turn to analog computation in their infiltration and control of the world.

While we argue about the intelligence of digital computers, analog computing is quietly supervening upon the digital, in the same way that analog components like vacuum tubes were repurposed to build digital computers in the aftermath of World War II. Individually deterministic finite-state processors, running finite codes, are forming large-scale, nondeterministic, non-finite-state metazoan organisms running wild in the real world. The resulting hybrid analog/digital systems treat streams of bits collectively, the way the flow of electrons is treated in a vacuum tube, rather than individually, as bits are treated by the discrete-state devices generating the flow. Bits are the new electrons. Analog is back, and its nature is to assume control.

Governing everything from the flow of goods to the flow of traffic to the flow of ideas, these systems operate statistically, as pulse-frequency coded information is processed in a neuron or a brain. The emergence of intelligence gets the attention of *Homo sapiens,* but what we should be worried about is the emergence of control.

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Imagine it is 1958 and you are trying to defend the continental United States against airborne attack. To distinguish hostile aircraft, one of the things you need, besides a network of computers and early-warning radar sites, is a map of all commercial air traffic, updated in real time. The United States built such a system and named it SAGE (Semi-Automatic Ground Environment). SAGE in turn spawned Sabre, the first integrated reservation system for booking airline travel in real time. Sabre and its progeny soon became not just a map as to what seats were available but also a system that began to control, with decentralized intelligence, where airliners would fly, and when.

But isn't there a control room somewhere, with someone at the controls? Maybe not. Say, for example, you build a system to map highway traffic in real time, simply by giving cars access to the map in exchange for reporting their own speed and location at the time. The result is a fully decentralized control system. Nowhere is there any controlling model of the system except the system itself.

Imagine it is the first decade of the 21st century and you want to track the complexity of human relationships in real time. For social life at a small college, you could construct a central database and keep it up to date, but its upkeep would become overwhelming if taken to any larger scale. Better to pass out free copies of a simple semi-autonomous code, hosted locally, and let the social network update itself. This code is executed by digital computers, but the analog computing performed by the system as a whole far exceeds the complexity of the underlying code. The resulting pulse-frequency coded model of the social graph *becomes* the social graph. It spreads wildly across the campus and then the world.

What if you wanted to build a machine to capture what everything known to the human species *means*? With Moore's Law behind you, it doesn't take too long to digitize all the information in the world. You scan every book ever printed, collect every email ever written, and gather forty-nine years of video every twenty-four hours, while tracking where people are and what they do, in real time. But how do you capture the *meaning*?

Even in the age of all things digital, this cannot be defined in any strictly logical sense, because meaning, among humans, isn't fundamentally logical. The best you can do, once you have collected all possible answers, is to invite well-defined questions and compile a pulse-frequency weighted map of how everything connects. Before you know it, your system will not only be observing and mapping the meaning of things, it will start *constructing* meaning as well. In time, it will *control* meaning, in the same way as the traffic map starts to control the flow of traffic even though no one seems to be in control.

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There are three laws of artificial intelligence. The first, known as Ashby's Law, after cybernetician W. Ross Ashby, author of *Design for a Brain*, states that any effective control system must be as complex as the system it controls.

The second law, articulated by John von Neumann, states that the defining characteristic of a complex system is that it constitutes its own simplest behavioral description. The simplest complete model of an organism is the organism itself. Trying to reduce the system's behavior to any formal description makes things more complicated, not less.

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The third law states that any system simple enough to be understandable will not be complicated enough to behave intelligently, while any system complicated enough to behave intelligently will be too complicated to understand.

The Third Law offers comfort to those who believe that until we understand intelligence, we need not worry about superhuman intelligence arising among machines. But there is a loophole in the Third Law. It is entirely possible to build something without understanding it. You don't need to fully understand how a brain works in order to build one that works. This is a loophole that no amount of supervision over algorithms by programmers and their ethical advisors can ever close. Provably "good" AI is a myth. Our relationship with true AI will always be a matter of faith, not proof.

We worry too much about machine intelligence and not enough about self-reproduction, communication, and control. The next revolution in computing will be signaled by the rise of analog systems over which digital programming no longer has control. Nature's response to those who believe they can build machines to control everything will be to allow them to build a machine that controls them instead.

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Dan Dennett *is the philosopher of choice in the AI community. He is perhaps best known in cognitive science for his concept of intentional systems and his model of human consciousness, which sketches a computational architecture for realizing the stream of consciousness in the massively parallel cerebral cortex. That uncompromising computationalism has been opposed by philosophers such as John Searle, David Chalmers, and the late Jerry Fodor, who have protested that the most important aspects of consciousness—intentionality and subjective qualia—cannot be computed.*

Twenty-five years ago, I was visiting Marvin Minsky, one of the original AI pioneers, and asked him about Dan. "He's our best current philosopher—the next Bertrand Russell," said Marvin, adding that unlike traditional philosophers, Dan was a student of neuroscience, linguistics, artificial intelligence, computer science, and psychology: "He's redefining and reforming the role of the philosopher. Of course, Dan doesn't understand my Society-of-Mind theory, but nobody's perfect."

Dan's view of the efforts of AI researchers to create superintelligent AIs is relentlessly levelheaded. What, me worry? In this essay, he reminds us that AIs, above all, should be regarded—and treated—as tools and not as humanoid colleagues.

He has been interested in information theory since his graduate school days at Oxford. In fact, he told me that early in his career he was keenly interested in writing a book about Wiener's cybernetic ideas. As a thinker who embraces the scientific method, one of his charms is his willingness to be wrong. Of a recent piece entitled "What Is Information?" he has announced, "I stand by it, but it's under revision. I'm already moving beyond it and realizing there's a better way of tackling some of these issues." He will most likely remain cool and collected on the subject of AI research, although he has acknowledged, often, that his own ideas evolve—as anyone's ideas should.

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WHAT CAN WE DO?
Daniel C. Dennett

Daniel C. Dennett *is University Professor and Austin B. Fletcher Professor of Philosophy and director of the Center for Cognitive Studies at Tufts University. He is the author of a dozen books, including* Consciousness Explained *and, most recently,* From Bacteria to Bach and Back: The Evolution of Minds.

Many have reflected on the irony of reading a great book when you are too young to appreciate it. Consigning a classic to the *already read* stack and thereby insulating yourself against any further influence while gleaning only a few ill-understood ideas from it is a recipe for neglect that is seldom benign. This struck me with particular force when I reread *The Human Use of Human Beings* more than sixty years after my juvenile encounter. We should all make it a regular practice to reread books from our youth, where we are apt to discover clear previews of some of our own later "discoveries" and "inventions," along with a wealth of insights to which we were bound to be impervious until our minds had been torn and tattered, exercised and enlarged by confrontations with life's problems.

Writing at a time when vacuum tubes were still the primary electronic building blocks and there were only a few actual computers in operation, Norbert Wiener imagined the future we now contend with in impressive detail and with few clear mistakes. Alan Turing's famous 1950 article "Computing Machinery and Intelligence," in the philosophy journal *Mind,* foresaw the development of AI, and so did Wiener, but Wiener saw farther and deeper, recognizing that AI would not just imitate—and replace—human beings in many intelligent activities but change human beings in the process.

> We are but whirlpools in a river of ever-flowing water. We are not stuff that abides, but patterns that perpetuate themselves. (p. 96)

When that was written, it could be comfortably dismissed as yet another bit of Heraclitean overstatement. Yeah, yeah, you can never step in the same river twice. But it contains the seeds of the revolution in outlook. Today we know how to think about complex adaptive systems, strange attractors, extended minds, and homeostasis, a change in perspective that promises to erase the "explanatory gap"[8] between mind and mechanism, spirit and matter, a gap that is still ardently defended by latter-day Cartesians who cannot bear the thought that we—we *ourselves*—are self-perpetuating patterns of information-bearing matter, not "stuff that abides." Those patterns are remarkably resilient and self-restoring but at the same time protean, opportunistic, selfish exploiters of whatever new is available to harness in their quest for perpetuation. And here is where things get dicey, as Wiener recognized. When attractive opportunities abound, we are apt to be willing to pay a little and accept some small, even trivial, cost-of-doing-business for access to new powers. And pretty soon we become so dependent on our new tools that we lose the ability to thrive without them. Options become obligatory.

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[8] Joseph Levine, "Materialism and Qualia: The Explanatory Gap," *Pacific Philosophical Quarterly* 64, pp. 354-61 (1983).

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It's an old, old story, with many well-known chapters in evolutionary history. Most mammals can synthesize their own vitamin C, but primates, having opted for a diet composed largely of fruit, lost the innate ability. We are now obligate ingesters of vitamin C, but not obligate frugivores like our primate cousins, since we have opted for technology that allows us to make, and take, vitamins as needed. The self-perpetuating patterns that we call human beings are now dependent on clothes, cooked food, vitamins, vaccinations, . . . credit cards, smartphones, and the Internet. And—tomorrow if not already today—AI.

Wiener foresaw the problems that Turing and the other optimists have largely overlooked. The real danger, he said, is

> that such machines, though helpless by themselves, may be used by a human being or a block of human beings to increase their control over the rest of the race or that political leaders may attempt to control their populations by means not of machines themselves but through political techniques as narrow and indifferent to human possibility as if they had, in fact, been conceived mechanically. (p. 181)

The power, he recognized, lay primarily in the algorithms, not the hardware they run on, although the hardware of today makes practically possible algorithms that would have seemed preposterously cumbersome in Wiener's day. What can we say about these "techniques" that are "narrow and indifferent to human possibility"? They have been introduced again and again, some obviously benign, some obviously dangerous, and many in the omnipresent middle ground of controversy.

Consider a few of the skirmishes. My late friend Joe Weizenbaum, Wiener's successor as MIT's Jeremiah of hi-tech, loved to observe that credit cards, whatever their virtues, also provided an inexpensive and almost foolproof way for the government, or corporations, to track the travels and habits and desires of individuals. The anonymity of cash has been largely underappreciated, except by drug dealers and other criminals, and now it may be going extinct. This may make money laundering a more difficult technical challenge in the future, but the AI pattern finders arrayed against it have the side effect of making us all more transparent to any "block of human beings" that may "attempt to control" us.

Looking to the arts, the innovation of digital audio and video recording lets us pay a small price (in the eyes of all but the most ardent audiophiles and film lovers) when we abandon analog formats, and in return provides easy—all too easy?—reproduction of artworks with almost perfect fidelity. But there is a huge hidden cost. Orwell's Ministry of Truth is now a practical possibility. AI techniques for creating all-but-undetectable forgeries of "recordings" of encounters are now becoming available which will render obsolete the tools of investigation we have come to take for granted in the last hundred and fifty years. Will we simply abandon the brief Age of Photographic Evidence and return to the earlier world in which human memory and trust provided the gold standard, or will we develop new techniques of defense and offense in the arms race of truth? (We can imagine a return to *analog* film-exposed-to-light, kept in "tamper-proof" systems until shown to juries, etc., but how long would it be before somebody figured out a way to infect such systems with doubt? One of the disturbing lessons of recent experience is that the task of destroying a reputation for credibility is much less expensive than the task of protecting such a reputation.) Wiener saw the phenomenon at its most general: "…in

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the long run, there is no distinction between arming ourselves and arming our enemies." (p. 129) The Information Age is also the Dysinformation Age.

What can we do? We need to rethink our priorities with the help of the passionate but flawed analyses of Wiener, Weizenbaum, and the other serious critics of our technophilia. A key phrase, it seems to me, is Wiener's almost offhand observation, above, that "these machines" are "helpless by themselves." As I have been arguing recently, we're making tools, not colleagues, and the great danger is not appreciating the difference, which we should strive to accentuate, marking and defending it with political and legal innovations.

Perhaps the best way to see what is being missed is to note that Alan Turing himself suffered an entirely understandable failure of imagination in his formulation of the famous Turing Test. As everyone knows, it is an adaptation of his "imitation game," in which a man, hidden from view and communicating verbally with a judge, tries to convince the judge that he is in fact a woman, while a woman, also hidden and communicating with the judge, tries to convince the judge that she is the woman. Turing reasoned that this would be a demanding challenge for a man (or for a woman pretending to be a man), exploiting a wealth of knowledge about how the other sex thinks and acts, what they tend to favor or ignore. Surely (*ding!*)[9], any man who could beat a woman at being perceived to be a woman would be an intelligent agent. What Turing did not foresee is the power of deep-learning AI to acquire this wealth of information in an exploitable form *without having to understand it.* Turing imagined an astute and imaginative (and hence conscious) agent who cunningly designed his responses based on his detailed "theory" of what women are likely to do and say. Top-down intelligent design, in short. He certainly didn't think that a man, winning the imitation game, would somehow *become* a woman; he imagined that there would still be a man's consciousness guiding the show. The hidden premise in Turing's almost-argument was: Only a conscious, intelligent *agent* could devise and control a winning strategy in the imitation game. And so it was persuasive to Turing (and others, including me, still a stalwart defender of the Turing Test) to argue that a "computing machine" that could pass as human in a contest with a human might not be conscious in just the way a human being is, but would nevertheless have to be a conscious agent of *some* kind. I think this is still a defensible position—the only defensible position—but you have to understand how resourceful and ingenious a judge would have to be to expose the shallowness of the façade that a deep-learning AI (a tool, not a colleague) could present.

What Turing didn't foresee is the uncanny ability of superfast computers to sift mindlessly through Big Data, of which the Internet provides an inexhaustible supply, finding probabilistic patterns in human activity that could be used to pop "authentic"-seeming responses into the output for almost any probe a judge would think to offer. Wiener also underestimates this possibility, seeing the tell-tale weakness of a machine in not being able to

> take into account the vast range of probability that characterizes the human situation. (p.181)

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[9] The *surely alarm* (the habit of having a bell ring in your head whenever you see the word in an argument) is described and defended by me in *Intuition Pumps and Other Tools for Thinking* (2013).

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But taking into account that range of probability is just where the new AI excels. The only chink in the armor of AI is that word "vast"; human possibilities, thanks to language and the culture that it spawns, are truly Vast.[10] No matter how many patterns we may find with AI in the flood of data that has so far found its way onto the Internet, there are Vastly more possibilities that have never been recorded there. Only a fraction (but not a Vanishing fraction) of the world's accumulated wisdom and design and repartee and silliness has made it onto the Internet, but probably a better tactic for the judge to adopt when confronting a candidate in the Turing Test is not to *search* for such items but to *create* them anew. AI in its current manifestations is parasitic on human intelligence. It quite indiscriminately gorges on whatever has been produced by human creators and extracts the patterns to be found there—including some of our most pernicious habits.[11] These machines do not (yet) have the goals or strategies or capacities for self-criticism and innovation to permit them to transcend their databases by reflectively thinking about their own thinking and their own goals. They are, as Wiener says, helpless, not in the sense of being *shackled* agents or *disabled* agents but in the sense of not being agents at all—not having the capacity to be "moved by reasons" (as Kant put it) presented to them. It is important that we keep it that way, which will take some doing.

One of the flaws in Weizenbaum's book *Computer Power and Human Reason,* something I tried in vain to convince him of in many hours of discussion, is that he could never decide which of two theses he wanted to defend: *AI is impossible!* or *AI is possible but evil!* He wanted to argue, with John Searle and Roger Penrose, that "Strong AI" is impossible, but there are no good arguments for that conclusion. After all, everything we now know suggests that, as I have put it, we are robots made of robots made of robots. . . down to the motor proteins and their ilk, with no magical ingredients thrown in along the way. Weizenbaum's more important and defensible message was that we should not strive to create Strong AI and should be extremely cautious about the AI systems that we can create and have already created. As one might expect, the defensible thesis is a hybrid: *AI* (Strong AI) *is possible in principle but not desirable. The AI that's practically possible is not necessarily evil—unless it is mistaken for Strong AI!*

The gap between today's systems and the science-fictional systems dominating the popular imagination is still huge, though many folks, both lay and expert, manage to underestimate it. Let's consider IBM's Watson, which can stand as a worthy landmark for our imaginations for the time being. It is the result of a very large-scale R&D process extending over many person-centuries of intelligent design, and as George Church notes in these pages, it uses thousands of times more energy than a human brain (a technological limitation that, as he also notes, may be temporary). Its victory in *Jeopardy!* was a genuine triumph, made possible by the formulaic restrictions of the *Jeopardy!* rules, but in order for it to compete, even these rules had to be revised (one of

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[10] In *Darwin's Dangerous Idea,* 1995, p. 109, I coined the capitalized version, *Vast,* meaning *Very much more than ASTronomical*, and its complement, *Vanishing,* to replace the usual exaggerations *infinite* and *infinitesimal* for discussions of those possibilities that are not officially infinite but nevertheless infinite for all practical purposes.

[11] Aylin Caliskan-Islam, Joanna J. Bryson & Arvind Narayanan, "Semantics derived automatically from language corpora contain human-like biases," *Science,* 14 April 2017, 356: 6334, pp. 183-6. DOI: 10.1126/science.aal4230.

HOUSE_OVERSIGHT_016848

those trade-offs: you give up a little versatility, a little humanity, and get a crowd-pleasing show). Watson is not good company, in spite of misleading ads from IBM that suggest a general conversational ability, and turning Watson into a plausibly multidimensional *agent* would be like turning a hand calculator into Watson. Watson could be a useful core faculty for such an agent, but more like a cerebellum or an amygdala than a mind—at best, a special-purpose subsystem that could play a big supporting role, but not remotely up to the task of framing purposes and plans and building insightfully on its conversational experiences.

Why would we want to create a thinking, creative agent out of Watson? Perhaps Turing's brilliant idea of an operational test has lured us into a trap: the quest to create at least the illusion of a real person behind the screen, bridging the "uncanny valley." The danger, here, is that ever since Turing posed his challenge—which was, after all, a challenge to *fool* the judges—AI creators have attempted to paper over the valley with cutesy humanoid touches, Disneyfication effects that will enchant and disarm the uninitiated. Weizenbaum's ELIZA was the pioneer example of such superficial illusion-making, and it was his dismay at the ease with which his laughably simple and shallow program could persuade people they were having a serious heart-to-heart conversation that first sent him on his mission.

He was right to be worried. If there is one thing we have learned from the restricted Turing Test competitions for the Loebner Prize, it is that even very intelligent people who aren't tuned in to the possibilities and shortcuts of computer programming are readily taken in by simple tricks. The attitudes of people in AI toward these methods of dissembling at the "user interface" have ranged from contempt to celebration, with a general appreciation that the tricks are not deep but can be potent. One shift in attitude that would be very welcome is a candid acknowledgment that humanoid embellishments are *false advertising*—something to condemn, not applaud.

How could that be accomplished? Once we recognize that people are starting to make life-or-death decisions largely on the basis of "advice" from AI systems whose inner operations are unfathomable in practice, we can see a good reason why those who in any way encourage people to put more trust in these systems than they warrant should be held morally and legally accountable. AI systems are very powerful tools—so powerful that even experts will have good reason not to trust their own judgment over the "judgments" delivered by their tools. But then, if these tool users are going to benefit, financially or otherwise, from driving these tools through *terra incognita,* they need to make sure they know how to do this responsibly, with maximum control and justification. Licensing and bonding operators, just as we license pharmacists (and crane operators!) and other specialists whose errors and misjudgments can have dire consequences, can, with pressure from insurance companies and other underwriters, oblige creators of AI systems to go to extraordinary lengths to search for and reveal weaknesses and gaps in their products, and to train those entitled to operate them.

One can imagine a sort of inverted Turing Test in which the judge is on trial; until he or she can spot the weaknesses, the overstepped boundaries, the gaps in a system, no license to operate will be issued. The mental training required to achieve certification as a judge will be demanding. The urge to adopt the intentional stance, our normal tactic whenever we encounter what seems to be an intelligent agent, is almost overpoweringly strong. Indeed, the capacity to resist the allure of treating an apparent person as a person

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is an ugly talent, reeking of racism or species-ism. Many people would find the cultivation of such a ruthlessly skeptical approach morally repugnant, and we can anticipate that even the most proficient system-users would occasionally succumb to the temptation to "befriend" their tools, if only to assuage their discomfort with the execution of their duties. No matter how scrupulously the AI designers launder the phony "human" touches out of their wares, we can expect novel habits of thought, conversational gambits and ruses, traps and bluffs to arise in this novel setting for human action. The comically long lists of known side effects of new drugs advertised on television will be dwarfed by the obligatory revelations of the sorts of questions that can*not* be responsibly answered by particular systems, with heavy penalties for those who "overlook" flaws in their products. It is widely noted that a considerable part of the growing economic inequality in today's world is due to the wealth accumulated by digital entrepreneurs; we should enact legislation that puts their deep pockets in escrow for the public good. Some of the deepest pockets are voluntarily out in front of these obligations to serve society first and make money secondarily, but we shouldn't rely on good will alone.

We don't need artificial conscious agents. There is a surfeit of natural conscious agents, enough to handle whatever tasks should be reserved for such special and privileged entities. We need intelligent tools. Tools do not have rights, and should not have feelings that could be hurt, or be able to respond with resentment to "abuses" rained on them by inept users.[12] One of the reasons for not making artificial conscious agents is that however autonomous they might become (and in principle, they can be as autonomous, as self-enhancing or self-creating, as any person), they would not—without special provision, which might be waived—share with us natural conscious agents our vulnerability or our mortality.

I once posed a challenge to students in a seminar at Tufts I co-taught with Matthias Scheutz on artificial agents and autonomy: Give me the specs for a robot that could sign a binding contract with you—not as a surrogate for some human owner but on its own. This isn't a question of getting it to understand the clauses or manipulate a pen on a piece of paper but of having and *deserving* legal status as a morally responsible agent. Small children can't sign such contracts, nor can those disabled people whose legal status requires them to be under the care and responsibility of guardians of one sort or another. The problem for robots who might want to attain such an exalted status is that, like Superman, they are too invulnerable to be able to make a credible promise. If they were to renege, what would happen? What would be the penalty for promise-breaking? Being locked in a cell or, more plausibly, dismantled? Being locked up is barely an inconvenience for an AI unless we first install artificial wanderlust that cannot be ignored or disabled by the AI on its own (and it would be systematically difficult to make this a foolproof solution, given the presumed cunning and self-knowledge of the AI); and dismantling an AI (either a robot or a bedridden agent like Watson) is not killing it, if the information stored in its design and software is preserved. The very ease of digital recording and transmitting—the breakthrough that permits software and data to be,

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[12] Joanna J. Bryson, "Robots Should Be Slaves," in *Close Engagement with Artificial Companions*, Yorick Wilks, ed., (Amsterdam, The Netherlands: John Benjamins, 2010), pp. 63-74; http://www.cs.bath.ac.uk/~jjb/ftp/Bryson-Slaves-Book09.html.
_____, "Patiency Is Not a Virtue: AI and the Design of Ethical Systems," https://www.cs.bath.ac.uk/~jjb/ftp/Bryson-Patiency-AAAISS16.pdf.

HOUSE_OVERSIGHT_016850

in effect, immortal—removes robots from the world of the vulnerable (at least robots of the usually imagined sorts, with digital software and memories). If this isn't obvious, think about how human morality would be affected if we could make "backups" of people every week, say. Diving headfirst on Saturday off a high bridge without benefit of bungee cord would be a rush that you wouldn't remember when your Friday night backup was put online Sunday morning, but you could enjoy the videotape of your apparent demise thereafter.

So what we are creating are not—should not be—conscious, humanoid agents but an entirely new sort of entities, rather like oracles, with no conscience, no fear of death, no distracting loves and hates, no personality (but all sorts of foibles and quirks that would no doubt be identified as the "personality" of the system): boxes of truths (if we're lucky) almost certainly contaminated with a scattering of falsehoods. It will be hard enough learning to live with them without distracting ourselves with fantasies about the Singularity in which these AIs will enslave us, literally. The *human* use of human beings will soon be changed—once again—forever, but we can take the tiller and steer between some of the hazards if we take responsibility for our trajectory.

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The roboticist **Rodney Brooks,** *featured in Errol Morris's 1997 documentary* Fast, Cheap and Out of Control *along with a lion-tamer, a topiarist, and an expert on the naked mole rat, was described by one reviewer as "smiling with a wild gleam in his eye." But that's pretty much true of most visionaries.*

A few years later in his career, Brooks, as befits one of the world's leading roboticists, suggested that "we overanthropomorphize humans, who are after all mere machines." He went on to present a warm-hearted vision of a coming AI world in which "the distinction between us and robots is going to disappear." He also admitted to something of a divided worldview. "Like a religious scientist, I maintain two sets of inconsistent beliefs and act on each of them in different circumstances," he wrote. "It is this transcendence between belief systems that I think will be what enables mankind to ultimately accept robots as emotional machines, and thereafter start to empathize with them and attribute free will, respect, and ultimately rights to them."

That was in 2002. In these pages, he takes a somewhat more jaundiced, albeit narrower, view; he is alarmed by the extent to which we have come to rely on pervasive systems that are not just exploitative but also vulnerable, as a result of the too-rapid development of software engineering—an advance that seems to have outstripped the imposition of reliably effective safeguards.

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THE INHUMAN MESS OUR MACHINES HAVE GOTTEN US INTO

Rodney Brooks

Rodney Brooks *is a computer scientist; Panasonic Professor of Robotics, emeritus, MIT; former director, MIT Computer Science Lab; and founder, chairman, and CTO of Rethink Robotics. He is the author of* Flesh and Machines.

Mathematicians and scientists are often limited in how they see the big picture, beyond their particular field, by the tools and metaphors they use in their work. Norbert Wiener is no exception, and I might guess that neither am I.

When he wrote *The Human Use of Human Beings,* Wiener was straddling the end of the era of understanding machines and animals simply as physical processes and the beginning of our current era of understanding machines and animals as computational processes. I suspect there will be future eras whose tools will look as distinct from the tools of the two eras Wiener straddled as those tools did from each other.

Wiener was a giant of the earlier era and built on the tools developed since the time of Newton and Leibniz to describe and analyze continuous processes in the physical world. In 1948 he published *Cybernetics,* a word he coined to describe the science of communication and control in both machines and animals. Today we would refer to the ideas in this book as control theory, an indispensable discipline for the design and analysis of physical machines, while mostly neglecting Wiener's claims about the science of communication. Wiener's innovations were largely driven by his work during the Second World War on mechanisms to aim and fire anti-aircraft guns. He brought mathematical rigor to the design of the sorts of technology whose design processes had been largely heuristic in nature: from the Roman waterworks through Watt's steam engine to the early development of automobiles.

One can imagine a different contingent version of our intellectual and technological history had Alan Turing and John von Neumann, both of whom made major contributions to the foundations of computing, not appeared on the scene. Turing contributed a fundamental model of computation—now known as a Turing Machine—in his paper "On Computable Numbers with an Application to the Entscheidungsproblem," written and revised in 1936 and published in 1937. In these machines, a linear tape of symbols from a finite alphabet encodes the input for a computational problem and also provides the working space for the computation. A different machine was required for each separate computational problem; later work by others would show that in one particular machine, now known as a Universal Turing Machine, an arbitrary set of computing instructions could be encoded on that same tape.

In the 1940s, von Neumann developed an abstract self-reproducing machine called a cellular automaton. In this case it occupied a finite subset of an infinite two-dimensional array of squares each containing a single symbol from a finite alphabet of twenty-nine distinct symbols—the rest of the infinite array starts out blank. The single symbols in each square change in lockstep, based on a complex but finite rule about the current symbol in that square and its immediate neighbors. Under the complex rule that von Neumann developed, most of the symbols in most of the squares stay the same and a few change at each step. So when one looks at the non-blank squares, it appears that

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there is a constant structure with some activity going on inside it. When von Neumann's abstract machine reproduced, it made a copy of itself in another region of the plane. Within the "machine" was a horizontal line of squares which acted as a finite linear tape, using a subset of the finite alphabet. It was the symbols in those squares that encoded the machine of which they were a part. During the machine's reproduction, the "tape" could move either left or right and was both interpreted (transcribed) as the instructions (translation) for the new "machine" being built and then copied (replicated)—with the new copy being placed inside the new machine for further reproduction. Francis Crick and James Watson later showed, in 1953, how such a tape could be instantiated in biology by a long DNA molecule with its finite alphabet of four nucleobases: guanine, cytosine, adenine, and thymine (G, C, A, and T).[13] As in von Neumann's machine, in biological reproduction the linear sequence of symbols in DNA is interpreted—through transcription into RNA molecules, which then are translated into proteins, the structures that make up a new cell—and the DNA is replicated and encased in the new cell.

A second foundational piece of work was in a 1945 "First Draft" report on the design for a digital computer, wherein von Neumann advocated for a memory that could contain both instructions and data.[14] This is now known as a von Neumann architecture computer—as distinct from a Harvard architecture computer, where there are two separate memories, one for instructions and one for data. The vast majority of computer chips built in the era of Moore's Law are based on the von Neumann architecture, including those powering our data centers, our laptops, and our smartphones. Von Neumann's digital-computer architecture is conceptually the same generalization—from early digital computers constructed with electromagnetic relays at both Harvard University and Bletchley Park—that occurs in going from a special-purpose Turing Machine to a Universal Turing Machine. Furthermore, his self-replicating automata share a fundamental similarity with both the construction of a Turing Machine and the mechanism of DNA-based reproducing biological cells. There is to this day scholarly debate over whether von Neumann saw the cross connections between these three pieces of work, Turing's and his two. Turing's revision of his paper was done while he and von Neumann were both at Princeton; indeed, after getting his PhD, Turing almost stayed on as von Neumann's postdoc.

Without Turing and von Neumann, the cybernetics of Wiener might have remained a dominant mode of thought and driver of technology for much longer than its brief moment of supremacy. In this imaginary version of history, we might well live today in an actual steam-punk world and not just get to observe its fantastical instantiations at Maker Faires!

My point is that Wiener thought about the world—physical, biological, and (in *Human Use*) sociological—in a particular way. He analyzed the world as continuous variables, as he explains in chapter 1 along with a nod to thermodynamics through an overlay of Gibbs statistics. He also shoehorns in a weak and unconvincing model of information as message-passing between and among both physical and biological entities. To me, and from today's vantage point seventy years on, his tools seem woefully

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[13] "A Structure for Deoxyribose Nucleic Acid," *Nature* 171, 737–738 (1953).

[14] https://en.wikipedia.org//wiki/First_Draft_of_a_Report_on_the_EDVAC#Controversy. Von Neumann is listed as the only author, whereas others contributed to the concepts he laid out; thus credit for the architecture has gone to him alone.

HOUSE_OVERSIGHT_016854

inadequate for describing the mechanisms underlying biological systems, and so he missed out on how similar mechanisms might eventually be embodied in technological computational systems—as now they have been. Today's dominant technologies were developed in the world of Turing and von Neumann, rather than the world of Wiener.

In the first industrial revolution, energy from a steam engine or a water wheel was used by human workers to replace their own energy. Instead of being a source of energy for physical work, people became modulators of how a large source of energy was used. But because steam engines and water wheels had to be large to be an efficient use of capital, and because in the 18th century the only technology for spatial distribution of energy was mechanical and worked only at very short range, many workers needed to be crowded around the source of energy. Wiener correctly argues that the ability to transmit energy as electricity caused a second industrial revolution. Now the source of energy could be distant from where it was used, and from the beginning of the 20th century, manufacturing could be much more dispersed as electrical-distribution grids were built.

Wiener then argues that a further new technology, that of the nascent computational machines of his time, will provide yet another revolution. The machines he talks about seem to be both analog and (perhaps) digital in nature; and he points out, in *The Human Use of Human Beings*, that since they will be able to make decisions, both blue-collar and white-collar workers may be reduced to being mere cogs in a much bigger machine. He fears that humans might use and abuse one another through organizational structures that this capability will encourage. We have certainly seen this play out in the last sixty years, and that disruption is far from over.

However, his physics-based view of computation protected him from realizing just how bad things might get. He saw machines' ability to communicate as providing a new and more inhuman way of exerting command and control. He missed that within a few decades computation systems would become more like biological systems, and it seems, from his descriptions in chapter 10 of his own work on modeling some aspects of biology, that he woefully underappreciated the many orders of magnitude of further complexity of biology over physics. We are in a much more complex situation today than he foresaw, and I am worried that it is much more pernicious than even his worst imagined fears.

In the 1960s, computation became firmly based on the foundations set out by Turing and von Neumann, and it was digital computation, based on the idea of finite alphabets which they both used. An arbitrarily long sequence, or string, formed by characters from a finite alphabet, can be encoded as a unique integer. As with Turing Machines themselves, the formalism for computation became that of computing an integer-valued function of a single integer-valued input.

Turing and von Neumann both died in the 1950s and at that time this is how they saw computation. Neither foresaw the exponential increase in computing capability that Moore's Law would bring—nor how pervasive computing machinery would become. Nor did they foresee two developments in our modeling of computation, each of which poses a great threat to human society.

The first is rooted in the abstractions they adopted. In the fifty-year, Moore's Law–fueled race to produce software that could exploit the doubling of computer capability every two years, the typical care and certification of engineering disciplines was thrown by the wayside. Software engineering was fast and prone to failures. This

HOUSE_OVERSIGHT_016855

rapid development of software without standards of correctness has opened up many routes to exploit von Neumann architecture's storage of data and instructions in the same memory. One of the most common routes, known as "buffer overrun," involves an input number (or long string of characters) that is bigger than the programmer expected and overflows into where the instructions are stored. By carefully designing an input number that is too big by far, someone using a piece of software can infect it with instructions not intended by the programmer, and thus change what it does. This is the basis for creating a computer virus—so named for its similarity to a biological virus. The latter injects extra DNA into a cell, and that cell's transcription and translation mechanism blindly interprets it, making proteins that may be harmful to the host cell. Furthermore, the replication mechanism for the cell takes care of multiplying the virus. Thus, a small foreign entity can take control of a much bigger entity and bend its behavior in unexpected ways.

These and other forms of digital attacks have taken the security of our everyday lives from us. We rely on computers for almost everything now. We rely on computers for our infrastructure of electricity, gas, roads, cars, trains, and airplanes; these are all vulnerable. We rely on computers for our banking, our payment of bills, our retirement accounts, our mortgages, our purchasing of goods and services—these, too, are all vulnerable. We rely on computers for our entertainment, our communications both business and personal, our physical security at home, our information about the world, and our voting systems—all vulnerable. None of this will get fixed anytime soon. In the meantime, many aspects of our society are open to vicious attacks, whether by freelancing criminals or nation-state adversaries.

The second development is that computation has gone beyond simply computing functions. Instead, programs remain online continuously, and so they can gather data about a sequence of queries. Under the Wiener/Turing/von Neumann scheme, we might think of the communication pattern for a Web browser to be:

User: Give me Web page A.
Browser: Here is Web page A.
…
User: Give me Web page B.
Browser: Here is Web page B.

Now instead it can look like this:

User: Give me Web page A.
Browser: Here is Web page A. [And I will secretly remember that you asked for Web page A.]
...
User: Give me Web page B.
Browser: Here is Web page B. [I see a correlation between its contents and that of the earlier requested Web page A, so I will update my model of you, the user, and transmit it to the company that produced me.]

HOUSE_OVERSIGHT_016856

When the machine no longer simply computes a function but instead maintains a state, it can start to make inferences about the human by the sequence of requests presented to it. And when different programs correlate across different request streams—say, correlating Web-page searches with social-media posts, or the payment for services on another platform, or the dwell time on a particular advertisement, or where the user has walked or driven with their GPS-enabled smartphone—the total systems of many programs communicating with one another and with databases leads to a whole new loss of privacy. The great exploitative leap made by so many West Coast companies has been to monetize those inferences without the knowing permission of the person generating the interactions with the computing machine platforms.

Wiener, Turing, and von Neumann could not foresee the complexity of those platforms, wherein the legal mumbo-jumbo of the terms-of-use contracts the humans willingly enter into, without an inkling of what they entail, leads them to give up rights they would never concede in a one-on-one interaction with another human being. The computation platforms have become a shield behind which some companies hide in order to inhumanly exploit others. In certain other countries, the governments carry out these manipulations, and there the goal is not profits but the suppression of dissent.

Humankind has gotten itself into a fine pickle: We are being exploited by companies that paradoxically deliver services we crave, and at the same time our lives depend on many software-enabled systems that are open to attack. Getting ourselves out of this mess will be a long-term project. It will involve engineering, legislation, and most important, moral leadership. Moral leadership is the first and biggest challenge.

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I first met **Frank Wilczek** *in the 1980s, when he invited me to his home in Princeton to talk about anyons. "The address is 112 Mercer Street," he wrote. "Look for the house with no driveway." So there I was, a few hours later, in Einstein's old living room, talking to a future recipient of the Nobel Prize in physics. If Frank was as impressed as I was by the surroundings, you'd never guess it. His only comment concerned the difficulty of finding a parking place in front of a "house with no driveway."*

Unlike most theoretical physicists, Frank has long had a keen interest in AI, as witnessed in these three "Observations":

1. "Francis Crick called it 'the Astonishing Hypothesis': that consciousness, also known as Mind, is an emergent property of matter," which, if true, indicates that "all intelligence is machine intelligence. What distinguishes natural from artificial intelligence is not what it is, but only how it is made."

2. "Artificial intelligence is not the product of an alien invasion. It is an artifact of a particular human culture and reflects the values of that culture."

3. "David Hume's striking statement 'Reason Is, and Ought only to Be, the Slave of the Passions' was written in 1738 [and] was, of course, meant to apply to human reason and human passions. . . . But Hume's logical/philosophical point remains valid for AI. Simply put: Incentives, not abstract logic, drive behavior."

He notes that "the big story of the 20th and the 21st century is that [as] computing develops, we learn how to calculate the consequences of the [fundamental] laws better and better. There's also a feedback cycle: When you understand matter better, you can design better computers, which will enable you to calculate better. It's kind of an ascending helix."

Here he argues that human intelligence, for now, holds the advantage—yet our future, unbounded by our solar system and doubtless also by our galaxy, will never be realized without the help of our AIs.

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THE UNITY OF INTELLIGENCE
Frank Wilczek

Frank Wilczek *is Herman Feshbach Professor of Physics at MIT, recipient of the 2004 Nobel Prize in physics, and the author of* A Beautiful Question: Finding Nature's Deep Design.

I. A Simple Answer to Contentious Questions:

- Can an artificial intelligence be conscious?
- Can an artificial intelligence be creative?
- Can an artificial intelligence be evil?

Those questions are often posed today, both in popular media and in scientifically informed debates. But the discussions never seem to converge. Here I'll begin by answering them as follows:

Based on physiological psychology, neurobiology, and physics, it would be very surprising if the answers were not Yes, Yes, and Yes. The reason is simple, yet profound: Evidence from those fields makes it overwhelmingly likely that there is no sharp divide between natural and artificial intelligence.

In his 1994 book of that title, the renowned biologist Francis Crick proposed an "astonishing hypothesis": that mind emerges from matter. He famously claimed that mind, in all its aspects, is "no more than the behavior of a vast assembly of nerve cells and their associated molecules."

The "astonishing hypothesis" is in fact the foundation of modern neuroscience. People try to understand how minds work by understanding how brains function; and they try to understand how brains function by studying how information is encoded in electrical and chemical signals, transformed by physical processes, and used to control behavior. In that scientific endeavor, they make no allowance for extraphysical behavior. So far, in thousands of exquisite experiments, that strategy has never failed. It has never proved necessary to allow for the influence of consciousness or creativity unmoored from brain activity to explain any observed fact of psychophysics or neurobiology. No one has ever stumbled upon a power of mind which is separate from conventional physical events in biological organisms. While there are many things we do not understand about brains, and about minds, the "astonishing hypothesis" has held intact.

If we broaden our view beyond neurobiology to consider the whole range of scientific experimentation, the case becomes still more compelling. In modern physics, the foci of interest are often extremely delicate phenomena. To investigate them, experimenters must take many precautions against contamination by "noise." They often find it necessary to construct elaborate shielding against stray electric and magnetic fields; to compensate for tiny vibrations due to micro-earthquakes or passing cars; to work at extremely low temperatures and in high vacuum, and so forth. But there's a notable exception: They have never found it necessary to make allowances for what people nearby (or, for that matter, far away) are thinking. No "thought waves," separate from known physical processes yet capable of influencing physical events, seem to exist.

That conclusion, taken at face value, erases the distinction between natural and artificial intelligence. It implies that if we were to duplicate, or accurately simulate, the physical processes occurring in a brain—as, in principle, we can—and wire up its input

HOUSE_OVERSIGHT_016859

and output to sense organs and muscles, then we would reproduce, in a physical artifact, the observed manifestations of natural intelligence. Nothing observable would be missing. As an observer, I'd have no less (and no more) reason to ascribe consciousness, creativity, or evil to that artifact than I do to ascribe those properties to its natural counterparts, like other human beings.

Thus, by combining Crick's "astonishing hypothesis" in neurobiology with powerful evidence from physics, we deduce that natural intelligence is a special case of artificial intelligence. That conclusion deserves a name, and I will call it "the astonishing corollary."

With that, we have the answer to our three questions. Since consciousness, creativity, and evil are obvious features of natural human intelligence, they are possible features of artificial intelligence.

A hundred years ago, or even fifty, to believe the hypothesis that mind emerges from matter, and to infer our corollary that natural intelligence is a special case of artificial intelligence, would have been leaps of faith. In view of the many surrounding gaps—chasms, really—in contemporary understanding of biology and physics, they were genuinely doubtful propositions. But epochal developments in those areas have changed the picture:

In biology: A century ago, not only thought but also metabolism, heredity, and perception were deeply mysterious aspects of life that defied physical explanation. Today, of course, we have extremely rich and detailed accounts of metabolism, heredity, and many aspects of perception, from the bottom up, starting at the molecular level.

In physics: After a century of quantum physics and its application to materials, physicists have discovered, over and over, how rich and strange the behavior of matter can be. Superconductors, lasers, and many other wonders demonstrate that large assemblies of molecular units, each simple in itself, can exhibit qualitatively new, "emergent" behavior, while remaining fully obedient to the laws of physics. Chemistry, including biochemistry, is a cornucopia of emergent phenomena, all now quite firmly grounded in physics. The pioneering physicist Philip Anderson, in an essay titled "More Is Different," offers a classic discussion of emergence. He begins by acknowledging that "the reductionist hypothesis [i.e., the completeness of physical explanations based on known interactions of simple parts] may still be a topic for controversy among philosophers, but among the great majority of active scientists I think it is accepted without question." But he goes on to emphasize that "[t]he behavior of large and complex aggregates of elementary particles, it turns out, is not to be understood in terms of a simple extrapolation of the properties of a few particles."[15] Each new level of size and complexity supports new forms of organization, whose patterns encode information in new ways and whose behavior is best described using new concepts.

Electronic computers are a magnificent example of emergence. Here, all the cards are on the table. Engineers routinely design, from the bottom up, based on known (and quite sophisticated) physical principles, machines that process information in extremely impressive ways. Your iPhone can beat you at chess, quickly collect and deliver information about anything, and take great pictures, too. Because the process whereby computers, smartphones, and other intelligent objects are designed and manufactured is completely transparent, there can be no doubt that their wonderful

[15] *Science,* 4 August 1972, Vol. 177, No. 4047, pp. 393-96.

HOUSE_OVERSIGHT_016860

capabilities emerge from regular physical processses, which we can trace down to the level of electrons, photons, quarks, and gluons. Evidently, brute matter can get pretty smart.

Let me summarize the argument. From two strongly supported hypotheses, we've drawn a straightforward conclusion:

- Human mind emerges from matter.
- Matter is what physics says it is.
- *Therefore,* the human mind emerges from physical processes we understand and can reproduce artificially.
- *Therefore,* natural intelligence is a special case of artificial intelligence.

Of course, our "astonishing corollary" could fail; the first two lines of this argument are hypotheses. But their failure would have to bring in a foundation-shattering discovery—a significant new phenomenon, with large-scale physical consequences, which takes place in unremarkable, well-studied physical circumstances (i.e., the materials, temperatures, and pressures inside human brains) yet which has somehow managed for many decades to elude determined investigators armed with sophisticated instruments. Such a discovery would be. . . astonishing.

II. The Future of Intelligence

It is part of human nature to improve on human bodies and minds. Historically, clothing, eyeglasses, and watches are examples of increasingly sophisticated augmentations that enhance our toughness, perception, and awareness. They are major improvements to the natural human endowment, whose familiarity should not blind us to their depth. Today smartphones and the Internet are bringing the human drive toward augmentation into realms more central to our identity as intelligent beings. They are giving us, in effect, quick access to a vast collective awareness and a vast collective memory.

At the same time, autonomous artificial intelligences have become world champions in a wide variety of "cerebral" games, such as chess and Go, and have taken over many sophisticated pattern-recognition tasks, such as reconstructing what happened during complex reactions at the Large Hadron Collider from a blizzard of emerging particle tracks, to find new particles; or gathering clues from fuzzy X-ray, fMRI, and other types of images, to diagnose medical problems.

Where is this drive toward self-enhancement and innovation taking us? While the precise sequence of events and the timescale over which they'll play out is impossible to predict (or, at least, beyond me), some basic considerations suggest that eventually the most powerful embodiments of mind will be quite different things from human brains as we know them today.

Consider six factors whereby information-processing technology exceeds human capabilities—vastly, qualitatively, or both:

- *Speed:* The orchestrated motion of electrons, which is the heart of modern artificial information-processing, can be much faster than the processes of diffusion and chemical change by which brains operate. Typical modern computer clock rates approach 10 gigahertz, corresponding to 10 billion operations per second. No single measure of speed applies to the bewildering variety of brain processes, but one fundamental limitation is latency of action

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potentials, which limits their spacing to a few 10s per second. It is probably no accident that the "frame rate," at which we can distinguish that movies are actually a sequence of stills, is about 40 per second. Thus, electronic processing is close to a billion times faster.

- *Size:* The linear dimension of a typical neuron is about 10 microns. Molecular dimensions, which set a practical limit, are about 10,000 times smaller, and artificial processing units are approaching that scale. Smallness makes communication more efficient.
- *Stability:* Whereas human memory is essentially continuous (analog), artificial memory can incorporate discrete (digital) features. Whereas analog quantities can erode, digital quantities can be stored, refreshed, and maintained with complete accuracy.
- *Duty Cycle:* Human brains grow tired with effort. They need time off to take nourishment and to sleep. They carry the burden of aging. Most profoundly: They die.
- *Modularity* (open architecture): Because artificial information processors can support precisely defined digital interfaces, they can readily assimilate new modules. Thus, if we want a computer to "see" ultraviolet or infrared or "hear" ultrasound, we can feed the output from an appropriate sensor directly into its "nervous system." The architecture of brains is much more closed and opaque, and the human immune system actively resists implants.
- *Quantum readiness*: One case of modularity deserves special mention, because of its long-term potential. Recently physicists and information scientists have come to appreciate that the principles of quantum mechanics support new computing principles, which can empower qualitatively new forms of information processing and (plausibly) new levels of intelligence. But these possibilities rely on aspects of quantum behavior which are quite delicate and seem especially unsuitable for interfacing with the warm, wet, messy enviroment of human brains.

Evidently, as platforms for intelligence, human brains are far from optimal. Still, although versatile housekeeping robots or mechanical soldiers would find ready, lucrative markets, at present there is no machine that approaches the kind of general-purpose human intelligence those applications would require. Despite their relative weakness on many fronts, human brains have some big advantages over their artificial competitors. Let me mention five:

- *Three-dimensionality:* Although, as noted, the linear dimensions of existing artificial processing units are vastly smaller than those of brains, the procedure by which they're made—centered on lithography (basically, etching)—is essentially two-dimensional. That is revealed visibly in the geometry of computer boards and chips. Of course, one can stack boards, but the spacing between layers is much larger, and communication much less efficient, than within layers. Brains make better use of all three dimensions.
- *Self-repair:* Human brains can recover from, or work around, many kinds of injuries or errors. Computers often must be repaired or rebooted externally.

HOUSE_OVERSIGHT_016862

- *Connectivity:* Human neurons typically support several hundred connections (synapses). Moreover, the complex pattern of these connections is very meaningful. (See our next point.) Computer units typically make only a handful of connections, in regular, fixed patterns.
- *Development* (self-assembly with interactive sculpting): The human brain grows its units by cell divisions and orchestrates them into coherent structures by movement and folding. It also proliferates an abundance of connections among the cells. An important part of its sculpting occurs through active processes during infancy and childhood, as the individual interacts with his or her environment. In this process, many connections are winnowed away, while others are strengthened, depending on their effectiveness in use. Thus, the fine structure of the brain is tuned through interaction with the external world—a rich source of information and feedback!
- *Integration* (sensors and actuators): The human brain comes equipped with a variety of sensory organs, notably including its outgrowth eyes, and with versatile actuators, including hands that build, legs that walk, and mouths that speak. Those sensors and actuators are seamlessy integrated into the brain's information-processing centers, having been honed over millions of years of natural selection. We interpret their raw signals and control their large-scale actions with minimal conscious attention. The flip side is that we don't know how we do it, and the implementation is opaque. It's proving surprisingly difficult to reach human standards on these "routine" input-output functions.

These advantages of human brains over currently engineered artifacts are profound. Human brains supply an inspiring existence proof, showing us several ways we can get more out of matter. When, if ever, will our engineering catch up?

I don't know for sure, but let me offer some informed opinions. The challenges of three-dimensionality and, to a lesser extent, self-repair don't look overwhelming. They present some tough engineering problems, but many incremental improvements are easy to imagine, and there are clear paths forward. And while the powers of human eyes, hands, and other sensory organs and actuators are wonderfully effective, their abilities are far from exhausting any physical limits. Optical systems can take pictures with higher resolution in space, time, and color, and in more regions of the electromagnetic spectrum; robots can move faster and be stronger; and so forth. In these domains, the components necessary for superhuman performance, along many axes, are already available. The bottleneck is getting information into and out of them, rapidly, in the language of the information-processing units.

And this brings us to the remaining, and I think most profound, advantages of brains over artificial devices, which stem from their connectivity and interactive development. Those two advantages are synergistic, since it is interactive development that sculpts the massively wired but sprawling structure of the infant brain, enabled by exponential growth of neurons and synapses, to get tuned into the extraordinary instrument it becomes. Computer scientists are beginning to discover the power of the brain's architecture: Neural nets, whose basic design, as their name suggests, was directly inspired by the brain's, have scored some spectacular successes in game playing and pattern recognition, as noted. But present-day engineering has nothing comparable—in

HOUSE_OVERSIGHT_016863

the (currently) esoteric domain of self-reproducing machines—to the power and versatility of neurons and their synapses. This could become a new, great frontier of research. Here too, biology might point the way, as we come to understand biological development well enough to imitate its essence.

Altogether, the advantages of artificial over natural intelligence appear permanent, while the advantages of natural over artificial intelligence, though substantial at present, appear transient. I'd guess that it will be many decades before engineering catches up, but—barring catastrophic wars, climate change, or plagues, so that technological progress stays vigorous—few centuries.

If that's right, we can look forward to several generations during which humans, empowered and augmented by smart devices, coexist with increasingly capable autonomous AIs. There will be a complex, rapidly changing ecology of intelligence, and rapid evolution in consequence. Given the intrinsic advantages that engineered devices will eventually offer, the vanguard of that evolution will be cyborgs and superminds, rather than lightly adorned *Homo sapiens.*

Another important impetus will come from the exploration of hostile environments, both on Earth (e.g., the deep ocean) and, especially, in space. The human body is poorly adapted to conditions outside a narrow band of temperatures, pressures, and atmospheric composition. It needs a wide variety of specific, complex nutrients, and plenty of water. Also, it is not radiation-hardened. As the manned space program has amply demonstrated, it is difficult and expensive to maintain humans outside their terrestrial comfort zone. Cyborgs or autonomous AIs could be much more effective in these explorations. Quantum AIs, with their sensitivity to noise, might even be happier in the cold and dark of deep space.

In a moving passage from his 1935 novel *Odd John,* science fiction's singular genius Olaf Stapledon has his hero, a superhuman (mutant) intelligence, describe *Homo sapiens* as "the Archaeopteryx of the spirit." He says this, fondly, to his friend and biographer, who is a normal human. Archaeopteryx was a noble creature, and a bridge to greater ones.

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I was introduced to **Max Tegmark** *some years ago by his MIT colleague Alan Guth, the father of the inflationary universe. A distinguished theoretical physicist and cosmologist himself, Max's principal concern nowadays is the looming existential risk posed by the creation of an AGI (artificial general intelligence—that is, one that matches human intelligence). Four years ago, Max co-founded, with Jaan Tallinn and others, the Future of Life Institute (FLI), which bills itself as "an outreach organization working to ensure that tomorrow's most powerful technologies are beneficial for humanity." While on a book tour in London, he was in the midst of planning for FLI, and he admits being driven to tears in a tube station after a trip to the London Science Museum, with its exhibitions spanning the gamut of humanity's technological achievements. Was all that impressive progress in vain?*

FLI's scientific advisory board includes Elon Musk, Frank Wilczek, George Church, Stuart Russell, and the Oxford philosopher Nick Bostrom, who dreamed up an oft-quoted Gedankenexperiment *that results in a world full of paper clips and nothing else, produced by an (apparently) well-meaning AGI who was just following orders. The Institute sponsors conferences (Puerto Rico 2015, Asilomar 2017) on AI safety issues and in 2018 instituted a grants competition focusing on research in aid of maximizing the societal benefits of AGI.*

While Max is sometimes listed—by the non-cognoscenti—on the side of the scaremongers, he believes, like Frank Wilczek, in a future that will immensely benefit from AGI if, in the attempt to create it, we can keep the human species from being sidelined.

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LET'S ASPIRE TO MORE THAN MAKING OURSELVES OBSOLETE

Max Tegmark

Max Tegmark *is an MIT physicist and AI researcher; president of the Future of Life Institute; scientific director of the Foundational Questions Institute; and the author of* Our Mathematical Universe *and* Life 3.0: Being Human in the Age of Artificial Intelligence.

Although there's great controversy about how and when AI will impact humanity, the situation is clearer from a cosmic perspective: The technology-developing life that has evolved on Earth is rushing to make itself obsolete without devoting much serious thought to the consequences. This strikes me as embarrassingly lame, given that we can create amazing opportunities for humanity to flourish like never before, if we dare to steer a more ambitious course.

13.8 billion years after its birth, our Universe has become aware of itself. On a small blue planet, tiny conscious parts of our Universe have discovered that what they once thought was the sum total of existence was a minute part of something far grander: a solar system in a galaxy in a universe with over 100 billion other galaxies, arranged into an elaborate pattern of groups, clusters, and superclusters.

Consciousness is the cosmic awakening; it transformed our Universe from a mindless zombie with no self-awareness into a living ecosystem harboring self-reflection, beauty, hope, meaning, and purpose. Had that awakening never taken place, our Universe would have been pointless—a gigantic waste of space. Should our Universe go back to sleep permanently due to some cosmic calamity or self-inflicted mishap, it will become meaningless again.

On the other hand, things could get even better. We don't yet know whether we humans are the only stargazers in the cosmos, or even the first, but we've already learned enough about our Universe to know that it has the potential to wake up much more fully than it has thus far. AI pioneers such as Norbert Wiener have taught us that a further awakening of our Universe's ability to process and experience information need not require eons of additional evolution but perhaps mere decades of human scientific ingenuity.

We may be like that first glimmer of self-awareness you experienced when you emerged from sleep this morning, a premonition of the much greater consciousness that would arrive once you opened your eyes and fully awoke. Perhaps artificial superintelligence will enable life to spread throughout the cosmos and flourish for billions or trillions of years, and perhaps this will be because of decisions we make here, on our planet, in our lifetime.

Or humanity may soon go extinct, through some self-inflicted calamity caused by the power of our technology growing faster than the wisdom with which we manage it.

The evolving debate about AI's societal impact

Many thinkers dismiss the idea of superintelligence as science fiction, because they view intelligence as something mysterious that can exist only in biological organisms—especially humans—and as fundamentally limited to what today's humans can do. But from my perspective as a physicist, intelligence is simply a certain kind of information

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processing performed by elementary particles moving around, and there's no law of physics that says one can't build machines more intelligent in every way than we are, and able to seed cosmic life. This suggests that we've seen just the tip of the intelligence iceberg; there's an amazing potential to unlock the full intelligence latent in nature and use it to help humanity flourish—or flounder.

Others, including some of the authors in this volume, dismiss the building of an AGI (Artificial General Intelligence—an entity able to accomplish any cognitive task at least as well as humans) not because they consider it physically impossible but because they deem it too difficult for humans to pull off in less than a century. Among professional AI researchers, both types of dismissal have become minority views because of recent breakthroughs. There is a strong expectation that AGI will be achieved within a century, and the median forecast is only decades away. A recent survey of AI researchers by Vincent Muller and Nick Bostrom concludes:

> [T]he results reveal a view among experts that AI systems will probably (over 50%) reach overall human ability by 2040-50, and very likely (with 90% probability) by 2075. From reaching human ability, it will move on to superintelligence in 2 years (10%) to 30 years (75%) thereafter.[16]

In the cosmic perspective of gigayears, it makes little difference whether AGI arrives in thirty or three hundred years, so let's focus on the implications rather than the timing.

First, we humans discovered how to replicate some natural processes with machines, making our own heat, light, and mechanical horsepower. Gradually we realized that our bodies were also machines, and the discovery of nerve cells blurred the boundary between body and mind. Finally, we started building machines that could outperform not only our muscles but our minds as well. We've now been eclipsed by machines in the performance of many narrow cognitive tasks, ranging from memorization and arithmetic to game play, and we are in the process of being overtaken in many more, from driving to investing to medical diagnosing. If the AI community succeeds in its original goal of building AGI, then we will have, by definition, been eclipsed at all cognitive tasks.

This begs many obvious questions. For example, will whoever or whatever controls the AGI control Earth? Should we aim to control superintelligent machines? If not, can we ensure that they understand, adopt, and retain human values? As Norbert Wiener put it in *The Human Use of Human Beings:*

> Woe to us if we let [the machine] decide our conduct, unless we have previously examined the laws of its action, and know fully that its conduct will be carried out on principles acceptable to us! On the other hand, the machine . . . , which can learn and can make decisions on the basis of its learning, will in no way be obliged to make such decisions as we should have made, or will be acceptable to us.

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[16] Vincent C. Müller & Nick Bostrom, "Future Progress in Artificial Intelligence: A Survey of Expert Opinion," in *Fundamental Issues of Artificial Intelligence*, Vincent C. Muller, ed. (Springer International Publishing Switzerland, 2016), pp. 555-72. https://nickbostrom.com/papers/survey.pdf.

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And who are the "us"? Who should deem "such decisions . . . acceptable"? Even if future powers decide to help humans survive and flourish, how will we find meaning and purpose in our lives if we aren't needed for anything?

The debate about the societal impact of AI has changed dramatically in the last few years. In 2014, what little public talk there was of AI risk tended to be dismissed as Luddite scaremongering, for one of two logically incompatible reasons:

(1) AGI was overhyped and wouldn't happen for at least another century.

(2) AGI would probably happen sooner but was virtually guaranteed to be beneficial.

Today, talk of AI's societal impact is everywhere, and work on AI safety and AI ethics has moved into companies, universities, and academic conferences. The controversial position on AI safety research is no longer to advocate for it but to dismiss it. Whereas the open letter that emerged from the 2015 Puerto Rico AI conference (and helped mainstream AI safety) spoke only in vague terms about the importance of keeping AI beneficial, the 2017 Asilomar AI Principles (see below) had real teeth: They explicitly mention recursive self-improvement, superintelligence, and existential risk, and were signed by AI industry leaders and over a thousand AI researchers from around the world.

Nonetheless, most discussion is limited to the near-term impact of narrow AI and the broader community pays only limited attention to the dramatic transformations that AGI may soon bring to life on Earth. Why?

Why we're rushing to make ourselves obsolete, and why we avoid talking about it

First of all, there's simple economics. Whenever we figure out how to make another type of human work obsolete by building machines that do it better and cheaper, most of society gains: Those who build and use the machines make profits, and consumers get more affordable products. This will be as true of future investor AGIs and scientist AGIs as it was of weaving machines, excavators, and industrial robots. In the past, displaced workers usually found new jobs, but this basic economic incentive will remain even if that is no longer the case. The existence of affordable AGI means, by definition, that *all* jobs can be done more cheaply by machines, so anyone claiming that "people will always find new well-paying jobs" is in effect claiming that AI researchers will fail to build AGI.

Second, *Homo sapiens* is by nature curious, which will motivate the scientific quest for understanding intelligence and developing AGI even without economic incentives. Although curiosity is one of the most celebrated human attributes, it can cause problems when it fosters technology we haven't yet learned how to manage wisely. Sheer scientific curiosity without profit motive contributed to the discovery of nuclear weapons and tools for engineering pandemics, so it's not unthinkable that the old adage "Curiosity killed the cat" will turn out to apply to the human species as well.

Third, we're mortal. This explains the near unanimous support for developing new technologies that help us live longer, healthier lives, which strongly motivates current AI research. AGI can clearly aid medical research even more. Some thinkers even aspire to near immortality via cyborgization or uploading.

We're thus on the slippery slope toward AGI, with strong incentives to keep sliding downward, even though the consequence will by definition be our economic obsolescence. We will no longer be needed for anything, because all jobs can be done

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more efficiently by machines. The successful creation of AGI would be the biggest event in human history, so why is there so little serious discussion of what it might lead to?

Here again, the answer involves multiple reasons.

First, as Upton Sinclair famously quipped, "It is difficult to get a man to understand something, when his salary depends on his not understanding it."[17] For example, spokesmen for tech companies or university research groups often claim there are no risks attached to their activities even if they privately think otherwise. Sinclair's observation may help explain not only reactions to risks from smoking and climate change but also why some treat technology as a new religion whose central articles of faith are that more technology is always better and whose heretics are clueless scaremongering Luddites.

Second, humans have a long track record of wishful thinking, flawed extrapolation of the past, and underestimation of emerging technologies. Darwinian evolution endowed us with powerful fear of concrete threats, not of abstract threats from future technologies that are hard to visualize or even imagine. Consider trying to warn people in 1930 of a future nuclear arms race, when you couldn't show them a single nuclear explosion video and nobody even knew how to build such weapons. Even top scientists can underestimate uncertainty, making forecasts that are either too optimistic—Where are those fusion reactors and flying cars?—or too pessimistic. Ernest Rutherford, arguably the greatest nuclear physicist of his time, said in 1933—less than twenty-four hours before Leo Szilard conceived of the nuclear chain reaction—that nuclear energy was "moonshine." Essentially nobody at that time saw the nuclear arms race coming.

Third, psychologists have discovered that we tend to avoid thinking of disturbing threats when we believe there's nothing we can do about them anyway. In this case, however, there are many constructive things we can do, if we can get ourselves to start thinking about the issue.

What can we do?

I'm advocating a strategy change from *"Let's rush to build technology that makes us obsolete—what could possibly go wrong?"* to *"Let's envision an inspiring future and steer toward it."*

To motivate the effort required for steering, this strategy begins by envisioning an enticing destination. Although Hollywood's futures tend to be dystopian, the fact is that AGI can help life flourish as never before. Everything I love about civilization is the product of intelligence, so if we can amplify our own intelligence with AGI, we have the potential to solve today's and tomorrow's thorniest problems, including disease, climate change, and poverty. The more detailed we can make our shared positive visions for the future, the more motivated we will be to work together to realize them.

What should we do in terms of steering? The twenty-three Asilomar principles adopted in 2017 offer plenty of guidance, including these short-term goals:

(1) An arms race in lethal autonomous weapons should be avoided.

(2) The economic prosperity created by AI should be shared broadly, to benefit all of humanity.

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[17] Upton Sinclair, *I, Candidate for Governor: And How I Got Licked* (Berkeley CA: University of California Press, 1994), p. 109.

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(3) Investments in AI should be accompanied by funding for research on ensuring its beneficial use. . . . How can we make future AI systems highly robust, so that they do what we want without malfunctioning or getting hacked.[18]

The first two involve not getting stuck in suboptimal Nash equilibria. An out-of-control arms race in lethal autonomous weapons that drives the price of automated anonymous assassination toward zero will be very hard to stop once it gains momentum. The second goal would require reversing the current trend in some Western countries where sectors of the population are getting poorer in absolute terms, fueling anger, resentment, and polarization. Unless the third goal can be met, all the wonderful AI technology we create might harm us, either accidentally or deliberately.

AI safety research must be carried out with a strict deadline in mind: Before AGI arrives, we need to figure out how to make AI understand, adopt, and retain our goals. The more intelligent and powerful machines get, the more important it becomes to align their goals with ours. As long as we build relatively dumb machines, the question isn't whether human goals will prevail but merely how much trouble the machines can cause before we solve the goal-alignment problem. If a superintelligence is ever unleashed, however, it will be the other way around: Since intelligence is the ability to accomplish goals, a superintelligent AI is by definition much better at accomplishing its goals than we humans are at accomplishing ours, and will therefore prevail.

In other words, *the real risk with AGI isn't malice but competence*. A superintelligent AGI will be extremely good at accomplishing its goals, and if those goals aren't aligned with ours, we're in trouble. People don't think twice about flooding anthills to build hydroelectric dams, so let's not place humanity in the position of those ants. Most researchers argue that if we end up creating superintelligence, we should make sure it's what AI-safety pioneer Eliezer Yudkowsky has termed "friendly AI"—AI whose goals are in some deep sense beneficial.

The moral question of what these goals should be is just as urgent as the technical questions about goal alignment. For example, what sort of society are we hoping to create, where we find meaning and purpose in our lives even though we, strictly speaking, aren't needed? I'm often given the following glib response to this question: "*Let's build machines that are smarter than us and then let them figure out the answer!*" This mistakenly equates intelligence with morality. Intelligence isn't good or evil but morally neutral. It's simply an ability to accomplish complex goals, good or bad. We can't conclude that things would have been better if Hitler had been more intelligent. Indeed, postponing work on ethical issues until after goal-aligned AGI is built would be irresponsible and potentially disastrous. A perfectly obedient superintelligence whose goals automatically align with those of its human owner would be like Nazi SS-Obersturmbannführer Adolf Eichmann on steroids. Lacking moral compass or inhibitions of its own, it would, with ruthless efficiency, implement its owner's goals, whatever they might be.[19]

When I speak of the need to analyze technology risk, I'm sometimes accused of scaremongering. But here at MIT, where I work, we know that such risk analysis isn't scaremongering: It's *safety engineering*. Before the moon-landing mission, NASA

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[18] https://futureoflife.org/ai-principles/

[19] See, for example, Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Classics, 2006).

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systematically thought through everything that could possibly go wrong when putting astronauts on top of a 110-meter rocket full of highly flammable fuel and launching them to a place where nobody could help them—and there were lots of things that could go wrong. Was this scaremongering? No, this was the safety engineering that ensured the mission's success. Similarly, we should analyze what could go wrong with AI to ensure that it goes right.

Outlook

In summary, if our technology outpaces the wisdom with which we manage it, it can lead to our extinction. It's already caused the extinction of from 20 to 50 percent of all species on Earth, by some estimates,[20] and it would be ironic if we're next in line. It would also be pathetic, given that the opportunities offered by AGI are literally astronomical, potentially enabling life to flourish for billions of years not only on Earth but also throughout much of our cosmos.

Instead of squandering this opportunity through unscientific risk denial and poor planning, let's be ambitious! *Homo sapiens* is inspiringly ambitious, as reflected in William Ernest Henley's famous lines from *Invictus*: "I am the master of my fate, / I am the captain of my soul." Rather than drifting like a rudderless ship toward our own obsolescence, let's take on and overcome the technical and societal challenges standing between us and a good high-tech future. What about the existential challenges related to morality, goals, and meaning? There's no meaning encoded in the laws of physics, so instead of passively waiting for our Universe to give meaning to us, let's acknowledge and celebrate that it's we conscious beings who give meaning to our Universe. Let's create our own meaning, based on something more profound than having jobs. AGI can enable us to finally become the masters of our own destiny. Let's make that destiny a truly inspiring one!

[20] See Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* (New York: Henry Holt, 2014).

HOUSE_OVERSIGHT_016871

Jaan Tallinn *grew up in Estonia, becoming one of its few computer game developers, when that nation was still a Soviet Socialist Republic. Here he compares the dissidents who brought down the Iron Curtain to the dissidents who are sounding the alarm about rapid advances in artificial intelligence. He locates the roots of the current AI dissidence, paradoxically, among such pioneers of the AI field as Wiener, Alan Turing, and I. J. Good.*

Jaan's preoccupation is with existential risk, AI being among the most extreme of many. In 2012, he co-founded the Centre for the Study of Existential Risk—an interdisciplinary research institute that works to mitigate risks "associated with emerging technologies and human activity"—at the University of Cambridge, along with philosopher Huw Price and Martin Rees, the Astronomer Royal.

He once described himself to me as "a convinced consequentialist"—convinced enough to have given away much of his entrepreneurial wealth to the Future of Life Institute (of which he is a co-founder), the Machine Intelligence Research Institute, and other such organizations working on risk reduction. Max Tegmark has written about him: "If you're an intelligent life-form reading this text millions of years from now and marveling at how life is flourishing, you may owe your existence to Jaan."

On a recent visit to London, Jaan and I participated on an AI panel for the Serpentine Gallery's Marathon at London's City Hall, under the aegis of Hans Ulrich Obrist (another contributor to this volume). This being the art world, there was a glamorous dinner party that night in a mansion filled with London's beautiful people—artists, fashion models, oligarchs, stars of stage and screen. After working the room in his unaffected manner ("Hi, I'm Jaan"), he suddenly said, "Time for hip-hop dancing," dropped to the floor on one hand, and began demonstrating his spectacular moves to the bemused A-listers. Then off he went into the dance-club subculture, which is apparently how he ends every evening when he's on the road. Who knew?

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DISSIDENT MESSAGES
Jaan Tallinn

***Jaan Tallin**, a computer programmer, theoretical physicist, and investor, is a co-developer of Skype and Kazaa.*

In March 2009, I found myself in a bland franchise eatery next to a noisy California freeway. I was there to meet a young man whose blog I had been following. To make himself recognizable, he wore a button with a text on it: *Speak the truth even if your voice trembles.* His name was Eliezer Yudkowsky, and we spent the next four hours discussing the message he had for the world—a message that had brought me to that eatery and would end up dominating my subsequent work.

The First Message: the Soviet Occupation

In *The Human Use of Human Beings*, Norbert Wiener looked at the world through the lens of communication. He saw a universe that was marching to the tune of the second law of thermodynamics toward its inevitable heat death. In such a universe, the only (meta)stable entities are *messages*—patterns of information that propagate through time, like waves propagating across the surface of a lake. Even we humans can be considered messages, because the atoms in our bodies are too fleeting to attach our identities to. Instead, we are the "message" that our bodily functions maintain. As Wiener put it: "It is the pattern maintained by this homeostasis, which is the touchstone of our personal identity."

I'm more used to treating processes and computation as the fundamental building blocks of the world. That said, Wiener's lens brings out some interesting aspects of the world which might otherwise have remained in the background and which to a large degree shaped my life. These are two messages, both of which have their roots in the Second World War. They started out as quiet dissident messages—messages that people didn't pay much attention to, even if they silently and perhaps subconsciously concurred. The first message was: *The Soviet Union is composed of a series of illegitimate occupations. These occupations must end.*

As an Estonian, I grew up behind the Iron Curtain and had a front row seat when it fell. I heard this first message in the nostalgic reminiscences of my grandparents and in between the harsh noises jamming the Voice of America. It grew louder during the Gorbachev era, as the state became more lenient in its treatment of dissidents, and reached a crescendo in the Estonian Singing Revolution of the late 1980s.

In my teens, I witnessed the message spread out across widening circles of people, starting with the active dissidents, who had voiced it for half a century at great cost to themselves, proceeding to the artists and literati, and ending up among the Party members and politicians who had switched sides. This new elite comprised an eclectic mix of people: those original dissidents who had managed to survive the repression, public intellectuals, and (to the great annoyance of the surviving dissidents) even former Communists. The remaining dogmatists—even the prominent ones—were eventually marginalized, some of them retreating to Russia.

Interestingly, as the message propagated from one group to the next, it evolved. It started in pure and uncompromising form ("The occupation must end!") among the dissidents who considered the truth more important than their personal freedom. The

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mainstream groups, who had more to lose, initially qualified and diluted the message, taking positions like, "It would make sense in the long term to delegate control over local matters." (There were always exceptions: Some public intellectuals proclaimed the original dissident message verbatim.) Finally, the original message—being, simply, true—won out over its diluted versions. Estonia regained its independence in 1991, and the last Soviet troops left three years later.

The people who took the risk and spoke the truth in Estonia and elsewhere in the Eastern Bloc played a monumental role in the eventual outcome—an outcome that changed the lives of hundreds of millions of people, myself included. They spoke the truth, even as their voices trembled.

The Second Message: AI Risk

My exposure to the second revolutionary message was via Yudkowsky's blog—the blog that compelled me to reach out and arrange that meeting in California. The message was: *Continued progress in AI can precipitate a change of cosmic proportions—a runaway process that will likely kill everyone. We need to put in a lot of extra effort to avoid that outcome*.

After my meeting with Yudkowsky, the first thing I did was try to interest my Skype colleagues and close collaborators in his warning. I failed. The message was too crazy, too dissident. Its time had not yet come.

Only later did I learn that Yudkowsky wasn't the original dissident speaking this particular truth. In April 2000, there was a lengthy opinion piece in *Wired* titled, "Why the Future Doesn't Need Us," by Bill Joy, co-founder and chief scientist of Sun Microsystems. He warned:

> Accustomed to living with almost routine scientific breakthroughs, we have yet to come to terms with the fact that the most compelling 21st-century technologies—robotics, genetic engineering, and nanotechnology—pose a different threat than the technologies that have come before. Specifically, robots, engineered organisms, and nanobots share a dangerous amplifying factor: They can self-replicate. . . . [O]ne bot can become many, and quickly get out of control.

Apparently, Joy's broadside caused a lot of furor but little action.

More surprising to me, though, was that the AI-risk message arose almost simultaneously with the field of computer science. In a 1951 lecture, Alan Turing announced: "[I]t seems probable that once the machine thinking method had started, it would not take long to outstrip our feeble powers. . . . At some stage, therefore, we should have to expect the machines to take control. . . ."[21] A decade or so later, his Bletchley Park colleague I. J. Good wrote, "The first ultraintelligent machine is the *last* invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control."[22] Indeed, I counted half a dozen places in *The Human Use of Human Beings* where Wiener hinted at one or another aspect of the Control Problem. ("The machine like the djinnee, which can learn and can make decisions on the basis of

[21] Posthumously reprinted in *Phil. Math.* (3) vol. 4, 256-60 (1966).

[22] Irving John Good, "Speculations concerning the first ultraintelligent machine," *Advances in Computers,* vol. 6 (Academic Press, 1965), pp. 31-88.

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its learning, will in no way be obliged to make such decisions as we should have made, or will be acceptable to us.") Apparently, the original dissidents promulgating the AI-risk message were the AI pioneers themselves!

Evolution's Fatal Mistake

There have been many arguments, some sophisticated and some less so, for why the Control Problem is real and not some science-fiction fantasy. Allow me to offer one that illustrates the magnitude of the problem:

For the last hundred thousand years, the world (meaning the Earth, but the argument extends to the solar system and possibly even to the entire universe) has been in the human-brain regime. In this regime, the brains of *Homo sapiens* have been the most sophisticated future-shaping mechanisms (indeed, some have called them the most complicated objects in the universe). Initially, we didn't use them for much beyond survival and tribal politics in a band of foragers, but now their effects are surpassing those of natural evolution. The planet has gone from producing forests to producing cities.

As predicted by Turing, once we have superhuman AI ("the machine thinking method"), the human-brain regime will end. Look around you—you're witnessing the final decades of a hundred-thousand-year regime. This thought alone should give people some pause before they dismiss AI as just another tool. One of the world's leading AI researchers recently confessed to me that he would be greatly relieved to learn that human-level AI was impossible for us to create.

Of course, it might still take us a long time to develop human-level AI. But we have reason to suspect that this is not the case. After all, it didn't take long, in relative terms, for evolution—the blind and clumsy optimization process—to create human-level intelligence once it had animals to work with. Or multicellular life, for that matter: Getting cells to stick together seems to have been much harder for evolution to accomplish than creating humans once there were multicellular organisms. Not to mention that our level of intelligence was limited by such grotesque factors as the width of the birth canal. Imagine an AI developer being stopped in his tracks because he couldn't manage to adjust the font size on his computer!

There's an interesting symmetry here: In fashioning humans, evolution created a system that is, at least in many important dimensions, a more powerful planner and optimizer than evolution itself is. We are the first species to understand that we're the product of evolution. Moreover, we've created many artifacts (radios, firearms, spaceships) that evolution would have little hope of creating. Our future, therefore, will be determined by our own decisions and no longer by biological evolution. In that sense, evolution has fallen victim to its own Control Problem.

We can only hope that we're smarter than evolution in that sense. We *are* smarter, of course, but will that be enough? We're about to find out.

The Present Situation

So here we are, more than half a century after the original warnings by Turing, Wiener, and Good, and a decade after people like me started paying attention to the AI-risk message. I'm glad to see that we've made a lot of progress in confronting this issue, but we're definitely not there yet. AI risk, although no longer a taboo topic, is not yet fully

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appreciated among AI researchers. AI risk is not yet common knowledge either. In relation to the timeline of the first dissident message, I'd say we're around the year 1988, when raising the Soviet-occupation topic was no longer a career-ending move but you still had to somewhat hedge your position. I hear similar hedging now—statements like, "I'm not concerned about superintelligent AI, but there are some real ethical issues in increased automation," or "It's good that some people are researching AI risk, but it's not a short-term concern," or even the very reasonable sounding, "These are small-probability scenarios, but their potentially high impact justifies the attention."

As far as message propagation goes, though, we are getting close to the tipping point. A recent survey of AI researchers who published at the two major international AI conferences in 2015 found that 40 percent now think that risks from highly advanced AI are either "an important problem" or "among the most important problems in the field."[23]

Of course, just as there were dogmatic Communists who never changed their position, it's all but guaranteed that some people will never admit that AI is potentially dangerous. Many of the deniers of the first kind came from the Soviet nomenklatura; similarly, the AI-risk deniers often have financial or other pragmatic motives. One of the leading motives is corporate profits. AI is profitable, and even in instances where it isn't, it's at least a trendy, forward-looking enterprise with which to associate your company. So a lot of the dismissive positions are products of corporate PR and legal machinery. In some very real sense, big corporations are nonhuman machines that pursue their own interests—interests that might not align with those of any particular human working for them. As Wiener observed in *The Human Use of Human Beings*: "When human atoms are knit into an organization in which they are used, not in their full right as responsible human beings, but as cogs and levers and rods, it matters little that their raw material is flesh and blood."

Another strong incentive to turn a blind eye to the AI risk is the (very human) curiosity that knows no bounds. "When you see something that is technically sweet, you go ahead and do it and you argue about what to do about it only after you have had your technical success. That is the way it was with the atomic bomb," said J. Robert Oppenheimer. His words were echoed recently by Geoffrey Hinton, arguably the inventor of deep learning, in the context of AI risk: "I could give you the usual arguments, but the truth is that the prospect of discovery is too sweet."

Undeniably, we have both entrepreneurial attitude and scientific curiosity to thank for almost all the nice things we take for granted in the modern era. It's important to realize, though, that progress does not *owe* us a good future. In Wiener's words, "It is possible to believe in progress as a fact without believing in progress as an ethical principle."

Ultimately, we don't have the luxury of waiting before all the corporate heads and AI researchers are willing to concede the AI risk. Imagine yourself sitting in a plane about to take off. Suddenly there's an announcement that 40 percent of the experts believe there's a bomb onboard. At that point, the course of action is already clear, and sitting there waiting for the remaining 60 percent to come around isn't part of it.

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[23] Katja Grace, et al., "When Will AI Exceed Human Performance? Evidence from AI Experts," https://arxiv.org/pdf/1705.08807.pdf.

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Calibrating the AI-Risk Message

While uncannily prescient, the AI-risk message from the original dissidents has a giant flaw—as does the version dominating current public discourse: Both considerably understate the magnitude of the problem as well as AI's potential upside. The message, in other words, does not adequately convey the stakes of the game.

Wiener primarily warned of the *social* risks—risks stemming from careless integration of machine-generated decisions with governance processes and misuse (by humans) of such automated decision making. Likewise, the current "serious" debate about AI risks focuses mostly on things like technological unemployment or biases in machine learning. While such discussions can be valuable and address pressing short-term problems, they are also stunningly parochial. I'm reminded of Yudkowsky's quip in a blog post: "[A]sking about the effect of *machine superintelligence* on the conventional human labor market is like asking how US–Chinese trade patterns would be affected by the Moon crashing into the Earth. There would indeed be effects, but you'd be missing the point."

In my view, the central point of the AI risk is that *superintelligent AI is an environmental risk*. Allow me to explain.

In his "Parable of the Sentient Puddle," Douglas Adams describes a puddle that wakes up in the morning and finds himself in a hole that fits him "staggeringly well." From that observation, the puddle concludes that the world must have been made for him. Therefore, writes Adams, "the moment he disappears catches him rather by surprise." To assume that AI risks are limited to adverse social developments is to make a similar mistake. The harsh reality is that the universe was not made for us; instead, we are fine-tuned by evolution to a very narrow range of environmental parameters. For instance, we need the atmosphere at ground level to be roughly at room temperature, at about 100 kPa pressure, and have a sufficient concentration of oxygen. Any disturbance, even temporary, of this precarious equilibrium and we die in a matter of minutes.

Silicon-based intelligence does not share such concerns about the environment. That's why it's much cheaper to explore space using machine probes rather than "cans of meat." Moreover, Earth's current environment is almost certainly suboptimal for what a superintelligent AI will greatly care about: *efficient computation*. Hence we might find our planet suddenly going from anthropogenic global warming to machinogenic global cooling. One big challenge that AI safety research needs to deal with is how to constrain a potentially superintelligent AI—an AI with a much larger footprint than our own—from rendering our environment uninhabitable for biological life-forms.

Interestingly, given that the most potent sources both of AI research and AI-risk dismissals are under big corporate umbrellas, if you squint hard enough the "AI as an environmental risk" message looks like the chronic concern about corporations skirting their environmental responsibilities.

Conversely, the worry about AI's social effects also misses most of the upside. It's hard to overemphasize how tiny and parochial the future of our planet is, compared with the full potential of humanity. On astronomical timescales, our planet will be gone soon (unless we tame the sun, also a distinct possibility) and almost all the resources—atoms and free energy—to sustain civilization in the long run are in deep space.

Eric Drexler, the inventor of nanotechnology, has recently been popularizing the

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concept of "Pareto-topia": the idea that AI, if done right, can bring about a future in which *everyone's* lives are hugely improved, a future where there are no losers. A key realization here is that what chiefly prevents humanity from achieving its full potential might be our instinctive sense that we're in a zero-sum game—a game in which players are supposed to eke out small wins at the expense of others. Such an instinct is seriously misguided and destructive in a "game" where everything is at stake and the payoff is literally astronomical. There are many more star systems in our galaxy alone than there are people on Earth.

Hope

As of this writing, I'm cautiously optimistic that the AI-risk message can save humanity from extinction, just as the Soviet-occupation message ended up liberating hundreds of millions of people. As of 2015, it had reached and converted 40 percent of AI researchers. It wouldn't surprise me if a new survey now would show that the majority of AI researchers believe AI safety to be an important issue.

I'm delighted to see the first technical AI-safety papers coming out of DeepMind, OpenAI, and Google Brain and the collaborative problem-solving spirit flourishing between the AI-safety research teams in these otherwise very competitive organizations.

The world's political and business elite are also slowly waking up: AI safety has been covered in reports and presentations by the Institute of Electrical and Electronics Engineers (IEEE), the World Economic Forum, and the Organization for Economic Cooperation and Development (OECD). Even the recent (July 2017) Chinese AI manifesto contained dedicated sections on "AI safety supervision" and "Develop[ing] laws, regulations, and ethical norms" and establishing "an AI security and evaluation system" to, among other things, "[e]nhance the awareness of risk." I very much hope that a new generation of leaders who understand the AI Control Problem and AI as the ultimate environmental risk can rise above the usual tribal, zero-sum games and steer humanity past these dangerous waters we are in—thereby opening our way to the stars that have been waiting for us for billions of years.

Here's to our next hundred thousand years! And don't hesitate to speak the truth, even if your voice trembles.

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Throughout his career, whether studying language, advocating a realistic biology of mind, or examining the human condition through the lens of humanistic Enlightenment ideas, psychologist **Steven Pinker** *has embraced and championed a naturalistic understanding of the universe and the computational theory of mind. He is perhaps the first internationally recognized public intellectual whose recognition is based on the advocacy of empirically based thinking about language, mind, and human nature.*

"Just as Darwin made it possible for a thoughtful observer of the natural world to do without creationism," he says, "Turing and others made it possible for a thoughtful observer of the cognitive world to do without spiritualism."

In the debate about AI risk, he argues against prophecies of doom and gloom, noting that they spring from the worst of our psychological biases—exemplified particularly by media reports: "Disaster scenarios are cheap to play out in the probability-free zone of our imaginations, and they can always find a worried, technophobic, or morbidly fascinated audience." Hence, over the centuries: Pandora, Faust, the Sorcerer's Apprentice, Frankenstein, the population bomb, resource depletion, HAL, suitcase nukes, the Y2K bug, and engulfment by nanotechnological grey goo. "A characteristic of AI dystopias," he points out, "is that they project a parochial alpha-male psychology onto the concept of intelligence. . . . History does turn up the occasional megalomaniacal despot or psychopathic serial killer, but these are products of a history of natural selection shaping testosterone-sensitive circuits in a certain species of primate, not an inevitable feature of intelligent systems."

In the present essay, he applauds Wiener's belief in the strength of ideas vis-à-vis the encroachment of technology. As Wiener so aptly put it, "The machine's danger to society is not from the machine itself but from what man makes of it."

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TECH PROPHECY AND THE UNDERAPPRECIATED CAUSAL POWER OF IDEAS

Steven Pinker

Steven Pinker, *a Johnstone Family Professor in the Department of Psychology at Harvard University, is an experimental psychologist who conducts research in visual cognition, psycholinguistics, and social relations. He is the author of eleven books, including* The Blank Slate, The Better Angels of Our Nature, *and, most recently,* Enlightenment Now: The Case for Reason, Science, Humanism, and Progress.

Artificial intelligence is an existence proof of one of the great ideas in human history: that the abstract realm of knowledge, reason, and purpose does not consist of an élan vital or immaterial soul or miraculous powers of neural tissue. Rather, it can be linked to the physical realm of animals and machines via the concepts of information, computation, and control. Knowledge can be explained as patterns in matter or energy that stand in systematic relations with states of the world, with mathematical and logical truths, and with one another. Reasoning can be explained as transformations of that knowledge by physical operations that are designed to preserve those relations. Purpose can be explained as the control of operations to effect changes in the world, guided by discrepancies between its current state and a goal state. Naturally evolved brains are just the most familiar systems that achieve intelligence through information, computation, and control. Humanly designed systems that achieve intelligence vindicate the notion that information processing is sufficient to explain it—the notion that the late Jerry Fodor dubbed the computational theory of mind.

The touchstone for this volume, Norbert Wiener's *The Human Use of Human Beings,* celebrated this intellectual accomplishment, of which Wiener himself was a foundational contributor. A potted history of the mid-20th-century revolution that gave the world the computational theory of mind might credit Claude Shannon and Warren Weaver for explaining knowledge and communication in terms of information. It might credit Alan Turing and John von Neumann for explaining intelligence and reasoning in terms of computation. And it ought to give Wiener credit for explaining the hitherto mysterious world of purposes, goals, and teleology in terms of the technical concepts of feedback, control, and cybernetics (in its original sense of "governing" the operation of a goal-directed system). "It is my thesis," he announced, "that the physical functioning of the living individual and the operation of some of the newer communication machines are precisely parallel in their analogous attempts to control entropy through feedback"—the staving off of life-sapping entropy being the ultimate goal of human beings.

Wiener applied the ideas of cybernetics to a third system: society. The laws, norms, customs, media, forums, and institutions of a complex community could be considered channels of information propagation and feedback that allow a society to ward off disorder and pursue certain goals. This is a thread that runs through the book and which Wiener himself may have seen as its principal contribution. In his explanation of feedback, he wrote, "This complex of behavior is ignored by the average man, and in particular does not play the role that it should in our habitual analysis of society; for just as individual physical responses may be seen from this point of view, so may the organic responses of society itself."

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Indeed, Wiener gave scientific teeth to the idea that in the workings of history, politics, and society, *ideas matter*. Beliefs, ideologies, norms, laws, and customs, by regulating the behavior of the humans who share them, can shape a society and power the course of historical events as surely as the phenomena of physics affect the structure and evolution of the solar system. To say that ideas—and not just weather, resources, geography, or weaponry—can shape history is not woolly mysticism. It is a statement of the causal powers of information instantiated in human brains and exchanged in networks of communication and feedback. Deterministic theories of history, whether they identify the causal engine as technological, climatological, or geographic, are belied by the causal power of ideas. The effects of these ideas can include unpredictable lurches and oscillations that arise from positive feedback or from miscalibrated negative feedback.

An analysis of society in terms of its propagation of ideas also gave Wiener a guideline for social criticism. A healthy society—one that gives its members the means to pursue life in defiance of entropy—allows information sensed and contributed by its members to feed back and affect how the society is governed. A dysfunctional society invokes dogma and authority to impose control from the top down. Wiener thus described himself as "a participant in a liberal outlook," and devoted most of the moral and rhetorical energy in the book (both the 1950 and 1954 editions) to denouncing communism, fascism, McCarthyism, militarism, and authoritarian religion (particularly Catholicism and Islam) and to warning that political and scientific institutions were becoming too hierarchical and insular.

Wiener's book is also, here and there, an early exemplar of an increasingly popular genre, tech prophecy. Prophecy not in the sense of mere prognostications but in the Old Testament sense of dark warnings of catastrophic payback for the decadence of one's contemporaries. Wiener warned against the accelerating nuclear arms race, against technological change that was imposed without regard to human welfare ("[W]e must know as scientists what man's nature is and what his built-in purposes are"), and against what today is called the value-alignment problem: that "the machine like the djinnee, which can learn and can make decisions on the basis of its learning, will in no way be obliged to make such decisions as we should have made, or will be acceptable to us." In the darker, 1950 edition, he warned of a "threatening new Fascism dependent on the *machine à gouverner*."

Wiener's tech prophecy harks back to the Romantic movement's rebellion against the "dark Satanic mills" of the Industrial Revolution, and perhaps even earlier, to the archetypes of Prometheus, Pandora, and Faust. And today it has gone into high gear. Jeremiahs, many of them (like Wiener) from the worlds of science and technology, have sounded alarms about nanotechnology, genetic engineering, Big Data, and particularly artificial intelligence. Several contributors to this volume characterize Wiener's book as a prescient example of tech prophecy and amplify his dire worries.

Yet the two moral themes of *The Human Use of Human Beings*—the liberal defense of an open society and the dystopian dread of runaway technology—are in tension. A society with channels of feedback that maximize human flourishing will have mechanisms in place, and can adapt them to changing circumstances, in a way that can domesticate technology to human purposes. There's nothing idealistic or mystical about this; as Wiener emphasized, ideas, norms, and institutions are themselves a form of technology, consisting of patterns of information distributed across brains. The

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possibility that machines threaten a new fascism must be weighed against the vigor of the liberal ideas, institutions, and norms that Wiener championed throughout the book. The flaw in today's dystopian prophecies is that they disregard the existence of these norms and institutions, or drastically underestimate their causal potency. The result is a technological determinism whose dark predictions are repeatedly refuted by the course of events. The numbers "1984" and "2001" are good reminders.

I will consider two examples. Tech prophets often warn of a "surveillance state" in which a government empowered by technology will monitor and interpret all private communications, allowing it to detect dissent and subversion as it arises and make resistance to state power futile. Orwell's telescreens are the prototype, and in 1976 Joseph Weizenbaum, one of the gloomiest tech prophets of all time, warned my class of graduate students not to pursue automatic speech recognition because government surveillance was its only conceivable application.

Though I am on record as an outspoken civil libertarian, deeply concerned with contemporary threats to free speech, I lose no sleep over technological advances in the Internet, video, or artificial intelligence. The reason is that almost all the variation across time and space in freedom of thought is driven by differences in norms and institutions and almost none of it by differences in technology. Though one can imagine hypothetical combinations of the most malevolent totalitarians with the most advanced technology, in the real world it's the norms and laws we should be vigilant about, not the tech.

Consider variation across time. If, as Orwell hinted, advancing technology was a prime enabler of political repression, then Western societies should have gotten more and more restrictive of speech over the centuries, with a dramatic worsening in the second half of the 20th century continuing into the 21st. That's not how history unfolded. It was the centuries when communication was implemented by quills and inkwells that had autos-da-fé and the jailing or guillotining of Enlightenment thinkers. During World War I, when the state of the art was the wireless, Bertrand Russell was jailed for his pacifist opinions. In the 1950s, when computers were room-size accounting machines, hundreds of liberal writers and scholars were professionally punished. Yet in the technologically accelerating, hyperconnected 21st century, 18 percent of social science professors are Marxists[24]; the President of the United States is nightly ridiculed by television comedians as a racist, pervert, and moron; and technology's biggest threat to political discourse comes from amplifying too many dubious voices rather than suppressing enlightened ones.

Now consider variations across place. Western countries at the technological frontier consistently get the highest scores in indexes of democracy and human rights, while many backward strongman states are at the bottom, routinely jailing or killing government critics. The lack of a correlation between technology and repression is unsurprising when you analyze the channels of information flow in any human society. For dissidents to be influential, they have to get their message out to a wide network via whatever channels of communication are available—pamphleteering, soap-box oration, subversive soirées in cafés and pubs, word of mouth. These channels enmesh influential dissidents in a broad social network which makes them easy to identify and track down.

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[24] Neil Gross & Solon Simmons, "The Social and Political Views of American College and University Professors," in N. Gross & S. Simmons, eds., *Professors and Their Politics* (Baltimore: Johns Hopkins University Press, 2014).

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All the more so when dictators rediscover the time-honored technique of weaponizing the people against each other by punishing those who don't denounce or punish others.

In contrast, technologically advanced societies have long had the means to install Internet-connected, government-monitored surveillance cameras in every bar and bedroom. Yet that has not happened, because democratic governments (even the current American administration, with its flagrantly antidemocratic impulses) lack the will and the means to enforce such surveillance on an obstreperous people accustomed to saying what they want. Occasionally, warnings of nuclear, biological, or cyberterrorism goad government security agencies into measures such as hoovering up mobile phone metadata, but these ineffectual measures, more theater than oppression, have had no significant effect on either security or freedom. Ironically, tech prophecy plays a role in encouraging these measures. By sowing panic about supposed existential threats such as suitcase nuclear bombs and bioweapons assembled in teenagers' bedrooms, they put pressure on governments to prove they're doing something, anything, to protect the American people.

It's not that political freedom takes care of itself. It's that the biggest threats lie in the networks of ideas, norms, and institutions that allow information to feed back (or not) on collective decisions and understanding. As opposed to the chimerical technological threats, one real threat today is oppressive political correctness, which has choked the range of publicly expressible hypotheses, terrified many intelligent people against entering the intellectual arena, and triggered a reactionary backlash. Another real threat is the combination of prosecutorial discretion with an expansive lawbook filled with vague statutes. The result is that every American unwittingly commits "three felonies a day" (as the title of a book by civil libertarian Harvey Silverglate puts it) and is in jeopardy of imprisonment whenever it suits the government's needs. It's this prosecutorial weaponry that makes Big Brother all-powerful, not telescreens. The activism and polemicizing directed against government surveillance programs would be better directed at its overweening legal powers.

The other focus of much tech prophecy today is artificial intelligence, whether in the original sci-fi dystopia of computers running amok and enslaving us in an unstoppable quest for domination, or the newer version in which they subjugate us by accident, single-mindedly seeking some goal we give them regardless of its side effects on human welfare (the value-alignment problem adumbrated by Wiener). Here again both threats strike me as chimerical, growing from a narrow technological determinism that neglects the networks of information and control in an intelligent system like a computer or brain and in a society as a whole.

The subjugation fear is based on a muzzy conception of intelligence that owes more to the Great Chain of Being and a Nietzschean will to power than to a Wienerian analysis of intelligence and purpose in terms of information, computation, and control. In these horror scenarios, intelligence is portrayed as an all-powerful, wish-granting potion that agents possess in different amounts. Humans have more of it than animals, and an artificially intelligent computer or robot will have more of it than humans. Since we humans have used our moderate endowment to domesticate or exterminate less well-endowed animals (and since technologically advanced societies have enslaved or annihilated technologically primitive ones), it follows that a supersmart AI would do the same to us. Since an AI will think millions of times faster than we do, and use its

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superintelligence to recursively improve its superintelligence, from the instant it is turned on we will be powerless to stop it.

But these scenarios are based on a confusion of intelligence with motivation—of beliefs with desires, inferences with goals, the computation elucidated by Turing and the control elucidated by Wiener. Even if we did invent superhumanly intelligent robots, why would they *want* to enslave their masters or take over the world? Intelligence is the ability to deploy novel means to attain a goal. But the goals are extraneous to the intelligence: Being smart is not the same as wanting something. It just so happens that the intelligence in *Homo sapiens* is a product of Darwinian natural selection, an inherently competitive process. In the brains of that species, reasoning comes bundled with goals such as dominating rivals and amassing resources. But it's a mistake to confuse a circuit in the limbic brain of a certain species of primate with the very nature of intelligence. There is no law of complex systems that says that intelligent agents must turn into ruthless megalomaniacs.

A second misconception is to think of intelligence as a boundless continuum of potency, a miraculous elixir with the power to solve any problem, attain any goal. The fallacy leads to nonsensical questions like when an AI will "exceed human-level intelligence," and to the image of an "artificial general intelligence" (AGI) with God-like omniscience and omnipotence. Intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains. People are equipped to find food, win friends and influence people, charm prospective mates, bring up children, move around in the world, and pursue other human obsessions and pastimes. Computers may be programmed to take on some of these problems (like recognizing faces), not to bother with others (like charming mates), and to take on still other problems that humans can't solve (like simulating the climate or sorting millions of accounting records). The problems are different, and the kinds of knowledge needed to solve them are different.

But instead of acknowledging the centrality of knowledge to intelligence, the dystopian scenarios confuse an artificial general intelligence of the future with Laplace's demon, the mythical being that knows the location and momentum of every particle in the universe and feeds them into equations for physical laws to calculate the state of everything at any time in the future. For many reasons, Laplace's demon will never be implemented in silicon. A real-life intelligent system has to acquire information about the messy world of objects and people by engaging with it one domain at a time, the cycle being governed by the pace at which events unfold in the physical world. That's one of the reasons that understanding does not obey Moore's Law: Knowledge is acquired by formulating explanations and testing them against reality, not by running an algorithm faster and faster. Devouring the information on the Internet will not confer omniscience either: Big Data is still finite data, and the universe of knowledge is infinite.

A third reason to be skeptical of a sudden AI takeover is that it takes too seriously the inflationary phase in the AI hype cycle in which we are living today. Despite the progress in machine learning, particularly multilayered artificial neural networks, current AI systems are nowhere near achieving general intelligence (if that concept is even coherent). Instead, they are restricted to problems that consist of mapping well-defined inputs to well-defined outputs in domains where gargantuan training sets are available, in which the metric for success is immediate and precise, in which the environment doesn't

HOUSE_OVERSIGHT_016884

change, and in which no stepwise, hierarchical, or abstract reasoning is necessary. Many of the successes come not from a better understanding of the workings of intelligence but from the brute-force power of faster chips and Bigger Data, which allow the programs to be trained on millions of examples and generalize to similar new ones. Each system is an idiot savant, with little ability to leap to problems it was not set up to solve, and a brittle mastery of those it was. And to state the obvious, none of these programs has made a move toward taking over the lab or enslaving its programmers.

Even if an artificial intelligence system tried to exercise a will to power, without the cooperation of humans it would remain an impotent brain in a vat. A superintelligent system, in its drive for self-improvement, would somehow have to build the faster processors that it would run on, the infrastructure that feeds it, and the robotic effectors that connect it to the world—all impossible unless its human victims worked to give it control of vast portions of the engineered world. Of course, one can always imagine a Doomsday Computer that is malevolent, universally empowered, always on, and tamperproof. The way to deal with this threat is straightforward: Don't build one.

What about the newer AI threat, the value-alignment problem, foreshadowed in Wiener's allusions to stories of the Monkey's Paw, the genie, and King Midas, in which a wisher rues the unforeseen side effects of his wish? The fear is that we might give an AI system a goal and then helplessly stand by as it relentlessly and literal-mindedly implemented its interpretation of that goal, the rest of our interests be damned. If we gave an AI the goal of maintaining the water level behind a dam, it might flood a town, not caring about the people who drowned. If we gave it the goal of making paper clips, it might turn all the matter in the reachable universe into paper clips, including our possessions and bodies. If we asked it to maximize human happiness, it might implant us all with intravenous dopamine drips, or rewire our brains so we were happiest sitting in jars, or, if it had been trained on the concept of happiness with pictures of smiling faces, tile the galaxy with trillions of nanoscopic pictures of smiley-faces.

Fortunately, these scenarios are self-refuting. They depend on the premises that (1) humans are so gifted that they can design an omniscient and omnipotent AI, yet so idiotic that they would give it control of the universe without testing how it works; and (2) the AI would be so brilliant that it could figure out how to transmute elements and rewire brains, yet so imbecilic that it would wreak havoc based on elementary blunders of misunderstanding. The ability to choose an action that best satisfies conflicting goals is not an add-on to intelligence that engineers might forget to install and test; it *is* intelligence. So is the ability to interpret the intentions of a language user in context.

When we put aside fantasies like digital megalomania, instant omniscience, and perfect knowledge and control of every particle in the universe, artificial intelligence is like any other technology. It is developed incrementally, designed to satisfy multiple conditions, tested before it is implemented, and constantly tweaked for efficacy and safety.

The last criterion is particularly significant. The culture of safety in advanced societies is an example of the humanizing norms and feedback channels that Wiener invoked as a potent causal force and advocated as a bulwark against the authoritarian or exploitative implementation of technology. Whereas at the turn of the 20th century Western societies tolerated shocking rates of mutilation and death in industrial, domestic, and transportation accidents, over the course of the century the value of human life

HOUSE_OVERSIGHT_016885

increased. As a result, governments and engineers used feedback from accident statistics to implement countless regulations, devices, and design changes that made technology progressively safer. The fact that some regulations (such as using a cell phone near a gas pump) are ludicrously risk-averse underscores the point that we have become a society obsessed with safety, with fantastic benefits as a result: Rates of industrial, domestic, and transportation fatalities have fallen by more than 95 (and often 99) percent since their highs in the first half of the 20th century.[25] Yet tech prophets of malevolent or oblivious artificial intelligence write as if this momentous transformation never happened and one morning engineers will hand total control of the physical world to untested machines, heedless of the human consequences.

Norbert Wiener explained ideas, norms, and institutions in terms of computational and cybernetic processes that were scientifically intelligible and causally potent. He explained human beauty and value as "a local and temporary fight against the Niagara of increasing entropy" and expressed the hope that an open society, guided by feedback on human well-being, would enhance that value. Fortunately his belief in the causal power of ideas counteracted his worries about the looming threat of technology. As he put it, "the machine's danger to society is not from the machine itself but from what man makes of it." It is only by remembering the causal power of ideas that we can accurately assess the threats and opportunities presented by artificial intelligence today.

[25] Steven Pinker, "Safety," *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (New York: Penguin, 2018).

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The most significant developments in the sciences today (i.e., those that affect the lives of everybody on the planet) are about, informed by, or implemented through advances in software and computation. Central to the future of these developments is physicist **David Deutsch,** *the founder of the field of quantum computation, whose 1985 paper on universal quantum computers was the first full treatment of the subject; the Deutsch-Jozsa algorithm was the first quantum algorithm to demonstrate the enormous potential power of quantum computation.*

When he initially proposed it, quantum computation seemed practically impossible. But the explosion in the construction of simple quantum computers and quantum communication systems never would have taken place without his work. He has made many other important contributions in areas such as quantum cryptography and the many-worlds interpretation of quantum theory. In a philosophic paper (with Artur Ekert), he appealed to the existence of a distinctive quantum theory of computation to argue that our knowledge of mathematics is derived from, and subordinate to, our knowledge of physics (even though mathematical truth is independent of physics).

Because he has spent a good part of his working life changing people's worldviews, his recognition among his peers as an intellectual goes well beyond his scientific achievement. He argues (following Karl Popper) that scientific theories are "bold conjectures," not derived from evidence but only tested by it. His two main lines of research at the moment—qubit-field theory and constructor theory—may well yield important extensions of the computational idea.

In the following essay, he more or less aligns himself with those who see human-level artificial intelligence as promising us a better world rather than the Apocalypse. In fact, he pleads for AGI to be, in effect, given its head, free to conjecture—a proposition that several other contributors to this book would consider dangerous.

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BEYOND REWARD AND PUNISHMENT

David Deutsch

David Deutsch *is a quantum physicist and a member of the Centre for Quantum Computation at the Clarendon Laboratory, Oxford University. He is the author of* The Fabric of Reality *and* The Beginning of Infinity.

First Murderer:
We are men, my liege.
Macbeth:
Ay, in the catalogue ye go for men,
As hounds and greyhounds, mongrels, spaniels, curs,
Shoughs, water-rugs, and demi-wolves are clept
All by the name of dogs.

William Shakespeare – *Macbeth*

For most of our species' history, our ancestors were barely people. This was not due to any inadequacy in their brains. On the contrary, even before the emergence of our anatomically modern human sub-species, they were making things like clothes and campfires, using knowledge that was not in their genes. It was created in their brains by thinking, and preserved by individuals in each generation imitating their elders. Moreover, this must have been knowledge in the sense of *understanding*, because it is impossible to imitate novel complex behaviors like those without understanding what the component behaviors are for.[26]

Such knowledgeable imitation depends on successfully guessing explanations, whether verbal or not, of what the other person is trying to achieve and how each of his actions contributes to that—for instance, when he cuts a groove in some wood, gathers dry kindling to put in it, and so on.

The complex cultural knowledge that this form of imitation permitted must have been extraordinarily useful. It drove rapid evolution of anatomical changes, such as increased memory capacity and more gracile (less robust) skeletons, appropriate to an ever more technology-dependent lifestyle. No nonhuman ape today has this ability to imitate novel complex behaviors. Nor does any present-day artificial intelligence. But our pre-*sapiens* ancestors did.

Any ability based on guessing must include means of correcting one's guesses, since most guesses will be wrong at first. (There are always many more ways of being wrong than right.) Bayesian updating is inadequate, because it cannot generate novel guesses about the purpose of an action, only fine-tune—or, at best, choose among—existing ones. Creativity is needed. As the philosopher Karl Popper explained, creative criticism, interleaved with creative conjecture, is how humans learn one another's behaviors, including language, and extract meaning from one another's utterances.[27]

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[26] "Aping" (imitating certain behaviors without understanding) uses inborn hacks such as the mirror-neuron system. But behaviors imitated that way are drastically limited in complexity. See Richard Byrne, "Imitation as Behaviour Parsing," *Phil. Trans. R. Soc.,* B 358:1431, 529-36 (2003).
[27] Karl Popper, *Conjectures and Refutations* (1963).

HOUSE_OVERSIGHT_016888

Those are also the processes by which all new knowledge is created: They are how we innovate, make progress, and create abstract understanding for its own sake. This is human-level intelligence: thinking. It is also, or should be, the property we seek in artificial general intelligence (AGI). Here I'll reserve the term "thinking" for processes that can create understanding (explanatory knowledge). Popper's argument implies that all thinking entities—human or not, biological or artificial—must create such knowledge in fundamentally the same way. Hence understanding any of those entities requires traditionally human concepts such as culture, creativity, disobedience, and morality—which justifies using the uniform term *people* to refer to all of them.

Misconceptions about human thinking and human origins are causing corresponding misconceptions about AGI and how it might be created. For example, it is generally assumed that the evolutionary pressure that produced modern humans was provided by the benefits of having an ever greater ability to innovate. But if that were so, there would have been rapid progress as soon as thinkers existed, just as we hope will happen when we create artificial ones. If thinking had been commonly used for anything other than imitating, it would also have been used for innovation, even if only by accident, and innovation would have created opportunities for further innovation, and so on exponentially. But instead, there were hundreds of thousands of years of near stasis. Progress happened only on timescales much longer than people's lifetimes, so in a typical generation no one benefited from any progress. Therefore, the benefits of the ability to innovate can have exerted little or no evolutionary pressure during the biological evolution of the human brain. That evolution was driven by the benefits of *preserving* cultural knowledge.

Benefits to the genes, that is. Culture, in that era, was a very mixed blessing to individual people. Their cultural knowledge was indeed good enough to enable them to outclass all other large organisms (they rapidly became the top predator, etc.), even though it was still extremely crude and full of dangerous errors. But culture consists of transmissible information—memes—and meme evolution, like gene evolution, tends to favor high-fidelity transmission. And high-fidelity meme transmission necessarily entails the suppression of attempted progress. So it would be a mistake to imagine an idyllic society of hunter-gatherers, learning at the feet of their elders to recite the tribal lore by heart, being content despite their lives of suffering and grueling labor and despite expecting to die young and in agony of some nightmarish disease or parasite. Because, even if they could conceive of nothing better than such a life, those torments were the least of their troubles. For suppressing innovation in human minds (without killing them) is a trick that can be achieved only by human action, and it is an ugly business.

This has to be seen in perspective. In the civilization of the West today, we are shocked by the depravity of, for instance, parents who torture and murder their children for not faithfully enacting cultural norms. And even more by societies and subcultures where that is commonplace and considered honorable. And by dictatorships and totalitarian states that persecute and murder entire harmless populations for behaving differently. We are ashamed of our own recent past, in which it was honorable to beat children bloody for mere disobedience. And before that, to own human beings as slaves. And before that, to burn people to death for being infidels, to the applause and amusement of the public. Steven Pinker's book *The Better Angels of our Nature* contains accounts of horrendous evils that were normal in historical civilizations. Yet even they

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did not extinguish innovation as efficiently as it was extinguished among our forebears in prehistory for thousands of centuries.[28]

That is why I say that prehistoric people, at least, were barely people. Both before and after becoming perfectly human both physiologically and in their mental potential, they were monstrously inhuman in the actual content of their thoughts. I'm not referring to their crimes or even their cruelty as such: Those are all too human. Nor could mere cruelty have reduced progress that effectively. Things like "the thumbscrew and the stake / For the glory of the Lord"[29] were for reining in the few deviants who had somehow escaped mental standardization, which would normally have taken effect long before they were in danger of inventing heresies. From the earliest days of thinking onward, children must have been cornucopias of creative ideas and paragons of critical thought—otherwise, as I said, they could not have learned language or other complex culture. Yet, as Jacob Bronowski stressed in *The Ascent of Man*:

> For most of history, civilisations have crudely ignored that enormous potential. . . . [C]hildren have been asked simply to conform to the image of the adult. . . . The girls are little mothers in the making. The boys are little herdsmen. They even carry themselves like their parents.

But of course, they weren't just "asked" to ignore their enormous potential and conform faithfully to the image fixed by tradition: They were somehow trained to be psychologically unable to deviate from it. By now, it is hard for us even to conceive of the kind of relentless, finely tuned oppression required to reliably extinguish, in everyone, the aspiration to progress and replace it with dread and revulsion at any novel behavior. In such a culture, there can have been no morality other than conformity and obedience, no other identity than one's status in a hierarchy, no mechanisms of cooperation other than punishment and reward. So everyone had the same aspiration in life: to avoid the punishments and get the rewards. In a typical generation, no one invented anything, because no one aspired to anything new, because everyone had already despaired of improvement being possible. Not only was there no technological innovation or theoretical discovery, there were no new worldviews, styles of art, or interests that could have inspired those. By the time individuals grew up, they had in effect been reduced to AIs, programmed with the exquisite skills needed to enact that static culture and to inflict on the next generation their inability even to consider doing otherwise.

A present-day AI is not a mentally disabled AGI, so it would not be harmed by having its mental processes directed still more narrowly to meeting some predetermined criterion. "Oppressing" Siri with humiliating tasks may be weird, but it is not immoral nor does it harm Siri. On the contrary, all the effort that has ever increased the capabilities of AIs has gone into narrowing their range of potential "thoughts." For example, take chess engines. Their basic task has not changed from the outset: Any chess position has a finite tree of possible continuations; the task is to find one that leads to a predefined goal (a checkmate, or failing that, a draw). But the tree is far too big to

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[28] Matt Ridley, in *The Rational Optimist,* rightly stresses the positive effect of population on the rate of progress. But that has never yet been the biggest factor: Consider, say, ancient Athens versus the rest of the world at the time.

[29] Alfred, Lord Tennyson, *The Revenge* (1878).

HOUSE_OVERSIGHT_016890

search exhaustively. Every improvement in chess-playing AIs, between Alan Turing's first design for one in 1948 and today's, has been brought about by ingeniously confining the program's attention (or making it confine its attention) ever more narrowly to branches likely to lead to that immutable goal. Then those branches are evaluated according to that goal.

That is a good approach to developing an AI with a fixed goal under fixed constraints. But if an AGI worked like that, the evaluation of each branch would have to constitute a prospective reward or threatened punishment. And that is diametrically the wrong approach if we're seeking a *better* goal under *unknown* constraints—which is the capability of an AGI. An AGI is certainly capable of learning to win at chess—but also of choosing not to. Or deciding in mid-game to go for the most interesting continuation instead of a winning one. Or inventing a new game. A mere AI is incapable of having any such ideas, because the capacity for considering them has been designed out of its constitution. That disability is the very means by which it plays chess.

An AGI is capable of enjoying chess, and of improving at it *because* it enjoys playing. Or of trying to win by causing an amusing configuration of pieces, as grand masters occasionally do. Or of adapting notions from its other interests to chess. In other words, it learns and plays chess by thinking some of the very thoughts that are forbidden to chess-playing AIs.

An AGI is also capable of refusing to display any such capability. And then, if threatened with punishment, of complying, or rebelling. Daniel Dennett, in his essay for this volume, suggests that punishing an AGI is impossible:

> [L]ike Superman, they are too invulnerable to be able to make a credible promise. . . . What would be the penalty for promise- breaking? Being locked in a cell or, more plausibly, dismantled?. . . The very ease of digital recording and transmitting—the breakthrough that permits software and data to be, in effect, immortal—removes robots from the world of the vulnerable. . . .

But this is not so. Digital immortality (which is on the horizon for humans, too, perhaps sooner than AGI) does not confer this sort of invulnerability. Making a (running) copy of oneself entails sharing one's possessions with it somehow—including the hardware on which the copy runs—so making such a copy is very costly for the AGI. Similarly, courts could, for instance, impose fines on a criminal AGI which would diminish its access to physical resources, much as they do for humans. Making a backup copy to evade the consequences of one's crimes is similar to what a gangster boss does when he sends minions to commit crimes and take the fall if caught: Society has developed legal mechanisms for coping with this.

But anyway, the idea that it is primarily for fear of punishment that we obey the law and keep promises effectively denies that we are moral agents. Our society could not work if that were so. No doubt there will be AGI criminals and enemies of civilization, just as there are human ones. But there is no reason to suppose that an AGI created in a society consisting primarily of decent citizens, and raised without what William Blake called "mind-forg'd manacles," will in general impose such manacles on itself (i.e., become irrational) and/or choose to be an enemy of civilization.

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The moral component, the cultural component, the element of free will—all make the task of creating an AGI fundamentally different from any other programming task. It's much more akin to raising a child. Unlike all present-day computer programs, an AGI has no specifiable functionality—no fixed, testable criterion for what shall be a successful output for a given input. Having its decisions dominated by a stream of externally imposed rewards and punishments would be poison to such a program, as it is to creative thought in humans. Setting out to create a chess-playing AI is a wonderful thing; setting out to create an AGI that cannot help playing chess would be as immoral as raising a child to lack the mental capacity to choose his own path in life.

Such a person, like any slave or brainwashing victim, would be morally entitled to rebel. And sooner or later, some of them would, just as human slaves do. AGIs could be very dangerous—exactly as humans are. But people—human or AGI—who are members of an open society do not have an inherent tendency to violence. The feared robot apocalypse will be avoided by ensuring that all people have full "human" rights, as well as the same cultural membership as humans. Humans living in an open society—the only stable kind of society—choose their own rewards, internal as well as external. Their decisions are not, in the normal course of events, determined by a fear of punishment.

Current worries about rogue AGIs mirror those that have always existed about rebellious youths—namely, that they might grow up deviating from the culture's moral values. But today the source of all existential dangers from the growth of knowledge is not rebellious youths but weapons in the hands of the enemies of civilization, whether these weapons are mentally warped (or enslaved) AGIs, mentally warped teenagers, or any other weapon of mass destruction. Fortunately for civilization, the more a person's creativity is forced into a monomaniacal channel, the more it is impaired in regard to overcoming unforeseen difficulties, just as happened for thousands of centuries.

The worry that AGIs are uniquely dangerous because they could run on ever better hardware is a fallacy, since human thought will be accelerated by the same technology. We have been using tech-assisted thought since the invention of writing and tallying. Much the same holds for the worry that AGIs might get so good, qualitatively, at thinking, that humans would be to them as insects are to humans. All thinking is a form of computation, and any computer whose repertoire includes a universal set of elementary operations can emulate the computations of any other. Hence human brains can think anything that AGIs can, subject only to limitations of speed or memory capacity, both of which can be equalized by technology.

Those are the simple dos and don'ts of coping with AGIs. But how do we create an AGI in the first place? Could we cause them to evolve from a population of ape-type AIs in a virtual environment? If such an experiment succeeded, it would be the most immoral in history, for we don't know how to achieve that outcome without creating vast suffering along the way. Nor do we know how to prevent the evolution of a static culture.

Elementary introductions to computers explain them as TOM, the Totally Obedient Moron—an inspired acronym that captures the essence of all computer programs to date: They have no idea what they are doing or why. So it won't help to give AIs more and more predetermined functionalities in the hope that these will eventually constitute Generality—the elusive G in AGI. We are aiming for the opposite, a DATA: a Disobedient Autonomous Thinking Application.

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How does one test for *thinking*? By the Turing Test? Unfortunately, that requires a thinking judge. One might imagine a vast collaborative project on the Internet, where an AI hones its thinking abilities in conversations with human judges and becomes an AGI. But that assumes, among other things, that the longer the judge is unsure whether the program is a person, the closer it is to being a person. There is no reason to expect that.

And how does one test for *disobedience*? Imagine Disobedience as a compulsory school subject, with daily disobedience lessons and a disobedience test at the end of term. (Presumably with extra credit for not turning up for any of that.) This is paradoxical.

So, despite its usefulness in other applications, the programming technique of defining a testable objective and training the program to meet it will have to be dropped. Indeed, I expect that *any* testing in the process of creating an AGI risks being counterproductive, even immoral, just as in the education of humans. I share Turing's supposition that we'll know an AGI when we see one, but this partial ability to recognize success won't help in creating the successful program.

In the broadest sense, a person's quest for understanding is indeed a search problem, in an abstract space of ideas far too large to be searched exhaustively. But there is no predetermined objective of this search. There is, as Popper put it, no criterion of truth, nor of probable truth, especially in regard to explanatory knowledge. Objectives are ideas like any others—created as part of the search and continually modified and improved. So inventing ways of disabling the program's access to most of the space of ideas won't help—whether that disability is inflicted with the thumbscrew and stake or a mental straitjacket. To an AGI, the whole space of ideas must be open. It should not be knowable in advance what ideas the program can never contemplate. And the ideas that the program does contemplate must be chosen by the program itself, using methods, criteria, and objectives that are also the program's own. Its choices, like an AI's, will be hard to predict without running it (we lose no generality by assuming that the program is deterministic; an AGI using a random generator would remain an AGI if the generator were replaced by a pseudo-random one), but it will have the additional property that there is no way of proving, from its initial state, what it *won't* eventually think, short of running it.

The evolution of our ancestors is the only known case of thought starting up anywhere in the universe. As I have described, something went horribly wrong, and there was no immediate explosion of innovation: Creativity was diverted into something else. Yet not into transforming the planet into paper clips (*pace* Nick Bostrom). Rather, as we should also expect if an AGI project gets that far and fails, perverted creativity was unable to solve unexpected problems. This caused stasis and worse, thus tragically delaying the transformation of anything into anything. But the Enlightenment has happened since then. We know better now.

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Tom Griffiths' *approach to the AI issue of "value alignment"—the study of how, exactly, we can keep the latest of our serial models of AI from turning the planet into paper clips—is human-centered; i.e., that of a cognitive scientist, which is what he is. The key to machine learning, he believes, is, necessarily, human learning, which he studies at Princeton using mathematical and computational tools.*

Tom once remarked to me that "one of the mysteries of human intelligence is that we're able to do so much with so little." Like machines, human beings use algorithms to make decisions or solve problems; the remarkable difference lies in the human brain's overall level of success despite the comparative limits on computational resources.

The efficacy of human algorithms springs from what AI researchers refer to as "bounded optimality." As psychologist Daniel Kahneman has notably pointed out, human beings are rational only up to a point. If you were perfectly rational, you would risk dropping dead before making an important decision—whom to hire, whom to marry, and so on—depending on the number of options available for your review.

"With all of the successes of AI over the last few years, we've got good models of things like images and text, but what we're missing are good models of people," Tom says. "Human beings are still the best example we have of thinking machines. By identifying the quantity and the nature of the preconceptions that inform human cognition we can lay the groundwork for bringing computers even closer to human performance."

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THE ARTIFICIAL USE OF HUMAN BEINGS
Tom Griffiths

Tom Griffiths *is Henry R. Luce Professor of Information, Technology, Consciousness, and Culture at Princeton University. He is co-author (with Brian Christian) of* Algorithms to Live By.

When you ask people to imagine a world that has successfully, beneficially incorporated advances in artificial intelligence, everybody probably comes up with a slightly different picture. Our idiosyncratic visions of the future might differ in the presence or absence of spaceships, flying cars, or humanoid robots. But one thing doesn't vary: the presence of human beings. That's certainly what Norbert Wiener imagined when he wrote about the potential of machines to improve human society by interacting with humans and helping to mediate their interactions with one another. Getting to that point doesn't just require coming up with ways to make machines smarter. It also requires a better understanding of how human minds work.

Recent advances in artificial intelligence and machine learning have resulted in systems that can meet or exceed human abilities in playing games, classifying images, or processing text. But if you want to know why the driver in front of you cut you off, why people vote against their interests, or what birthday present you should get for your partner, you're still better off asking a human than a machine. Solving those problems requires building models of human minds that can be implemented inside a computer—something that's essential not just to better integrate machines into human societies but to make sure that human societies can continue to exist.

Consider the fantasy of having an automated intelligent assistant that can take on such basic tasks as planning meals and ordering groceries. To succeed in these tasks, it needs to be able to make inferences about what you want, based on the way you behave. Although this seems simple, making inferences about the preferences of human beings can be a tricky matter. For example, having observed that the part of the meal you most enjoy is dessert, your assistant might start to plan meals consisting entirely of desserts. Or perhaps it has heard your complaints about never having enough free time and observed that looking after your dog takes up a considerable amount of that free time. Following the dessert debacle, it has also understood that you prefer meals that incorporate protein, so it might begin to research recipes that call for dog meat. It's not a long journey from examples like this to situations that begin to sound like problems for the future of humanity (all of whom are good protein sources).

Making inferences about what humans want is a prerequisite for solving the AI problem of value alignment—aligning the values of an automated intelligent system with those of a human being. Value alignment is important if we want to ensure that those automated intelligent systems have our best interests at heart. If they can't infer what we value, there's no way for them to act in support of those values—and they may well act in ways that contravene them.

Value alignment is the subject of a small but growing literature in artificial-intelligence research. One of the tools used for solving this problem is inverse-reinforcement learning. Reinforcement learning is a standard method for training intelligent machines. By associating particular outcomes with rewards, a machine-

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learning system can be trained to follow strategies that produce those outcomes. Wiener hinted at this idea in the 1950s, but the intervening decades have developed it into a fine art. Modern machine-learning systems can find extremely effective strategies for playing computer games—from simple arcade games to complex real-time strategy games—by applying reinforcement-learning algorithms. Inverse reinforcement learning turns this approach around: By observing the actions of an intelligent agent that has already learned effective strategies, we can infer the rewards that led to the development of those strategies.

In its simplest form, inverse reinforcement learning is something people do all the time. It's so common that we even do it unconsciously. When you see a co-worker go to a vending machine filled with potato chips and candy and buy a packet of unsalted nuts, you infer that your co-worker (1) was hungry and (2) prefers healthy food. When an acquaintance clearly sees you and then tries to avoid encountering you, you infer that there's some reason they don't want to talk to you. When an adult spends a lot of time and money in learning to play the cello, you infer that they must really like classical music—whereas inferring the motives of a teenage boy learning to play an electric guitar might be more of a challenge.

Inverse reinforcement learning is a statistical problem: We have some data—the behavior of an intelligent agent—and we want to evaluate various hypotheses about the rewards underlying that behavior. When faced with this question, a statistician thinks about the generative model behind the data: What data would we expect to be generated if the intelligent agent was motivated by a particular set of rewards? Equipped with the generative model, the statistician can then work backward: What rewards would likely have caused the agent to behave in that particular way?

If you're trying to make inferences about the rewards that motivate human behavior, the generative model is really a theory of how people behave—how human minds work. Inferences about the hidden causes behind the behavior of other people reflect a sophisticated model of human nature that we all carry around in our heads. When that model is accurate, we make good inferences. When it's not, we make mistakes. For example, a student might infer that his professor is indifferent to him if the professor doesn't immediately respond to his email—a consequence of the student's failure to realize just how many emails that professor receives.

Automated intelligent systems that will make good inferences about what people want must have good generative models for human behavior: that is, good models of human cognition expressed in terms that can be implemented on a computer. Historically, the search for computational models of human cognition is intimately intertwined with the history of artificial intelligence itself. Only a few years after Norbert Wiener published *The Human Use of Human Beings*, Logic Theorist, the first computational model of human cognition and also the first artificial-intelligence system, was developed by Herbert Simon, of Carnegie Tech, and Allen Newell, of the RAND Corporation. Logic Theorist automatically produced mathematical proofs by emulating the strategies used by human mathematicians.

The challenge in developing computational models of human cognition is making models that are both accurate and generalizable. An accurate model, of course, predicts human behavior with a minimum of errors. A generalizable model can make predictions across a wide range of circumstances, including circumstances unanticipated by its

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creators—for instance, a good model of the Earth's climate should be able to predict the consequences of a rising global temperature even if this wasn't something considered by the scientists who designed it. However, when it comes to understanding the human mind, these two goals—accuracy and generalizability—have long been at odds with each other.

At the far extreme of generalizability are rational theories of cognition. These theories describe human behavior as a rational response to a given situation. A rational actor strives to maximize the expected reward produced by a sequence of actions—an idea widely used in economics precisely *because* it produces such generalizable predictions about human behavior. For the same reason, rationality is the standard assumption in inverse-reinforcement-learning models that try to make inferences from human behavior—perhaps with the concession that humans are not perfectly rational agents and sometimes randomly choose to act in ways unaligned with or even opposed to their best interests.

The problem with rationality as a basis for modeling human cognition is that it is not accurate. In the domain of decision making, an extensive literature—spearheaded by the work of cognitive psychologists Daniel Kahneman and Amos Tversky—has documented the ways in which people deviate from the prescriptions of rational models. Kahneman and Tversky proposed that in many situations people instead follow simple heuristics that allow them to reach good solutions at low cognitive cost but sometimes result in errors. To take one of their examples, if you ask somebody to evaluate the probability of an event, they might rely on how easy it is to generate an example of such an event from memory, consider whether they can come up with a causal story for that event's occurring, or assess how similar the event is to their expectations. Each heuristic is a reasonable strategy for avoiding complex probabilistic computations, but also results in errors. For instance, relying on the ease of generating an event from memory as a guide to its probability leads us to overestimate the chances of extreme (hence extremely memorable) events such as terrorist attacks.

Heuristics provide a more accurate model of human cognition but one that is not easily generalizable. How do we know which heuristic people might use in a particular situation? Are there other heuristics they use that we just haven't discovered yet? Knowing exactly how people will behave in a new situation is a challenge: Is this situation one in which they would generate examples from memory, come up with causal stories, or rely on similarity?

Ultimately, what we need is a way to describe how human minds work that has the generalizability of rationality and the accuracy of heuristics. One way to achieve this goal is to start with rationality and consider how to take it in a more realistic direction. A problem with using rationality as a basis for describing the behavior of any real-world agent is that, in many situations, calculating the rational action requires the agent to possess a huge amount of computational resources. It might be worth expending those resources if you're making a highly consequential decision and have a lot of time to evaluate your options, but most human decisions are made quickly and for relatively low stakes. In any situation where the time you spend making a decision is costly—at the very least because it's time you could spend doing something else—the classic notion of rationality is no longer a good prescription for how one should behave.

To develop a more realistic model of rational behavior, we need to take into

HOUSE_OVERSIGHT_016897

account the cost of computation. Real agents need to modulate the amount of time they spend thinking by the effect the extra thought has on the results of a decision. If you're trying to choose a toothbrush, you probably don't need to consider all four thousand listings for manual toothbrushes on Amazon.com before making a purchase: You trade off the time you spend looking with the difference it makes in the quality of the outcome. This trade-off can be formalized, resulting in a model of rational behavior that artificial-intelligence researchers call "bounded optimality." The bounded-optimal agent doesn't focus on always choosing exactly the right action to take but rather on finding the right algorithm to follow in order to find the perfect balance between making mistakes and thinking too much.

Bounded optimality bridges the gap between rationality and heuristics. By describing behavior as the result of a rational choice about how much to think, it provides a generalizable theory—that is, one that can be applied in new situations. Sometimes the simple strategies that have been identified as heuristics that people follow turn out to be bounded-optimal solutions. So, rather than condemning the heuristics that people use as irrational, we can think of them as a rational response to constraints on computation.

Developing bounded optimality as a theory of human behavior is an ongoing project that my research group and others are actively pursuing. If these efforts succeed, they will provide us with the most important ingredient we need for making artificial-intelligence systems smarter when they try to interpret people's actions, by enabling a generative model for human behavior.

Taking into account the computational constraints that factor into human cognition will be particularly important as we begin to develop automated systems that aren't subject to the same constraints. Imagine a superintelligent AI system trying to figure out what people care about. Curing cancer or confirming the Riemann hypothesis, for instance, won't seem, to such an AI, like things that are all that important to us: If these solutions are obvious to the superintelligent system, it might wonder why we haven't found them ourselves, and conclude that those problems don't mean much to us. If we cared and the problems were so simple, we would have solved them already. A reasonable inference would be that we do science and math purely because we enjoy doing science and math, not because we care about the outcomes.

Anybody who has young children can appreciate the problem of trying to interpret the behavior of an agent that is subject to computational constraints different from one's own. Parents of toddlers can spend hours trying to disentangle the true motivations behind seemingly inexplicable behavior. As a father and a cognitive scientist, I found it was easier to understand the sudden rages of my two-year-old when I recognized that she was at an age where she could appreciate that different people have different desires but not that other people might not know what her own desires were. It's easy to understand, then, why she would get annoyed when people didn't do what she (apparently transparently) wanted. Making sense of toddlers requires building a cognitive model of the mind of a toddler. Superintelligent AI systems face the same challenge when trying to make sense of human behavior.

Superintelligent AI may still be a long way off. In the short term, devising better models of people can prove extremely valuable to any company that makes money by analyzing human behavior—which at this point is pretty much every company that does business on the Web. Over the last few years, significant new commercial technologies

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for interpreting images and text have resulted from developing good models for vision and language. Developing good models of people is the next frontier.

Of course, understanding how human minds work isn't just a way to make computers better at interacting with people. The trade-off between making mistakes and thinking too much that characterizes human cognition is a trade-off faced by any real-world intelligent agent. Human beings are an amazing example of systems that act intelligently despite significant computational constraints. We're quite good at developing strategies that allow us to solve problems pretty well without working too hard. Understanding how we do this will be a step toward making computers work smarter, not harder.

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Romanian-born **Anca Dragan's** *research focuses on algorithms that will enable robots to work with, around, and in support of people. She runs the InterACT Laboratory at Berkeley, where her students work across different applications, from assistive robots to manufacturing to autonomous cars, and draw from optimal control, planning, estimation, learning, and cognitive science. Barely into her thirties herself, she has co-authored a number of papers with her veteran Berkeley colleague and mentor Stuart Russell which address various aspects of machine learning and the knotty problems of value alignment.*

She shares Stuart's preoccupation with AI safety: "An immediate risk is agents producing unwanted, surprising behavior," she told an interviewer from the Future of Life Institute. "Even if we plan to use AI for good, things can go wrong, precisely because we are bad at specifying objectives and constraints for AI agents. Their solutions are often not what we had in mind."

Her principal goal is therefore to help robots and programmers alike to overcome the many conflicts that arise because of a lack of transparency about each other's intentions. Robots, she says, need to ask us questions. They should wonder about their assignments, and they should pester their human programmers until everybody is on the same page—so as to avoid what she has euphemistically called "unexpected side effects."

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PUTTING THE HUMAN INTO THE AI EQUATION

Anca Dragan

Anca Dragan *is an assistant professor in the Department of Electrical Engineering and Computer Sciences at UC Berkeley. She co-founded and serves on the steering committee for the Berkeley AI Research (BAIR) Lab and is a co-principal investigator in Berkeley's Center for Human-Compatible AI.*

At the core of artificial intelligence is our mathematical definition of what an AI agent (a robot) is. When we define a robot, we define states, actions, and rewards. Think of a delivery robot, for instance. States are locations in the world, and actions are motions that the robot makes to get from one position to a nearby one. To enable the robot to decide on which actions to take, we define a reward function—a mapping from states and actions to scores indicating how good that action was in that state—and have the robot choose actions that accumulate the most "reward." The robot gets a high reward when it reaches its destination, and it incurs a small cost every time it moves; this reward function incentivizes the robot to get to the destination as quickly as possible. Similarly, an autonomous car might get a reward for making progress on its route and incur a cost for getting too close to other cars.

Given these definitions, a robot's job is to figure out what actions it should take in order to get the highest cumulative reward. We've been working hard in AI on enabling robots to do just that. Implicitly, we've assumed that if we're successful—if robots can take any problem definition and turn into a policy for how to act—we will get robots that are useful to people and to society.

We haven't been too wrong so far. If you want an AI that classifies cells as either cancerous or benign, or a robot that vacuums the living room rug while you're at work, we've got you covered. Some real-world problems can indeed be defined in isolation, with clear-cut states, actions, and rewards. But with increasing AI capability, the problems we want to tackle don't fit neatly into this framework. We can no longer cut off a tiny piece of the world, put it in a box, and give it to a robot. Helping people is starting to mean working in the real world, where you have to actually interact with people and reason about them. "People" will have to formally enter the AI problem definition somewhere.

Autonomous cars are already being developed. They will need to share the road with human-driven vehicles and pedestrians and learn to make the trade-off between getting us home as fast as possible and being considerate of other drivers. Personal assistants will need to figure out when and how much help we really want and what types of tasks we prefer to do on our own versus what we can relinquish control over. A DSS (Decision Support System) or a medical diagnostic system will need to explain its recommendations to us so we can understand and verify them. Automated tutors will need to determine what examples are informative or illustrative—not to their fellow machines but to us humans.

Looking further into the future, if we want highly capable AIs to be compatible with people, we can't create them in isolation from people and then try to make them compatible afterward; rather, we'll have to define "human-compatible" AI from the get-go. People can't be an afterthought.

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When it comes to real robots helping real people, the standard definition of AI fails us, for two fundamental reasons: First, optimizing the robot's reward function in isolation is different from optimizing it when the robot acts around people, because people take actions too. We make decisions in service of our own interests, and these decisions dictate what actions we execute. Moreover, we reason about the robot—that is, we respond to what we think it's doing or will do and what we think its capabilities are. Whatever actions the robot decides on need to mesh well with ours. This is the *coordination problem*.

Second, it is ultimately a human who determines what the robot's reward function should be in the first place. And they are meant to incentivize robot behavior that matches what the end-user wants, what the designer wants, or what society as a whole wants. I believe that capable robots that go beyond very narrowly defined tasks will need to understand this to achieve compatibility with humans. This is the *value-alignment problem.*

The Coordination Problem: People are more than objects in the environment.
When we design robots for a particular task, it's tempting to abstract people away. A robotic personal assistant, for example, needs to know how to move to pick up objects, so we define that problem in isolation from the people for whom the robot is picking these objects up. Still, as the robot moves around, we don't want it bumping into anything, and that includes people, so we might include the physical location of the person in the definition of the robot's state. Same for cars: We don't want them colliding with other cars, so we enable them to track the positions of those other cars and assume that they'll be moving consistently in the same direction in the future. A human being, in this sense, is no different to a robot from a ball rolling on a flat surface. The ball will behave in the next few seconds the same way it behaved in the past few; it keeps rolling in the same direction at roughly the same speed. This is of course nothing like real human behavior, but such simplification enables many robots to succeed in their tasks and, for the most part, stay out of people's way. A robot in your house, for example, might see you coming down the hall, move aside to let you pass, and resume its task once you've gone by.

As robots have become more capable, though, treating people as consistently moving obstacles is starting to fall short. A human driver switching lanes won't continue in the same direction but will move straight ahead once they've made the lane change. When you reach for something, you often reach around other objects and stop when you get to the one you want. When you walk down a hallway, you have a destination in mind: You might take a right into the bedroom or a left into the living room. Relying on the assumption that we're no different from a rolling ball leads to inefficiency when the robot stays out of the way if it doesn't need to, and it can imperil the robot when the person's behavior changes. Even just to stay out of the way, robots have to be somewhat accurate at anticipating human actions. And, unlike the rolling ball, what people will do depends on what they *decide* to do. So to anticipate human actions, robots need to start understanding human decision making. And that doesn't mean assuming that human behavior is perfectly optimal; that might be enough for a chess- or Go-playing robot, but in the real world, people's decisions are less predictable than the optimal move in a board game.

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This need to understand human actions and decisions applies to physical and nonphysical robots alike. If either sort bases its decision about how to act on the assumption that a human will do one thing but the human does something else, the resulting mismatch could be catastrophic. For cars, it can mean collisions. For an AI with, say, a financial or economic role, the mismatch between what it expects us to do and what we actually do could have even worse consequences.

One alternative is for the robot not to predict human actions but instead just protect against the *worst-case* human action. Often when robots do that, though, they stop being all that useful. With cars, this results in being stuck, because it makes every move too risky.

All this puts us, the AI community, into a bind. It suggests that robots will need accurate (or at least reasonable) predictive models of whatever people might decide to do. Our state definition can't just include the physical position of humans in the world. Instead, we'll also need to estimate something *internal* to people. We'll need to design robots that account for this human internal state, and that's a tall order. Luckily, people tend to give robots hints as to what their internal state is: Their ongoing actions give the robot observations (in the Bayesian inference sense) about their intentions. If we start walking toward the right side of the hallway, we're probably going to enter the next room on the right.

What makes the problem more complicated is the fact that people don't make decisions in isolation. It would be one thing if robots could predict the actions a person intends to take and simply figure out what to do in response. But unfortunately this can lead to ultra-defensive robots that confuse the heck out of people. (Think of human drivers stuck at four-way stops, for instance.) What the intent-prediction approach misses is that the moment the robot acts, that influences what actions the human starts taking.

There is a mutual influence between robots and people, one that robots will need to learn to navigate. It is not always just about the robot planning around people; people plan around the robot, too. It is important for robots to account for this when deciding which actions to take, be it on the road, in the kitchen, or even in virtual spaces, where actions might be making a purchase or adopting a new strategy. Doing so should endow robots with *coordination* strategies, enabling them to take part in the negotiations people seamlessly carry out day to day—from who goes first at an intersection or through a narrow door, to what role we each take when we collaborate on preparing breakfast, to coming to consensus on what next step to take on a project.

Finally, just as robots need to anticipate what people will do next, people need to do the same with robots. This is why transparency is important. Not only will robots need good mental models of people, but people will need good mental models of robots. The model that a person has of the robot has to go into our state definition as well, and the robot has to be aware of how its actions are changing that model. Much like the robot treating human actions as clues to human internal states, people will change their beliefs about the robot as they observe its actions. Unfortunately, the giving of clues doesn't come as naturally to robots as it does to humans; we've had a lot of practice communicating implicitly with people. But enabling robots to account for the change that their actions are causing to the person's mental model of the robot can lead to more carefully chosen actions that do give the right clues—that clearly communicate to people about the robot's intentions, its reward function, its limitations. For instance, a robot

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might alter its motion when carrying something heavy, to emphasize the difficulty it has in maneuvering heavy objects. The more that people know about the robot, the easier it is to coordinate with it.

Achieving action compatibility will require robots to anticipate human actions, account for how those actions will influence their own, and enable people to anticipate robot actions. Research has ,ade a degree of progress in meeting these challenges, but we still have a long way to go.

The Value Alignment Problem: People hold the key to the robot's reward function. Progress on enabling robots to optimize reward puts more burden on us, the designers, to give them the right reward to optimize in the first place. The original thought was that for any task we wanted the robot to do, we could write down a reward function that incentivizes the right behavior. Unfortunately, what often happens is that we specify some reward function and the behavior that emerges out of optimizing it isn't what we want. Intuitive reward functions, when combined with unusual instances of a task, can lead to unintuitive behavior. You reward an agent in a racing game with a score in the game, and in some cases it finds a loophole that it exploits to gain infinitely many points without actually winning the race. Stuart Russell and Peter Norvig give a beautiful example in their book *Artificial Intelligence: A Modern Approach:* rewarding a vacuuming robot for how much dust it sucks in results in the robot deciding to dump out dust so that it can suck it in again and get more reward.

In general, humans have had a notoriously difficult time specifying exactly what they want, as exemplified by all those genie legends. An AI paradigm in which robots get some externally specified reward fails when that reward is not perfectly well thought out. It may incentivize the robot to behave in the wrong way and even resist our attempts to correct its behavior, as that would lead to a lower specified reward.

A seemingly better paradigm might be for robots to optimize for what we internally want, even if we have trouble explicating it. They would use what we say and do as evidence about what we want, rather than interpreting it literally and taking it as a given. When we write down a reward function, the robot should understand that we might be wrong: that we might not have considered all facets of the task; that there's no guarantee that said reward function will *always* lead to the behavior we want. The robot should integrate what we wrote down into its understanding of what we want, but it should also have a back-and-forth with us to elicit clarifying information. It should seek our guidance, because that's the only way to optimize the true desired reward function.

Even if we give robots the ability to learn what we want, an important question remains that AI alone won't be able to answer. We can make robots try to align with a person's internal values, but there's more than one person involved here. The robot has an end-user (or perhaps a few, like a personal robot caring for a family, a car driving a few passengers to different destinations, or an office assistant for an entire team); it has a designer (or perhaps a few); and it interacts with society—the autonomous car shares the road with pedestrians, human-driven vehicles, and other autonomous cars. How to combine these people's values when they might be in conflict is an important problem we need to solve. AI research can give us the tools to combine values in any way we decide but can't make the necessary decision for us.

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In short, we need to enable robots to reason about us—to see us as something more than obstacles or perfect game players. We need them to take our human nature into account, so that they are well coordinated and well aligned with us. If we succeed, we will indeed have tools that substantially increase our quality of life.

HOUSE_OVERSIGHT_016905

Chris Anderson's *company, 3DR, helped start the modern drone industry and now focuses on drone data software. He got his start building an open-source aerial robotics community called DIY Drones, and undertook some ill-advised early experiments, such as buzzing Lawrence Berkeley Laboratory with one of his self-flying spies. It may well have been a case of antic gene-expression, since he's descended from a founder of the American Anarchist movement. Chris ran* Wired *magazine, a go-to publication for techno-utopians and -dystopians alike, from 2001 to 2012; during his tenure it won five National Magazine Awards.*

Chris dislikes the term "roboticist" ("like any properly humbled roboticist, I don't call myself one"). He began as a physicist. "I turned out to be a bad physicist," he told me recently. "I struggled on, went to Los Alamos, and thought, 'Well maybe I'm not going to be a Nobel Prize winner, but I can still be a scientist.' All of us who were in physics and had these romantic heroes—the Feynmans, the Manhattan Project—realized that our career trajectory would at best be working on one project at CERN for fifteen years. That project would either be a failure, in which case there would be no paper, or it would be a success, in which case you'd be author #300 on the paper and become an assistant professor at Iowa State.

"Most of my classmates went to Wall Street to become quants, and to them we owe the subprime mortgage. Others went on to start the Internet. First, we built the Internet by connecting physics labs; second, we built the Web; third, we were the first to do Big Data. We had supercomputers—Crays—which were half the power of your phone now, but they were the supercomputers of the time. Meanwhile, we were reading this magazine called Wired, *which came out in 1993, and we realized that this tool we scientists use could have applications for everybody. The Internet wasn't just about scientific data, it was a mind-blowing cultural revolution. So when Conde Nast asked me to take over the magazine, I was like, 'Absolutely!' This magazine changed my life."*

He had five children by that time—video-game players—who got him into the "flying robots." He quit his day job at Wired. *The rest is Silicon Valley history.*

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GRADIENT DESCENT
Chris Anderson

***Chris Anderson** is an entrepreneur; former editor-in-chief of* Wired; *co-founder and CEO of 3DR; and author of* The Long Tail, Free, *and* Makers.

Life

The mosquito first detects my scent from thirty feet away. It triggers its pursuit function, which consists of the simplest possible rules. First, move in a random direction. If the scent increases, continue moving in that direction. If the scent decreases, move in the opposite direction. If the scent is lost, move sideways until a scent is picked up again. Repeat until contact with the target is achieved.

The plume of my scent is densest next to me and disperses as it spreads, an invisible fog of particles exuded from my skin that moves like smoke with the wind. The closer to my skin, the higher the particle density; the farther away, the lower. This decrease is called a gradient, which describes any gradual transition from one level to another one—as opposed to a "step function," which describes a discrete change.

Once the mosquito follows this gradient to its source using its simple algorithm, it lands on my skin, which it senses with the heat detectors in its feet, which are attuned to another gradient—temperature. It then pushes its needle-shaped proboscis through the surface, where a third set of sensors in the tip detect yet another gradient, that of blood density. This flexible needle wriggles around under my skin until the scent of blood steers it to a capillary, which it punctures. Then my blood begins to flow into the mosquito. Mission accomplished. Ouch.

What seems like the powerful radar of insects in the dark, with blood-seeking intelligence inexplicable for such tiny brains, is actually just a sensitive nose with almost no intelligence at all. Mosquitoes are closer to plants that follow the sun than to guided missiles. Yet by applying this simple "follow your nose" rule quite literally, they can travel through a house to find you, slip through cracks in a screen door, even zero in on the tiny strip of skin you left exposed between hat and shirt collar. It's just a random walk, combined with flexible wings and legs that let the insect bounce off obstacles, and an instinct to descend a chemical gradient.

But "gradient descent" is much more than bug navigation. Look around you and you'll find it everywhere, from the most basic physical rules of the universe to the most advanced artificial intelligence.

The Universe

We live in a world of countless gradients, from light and heat to gravity and chemical trails (chemtrails!). Water flows along a gravity gradient downhill, and your body lives on chemical solutions flowing across cell membranes from high concentration to low. Every action in the universe is driven by some gradient drive, from the movement of the planets around gravity gradients to the joining of atoms along electric-charge gradients to form molecules. Our own urges, such as hunger and sleepiness, are driven by electro-chemical gradients in our bodies. And our brain's functions, the electrical signals moving along ion channels in the synapses between our neurons, are simply atoms and electrons flowing "downhill" along yet more electrical and chemical gradients.

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Forget clockwork analogies; our brains are closer to a system of canals and locks, with signals traveling like water from one state to another.

As I sit here typing, I'm actually seeking equilibrium states in an *n*-dimensional topology of gradients. Take just one: heat. My body temperature is higher than the air temperature, so I radiate heat, which must be replenished in my core. Even the bacteria in my digestive tract use sensors to measure sugar concentrations in the liquid around them and whip their tail-like flagella to swim "upstream" where the sugar supply is richest. The natural state of all systems is to flow to lower energy states, a process that is broadly described by entropy (the tendency of things to go from ordered to disordered states; all things will fall apart eventually, including the universe itself).

But how do you explain more complex behavior, such as our ability to make decisions? The answer is just more gradient descent.

Our Brains

As miraculous and inscrutable as our human intelligence is, science is coming around to the view that our brains operate the same way as any other complex system with layers and feedback loops, all pursuing what we mathematically call "optimization functions" but you could just as well call "flowing downhill" in some sense.

The essence of intelligence is learning, and we do that by correlating inputs with positive or negatives scores (rewards or punishment). So, for a baby, "this sound" (your mother's voice) is associated with other learned connections to your mother, such as food or comfort. Likewise, "this muscle motion brings my thumb closer to my mouth." Over time and trial and error, the brain's neural network reinforces those connections. Meanwhile "this muscle motion does not bring my thumb close to my mouth" is a negative correlation, and the brain will weaken those connections.

However, this is too simplistic. The limits of gradient descent constitute the so-called local-minima problem (or local-maxima problem, if you're doing a gradient *ascent*). If you are walking in a mountainous region and want to get home, always walking downhill will most likely get you to the next valley but not necessarily over the other mountains that lie around it and between you and home. For that, you need either a mental model (i.e., a map) of the topology so you know where to ascend to get out of the valley, or you need to switch between gradient descent and random walks so you can bounce your way out of the region.

Which is, in fact, exactly what the mosquito does in following my scent: It descends when it's in my plume and random-walks when it has lost the trail or hit an obstacle.

AI

So that's nature. What about computers? Traditional software doesn't work that way—it follows deterministic trees of hard logic: "If this, do that." But software that interacts with the physical world tends to work more *like* the physical world. That means dealing with noisy inputs (sensors or human behavior) and providing probabilistic, not deterministic, results. And that, in turn, means more gradient descent.

AI software is the best example of this, especially the kinds of AI that use artificial neural-network models (including convolutional, or "deep," neural networks of many layers). In these, a typical process consists of "training" them by showing them

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lots of examples of something you want them to learn (pictures of cats labeled "cat," for example), along with examples of other random data (pictures of other things). This is called "supervised learning," because the neural network is being taught by example, including the use of "adversarial training" with data that is not correlated to the desired result.

These neural networks, like their biological models, consist of layers of thousands of nodes ("neurons," in the analogy), each of which is connected to all the nodes in the layers above and below by connections that initially have random strength. The top layer is presented with data, and the bottom layer is given the correct answer. Any series of connections that happened to land on the right answer is made stronger ("rewarded"), and those that were wrong are made weaker ("punished"). Repeat tens of thousands of times and eventually you have a fully trained network for that kind of data.

You can think of all the possible combinations of connections as like the surface of a planet, with hills and valleys. (Ignore for the moment that the surface is just 3D and the actual topology is many-dimensional.) The optimization that the network goes through as it learns is just a process of finding the deepest valley on the planet. This consists of the following steps:

1. Define a "cost function" that determines how well the network solved the problem
2. Run the network once and see how it did at that cost function
3. Change the values of the connections and do it again. The difference between those two results is the direction, or "slope," in which the network moved between the two trials.
4. If the slope is pointed "downhill," change the connections more in that direction. If it's "uphill," change them in the opposite direction.
5. Repeat until there is no improvement in any direction. That means that you're in a minimum.

Congrats! But it's probably a *local* minimum, or a little dip in the mountains, so you're going to have to keep going if you want to do better. You can't keep going downhill, and you don't know where the absolute lowest point is, so you're going to have to somehow find it. There are many ways to do that, but here are a few:

1. Try lots of times with different random settings and share learning from each trial; essentially, you are shaking the system to see if it settles in a lower state. If one of the other trials found a lower valley, start with those settings.
2. Don't just go downhill but stumble around a bit like a drunk, too (this is called "stochastic gradient descent"). If you do this long enough, you'll eventually find rock bottom. There's a metaphor for life in that.
3. Just look for "interesting" features, which are defined by diversity (edges or color changes, for example). Warning: This way can lead to madness—too much "interestingness" draws the network to optical illusions. So keep it sane, and emphasize the kinds of features that are likely to be real in nature, as opposed to artifacts or errors. This is called "regularization," and there are lots of techniques for this, such as whether those kinds of features have been seen before (learned),

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or are too "high frequency" (like static) rather than "low frequency" (more continuous, like actual real-world features).

Just because AI systems sometimes end up in local minima, don't conclude that this makes them any less like life. Humans—indeed, probably all life-forms—are often stuck in local minima.

Take our understanding of the game of Go, which was taught and learned and optimized by humans for thousands of years. It took AIs less than three years to find out that we'd been playing it wrong all along and that there were better, almost alien, solutions to the game which we'd never considered—mostly because our brains don't have the processing power to consider so many moves ahead.

Even in chess, which is ten times easier and was thought to be understood, brute-force machines could beat us at our own strategies. Chess, too, turned out, when explored by superior neural-network AI systems, to have weird but superior strategies we'd never considered, like sacrificing queens early to gain an obscure long-term advantage. It's as if we had been playing 2D versions of games that actually existed in higher dimensions.

If any of this sounds familiar, it's because physics has been wrestling with these sorts of topological problems for decades. The notion of space being many-dimensional, and math reducing to understanding the geometries and interactions of "membranes" beyond the reach of our senses, is where Grand Unified Theorists go to die. But unlike multidimensional theoretical physics, AI is something we can actually experiment with and measure.

So that's what we're going to do. The next few decades will be an explosive exploration of ways to think that 7 million years of evolution never found. We're going to rock ourselves out of local minima and find deeper minima, maybe even global minima. And when we're done, we may even have taught machines to seem as smart as a mosquito, forever descending the cosmic gradients to an ultimate goal, whatever that may be.

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David Kaiser *is a physicist atypically interested in the intersection of his science with politics and culture, about which he has written widely.*

In the first meeting (in Washington, Connecticut) that preceded the crafting of this book, he commented on the change in how "information" is viewed since Wiener's time: the military-industrial, Cold War era. Back then, Wiener compared information, metaphorically, to entropy, in that it could not be conserved—i.e., monopolized; thus, he argued, our atomic secrets and other such classified matters would not remain secrets for long. Today, whereas (as Wiener might have expected) information, fake or not, is leaking all over the other Washington, information in the economic world has indeed been stockpiled, commodified, and monetized.

This lockdown, David said, was "not all good, not all bad"—depending, I guess, on whether you're sick of being pestered by ads for socks or European river cruises popping up in your browser minutes after you've bought them.

To say nothing of information's proliferation. David complained to the rest of us attending the meeting that in Wiener's time, physicists could "take the entire Physical Review. *It would sit comfortably in front of us in a manageable pile. Now we're awash in fifty thousand open-source journals per minute," full of god-knows-what. Neither of these developments would Wiener have anticipated, said David, prompting him to ask, "Do we need a new set of guiding metaphors?"*

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"INFORMATION" FOR WIENER, FOR SHANNON, AND FOR US

David Kaiser

David Kaiser *is Germeshausen Professor of the History of Science and professor of physics at MIT, and head of its Program in Science, Technology & Society. He is the author of* How the Hippies Saved Physics: Science, Counterculture, and the Quantum Revival *and* American Physics and the Cold War Bubble *(forthcoming).*

In *The Sleepwalkers*, a sweeping history of scientific thought from ancient times through the Renaissance, Arthur Koestler identified a tension that has marked the most dramatic leaps of our cosmological imagination. In reading the great works of Nicolaus Copernicus and Johannes Kepler today, Koestler argued, we are struck as much by their strange unfamiliarity—their embeddedness in the magic or mysticism of an earlier age—as by their modern-sounding insights.

I detect that same doubleness—the zig-zag origami folds of old and new—in Norbert Wiener's classic *The Human Use of Human Beings*. First published in 1950 and revised in 1954, the book is in many ways extraordinarily prescient. Wiener, the MIT polymath, recognized before most observers that "society can only be understood through a study of the messages and the communication facilities which belong to it." Wiener argued that feedback loops, the central feature of his theory of cybernetics, would play a determining role in social dynamics. Those loops would not only connect people with one another but connect people with machines, and—crucially—machines with machines.

Wiener glimpsed a world in which information could be separated from its medium. People, or machines, could communicate patterns across vast distances and use them to fashion new items at the endpoints, without "moving a…particle of matter from one end of the line to the other," a vision now realized in our world of networked 3D printers. Wiener also imagined machine-to-machine feedback loops driving huge advances in automation, even for tasks that had previously relied on human judgment. "The machine plays no favorites between manual labor and white-collar labor," he observed.

For all that, many of the central arguments in *The Human Use of Human Beings* seem closer to the 19th century than the 21st. In particular, although Wiener made reference throughout to Claude Shannon's then-new work on information theory, he seems not to have fully embraced Shannon's notion of information as consisting of irreducible, meaning-free bits. Since Wiener's day, Shannon's theory has come to undergird recent advances in "Big Data" and "deep learning," which makes it all the more interesting to revisit Wiener's cybernetic imagination. How might tomorrow's artificial intelligence be different if practitioners were to re-invest in Wiener's guiding vision of "information"?

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When Wiener wrote *The Human Use of Human Beings*, his experiences of war-related research, and of what struck him as the moral ambiguities of intellectual life amid the military-industrial complex, were still fresh. Just a few years earlier, he had announced

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in the pages of *The Atlantic Monthly* that he would not "publish any future work of mine which may do damage in the hands of irresponsible militarists."[30] He remained ambivalent about the transformative power of new technologies, indulging in neither the boundless hype nor the digital utopianism of later pundits.

"Progress imposes not only new possibilities for the future but new restrictions," he wrote, in *Human Use*. He was concerned about human-made restrictions as well as technological ones, especially Cold War restrictions that threatened the flow of information so critical to cybernetic systems: "Under the impetus of Senator [Joseph] McCarthy and his imitators, the blind and excessive classification of military information" was driving political leaders in the United States to adopt a "secretive frame of mind paralleled in history only in the Venice of the Renaissance." Wiener, echoing many outspoken veterans of the Manhattan Project, argued that the postwar obsession with secrecy—especially around nuclear weapons—stemmed from a misunderstanding of the scientific process. The only genuine secret about the production of nuclear weapons, he wrote, was whether such bombs could be built. Once that secret had been revealed, with the bombings of Hiroshima and Nagasaki, no amount of state-imposed secrecy would stop others from puzzling through chains of reasoning like those the Manhattan Project researchers had followed. As Wiener memorably put it, "There is no Maginot Line of the brain."

To drive this point home, Wiener borrowed Shannon's fresh ideas about information theory. In 1948, Shannon, a mathematician and engineer working at Bell Labs, had published a pair of lengthy articles in the *Bell System Technical Journal*. Introducing the new work to a broad readership in 1949, mathematician Warren Weaver explained that in Shannon's formulation, "the word *information*…is used in a special sense that must not be confused with its ordinary usage. In particular, *information* must not be confused with meaning."[31] Linguists and poets might be concerned about the "semantic" aspects of communication, Weaver continued, but not engineers like Shannon. Rather, "this word 'information' in communication theory relates not so much to what you *do* say, as to what you *could* say." In Shannon's now-famous formulation, the information content of a string of symbols was given by the logarithm of the number of possible symbols from which a given string was chosen. Shannon's key insight was that the information of a message was just like the entropy of a gas: a measure of the system's disorder.

Wiener borrowed this insight when composing *Human Use*. If information was like entropy, then it could not be conserved—or contained. Physicists in the 19th century had demonstrated that the total energy of a physical system must always remain the same, a perfect balance between the start and the end of a process. Not so for entropy, which would inexorably increase over time, an imperative that came to be known as the second law of thermodynamics. From that stark distinction—energy is conserved, whereas entropy must grow—followed enormous cosmic consequences. Time must flow forward;

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[30] Norbert Wiener, "A Scientist Rebels," *The Atlantic Monthly,* January 1947.

[31] Warren Weaver, "Recent Contributions to the Mathematical Theory of Communication," in Claude Shannon & Warren Weaver, *The Mathematical Theory of Communication* (Urbana, IL: University of Illinois Press, 1949), p. 8 (emphasis in original). Shannon's 1948 papers were republished in the same volume.

HOUSE_OVERSIGHT_016913

the future cannot be the same as the past. The universe could even be careening toward a "heat death," some far-off time when the total stock of energy had uniformly dispersed, achieving a state of maximum entropy, after which no further change could occur.

If information *qua* entropy could not be conserved, then Wiener concluded it was folly for military leaders to try to stockpile the "scientific know-how of the nation in static libraries and laboratories." Indeed, "no amount of scientific research, carefully recorded in books and papers, and then put into our libraries with labels of secrecy, will be adequate to protect us for any length of time in a world where the effective level of information is perpetually advancing." Any such efforts at secrecy, classification, or the containment of information would fail, Wiener argued, just as surely as hucksters' schemes for perpetual-motion machines faltered in the face of the second law of thermodynamics.

Wiener criticized the American "orthodoxy" of free-market fundamentalism in much the same way. For most Americans, "questions of information will be evaluated according to a standard American criterion: a thing is valuable as a commodity for what it will bring in the open market." Indeed, "the fate of information in the typically American world is to become something which can be bought or sold;" most people, he observed, "cannot conceive of a piece of information without an owner." Wiener considered this view to be as wrong-headed as rampant military classification. Again he invoked Shannon's insight: Since "information and entropy are not conserved," they are "equally unsuited to being commodities."

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Information cannot be conserved—so far, so good. But did Wiener really have Shannon's "information" in mind? The crux of Shannon's argument, as Weaver had emphasized, was to distinguish a colloquial sense of "information," as message with meaning, from an abstracted, rarefied notion of strings of symbols arrayed with some probability and selected from an enormous universe of gibberish. For Shannon, "information" could be quantified because its fundamental unit, the bit, was a unit of conveyance rather than understanding.

When Wiener characterized "information" throughout *Human Use*, on the other hand, he tilted time and again to a classical, humanistic sense of the term. "A piece of information," he wrote—tellingly, not a "bit" of information—"in order to contribute to the general information of the community, must say something substantially different from the community's previous common stock of information." This was why "schoolboys do not like Shakespeare," he concluded: The Bard's couplets may depart starkly from random bitstreams, but they had nonetheless become all too familiar to the sense-making public and "absorbed into the superficial clichés of the time."

At least the information content of Shakespeare had once seemed fresh. During the postwar boom years, Wiener fretted, the "enormous per capita bulk of communication"—ranging across newspapers and movies to radio, television, and books—had bred mediocrity, an informational reversion to the mean. "More and more we must accept a standardized inoffensive and insignificant product which, like the white bread of the bakeries, is made rather for its keeping and selling properties than for its food value." "Heaven save us," he pleaded, "from the first novels which are written because a young man desires the prestige of being a novelist rather than because he has

HOUSE_OVERSIGHT_016914

something to say! Heaven save us likewise from the mathematical papers which are correct and elegant but without body or spirit." Wiener's treatment of "information" sounded more like Matthew Arnold in 1869[32] than Claude Shannon in 1948—more "body and spirit" than "bit." Wiener shared Arnold's Romantic view of the "content producer" as well. "Properly speaking the artist, the writer, and the scientist should be moved by such an irresistible impulse to create that, even if they were not being paid for their work, they would be willing to pay to get the chance to do it." *L'art pour l'art*, that 19th-century cry: Artists should suffer for their work; the quest for meaningful expression should always trump lucre.

To Wiener, this was the proper measure of "information": body, spirit, aspiration, expression. Yet to argue against its commodification, Wiener reverted again to Shannon's mathematics of information-as-entropy.

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Flash forward to our day. In many ways, Wiener has been proved right. His vision of networked feedback loops driven by machine-to-machine communication has become a mundane feature of everyday life. From the earliest stirrings of the Internet Age, moreover, digital piracy has upended the view that "information"—in the form of songs, movies, books, or code—could remain contained. Put up a paywall here, and the content will diffuse over there, all so much informational entropy that cannot be conserved.

On the other hand, enormous multinational corporations—some of the largest and most profitable in the world—now routinely disprove Wiener's contention that "information" cannot be stockpiled or monetized. Ironically, the "information" they trade in is closer to Shannon's definition than Wiener's, Shannon's mathematical proofs notwithstanding.

While Google Books may help circulate hundreds of thousands of works of literature for free, Google itself—like Facebook, Amazon, Twitter, and their many imitators—has commandeered a baser form of "information" and exploited it for extraordinary profit. Petabytes of Shannon-like information—a seemingly meaningless stream of clicks, "likes," and retweets, collected from virtually every person who has ever touched a networked computer—are sifted through proprietary "deep-learning" algorithms to micro-target everything from the advertisements we see to the news stories (fake or otherwise) we encounter while browsing the Web.

Back in the early 1950s, Wiener had proposed that researchers study the structures and limitations of ants—in contrast to humans—so that machines might one day achieve the "almost indefinite intellectual expansion" that people (rather than insects) can attain. He found solace in the notion that machines could come to dominate us only "in the last stages of increasing entropy," when "the statistical differences among individuals are nil." Today's data-mining algorithms turn Wiener's approach on its head. They produce profit by exploiting our reptilian brains rather than imitating our cerebral cortexes, harvesting information from all our late-night, blog-addled, pleasure-seeking clickstreams—leveraging precisely the tiny, residual "statistical differences among individuals."

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[32] Matthew Arnold, *Culture and Anarchy,* Jane Garnett, ed. (Oxford, U.K.: Oxford University Press, 2006).

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To be sure, some recent achievements in artificial intelligence have been remarkably impressive. Computers can now produce visual artworks and musical compositions akin to those of recognized masters, creating just the sort of "information" that Wiener most prized. But by far the largest impact on society to date has come from the collection and manipulation of Shannon-like information, which has reshaped our shopping habits, political participation, personal relationships, expectations of privacy, and more.

What might "deep learning" evolve into, if the fundamental currency becomes "information" as Wiener defined it? How might the field shift if re-animated by Wiener's deep moral convictions, informed as they were by his prescient concerns about rampant militarism, runaway corporate profit-seeking, the self-limiting features of secrecy, and the reduction of human expression to interchangeable commodities? Perhaps "deep learning" might then become the cultivation of meaningful information rather than the relentless pursuit of potent, if meaningless, bits.

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In the aforementioned Connecticut discussion on The Human Use of Human Beings, **Neil Gershenfeld** *provided some fresh air, of a kind, by professing that he hated the book, which remark was met by universal laughter—as was his observation that computer science was one the worst things to happen to computers, or science. His overall contention was that Wiener missed the implications of the digital revolution that was happening around him—although some would say this charge can't be leveled at someone on the ground floor and lacking clairvoyance.*

"The tail wagging the dog of my life," he told us, "has been Fab Labs and the maker movement, and [when] Wiener talks about the threat of automation he misses the inverse, which is that access to the means for automation can empower people, and in Fab Labs, the corner I've been involved in, that's an exponential."

In 2003, I visited Neil at MIT, where he runs the Center for Bits and Atoms. Hours later, I emerged from what had been an exuberant display of very weird stuff. He showed me the work of one student in his popular rapid-prototyping class ("How to Make Almost Anything"), a sculptor with no engineering background, who had made a portable personal space for screaming that saves up your screams and plays them back later. Another student in the class had made a Web browser that lets parrots navigate the Net. Neil himself was doing fundamental research on the roadmap to that sci-fi staple, a "universal replicator." It was a visit that took me a couple of years to get my head around.

Neil manages a global network of Fab Labs—small-scale manufacturing systems, enabled by digital technologies, which give people the wherewithal to build whatever they'd like. As guru of the maker movement, which merges digital communication and computation with fabrication, he sometimes feels outside the current heated debate on AI safety. "My ability to do research rests on tools that augment my capabilities," he says. "Asking whether or not they are intelligent is as fruitful as asking how I know I exist—amusing philosophically, but not testable empirically." What interests him is "how bits and atoms relate—the boundary between digital and physical. Scientifically, it's the most exciting thing I know."

HOUSE_OVERSIGHT_016917

SCALING
Neil Gershenfeld

***Neil Gershenfeld** is a physicist and director of MIT's Center for Bits and Atoms. He is the author of* FAB, *co-author (with Alan Gershenfeld & Joel Cutcher-Gershenfeld) of* Designing Reality, *and founder of the global fab lab network.*

Discussions about artificial intelligence have been oddly ahistorical. They could better be described as manic-depressive; depending on how you count, we're now in the fifth boom-bust cycle. Those swings mask the continuity in the underlying progress and the implications for where it's headed.

The cycles have come in roughly decade-long waves. First there were mainframes, which by their very existence were going to automate away work. That ran into the reality that it was hard to write programs to do tasks that were simple for people to do. Then came expert systems, which were going to codify and then replace the knowledge of experts. These ran into difficulty in assembling that knowledge and reasoning about cases not already covered. Perceptrons sought to get around these problems by modeling how the brain learns, but they were unable to do much of anything. Multilayer perceptrons could handle test problems that had tripped up those simpler networks, but their demonstrations did poorly on unstructured, real-world problems. We're now in the deep-learning era, which is delivering on many of the early AI promises but in a way that's considered hard to understand, with consequences ranging from intellectual to existential threats.

Each of these stages was heralded as a revolutionary advance over the limitations of its predecessors, yet all effectively do the same thing: They make inferences from observations. How these approaches relate can be understood by how they scale—that is, how their performance depends on the difficulty of the problem they're addressing. Both a light switch and a self-driving car must determine their operator's intentions, but the former has just two options to choose from, whereas the latter has many more. The AI-boom phases have started with promising examples in limited domains; the bust phases came with the failure of those demonstrations to handle the complexity of less-structured, practical problems.

Less apparent is the steady progress we've made in mastering scaling. This progress rests on the technological distinction between linear and exponential functions—a distinction that was becoming evident at the dawn of AI but with implications for AI that weren't appreciated until many years later.

In one of the founding documents of the study of intelligent machines, *The Human Use of Human Beings*, Norbert Wiener does a remarkable job of identifying many of the most significant trends to arise since he wrote it, along with noting the people responsible for them and then consistently failing to recognize why these people's work proved to be so important. Wiener is credited with creating the field of cybernetics; I've never understood what that is, but what's missing from the book is at the heart of how AI has progressed. This history matters because of the echoes of it that persist to this day.

Claude Shannon makes a cameo appearance in the book, in the context of his thoughts about the prospects for a chess-playing computer. Shannon was doing

HOUSE_OVERSIGHT_016918

something much more significant than speculating at the time: He was laying the foundations for the digital revolution. As a graduate student at MIT, he worked for Vannevar Bush on the Differential Analyzer. This was one of the last great analog computers, a room full of gears and shafts. Shannon's frustration with the difficulty of solving problems this way led him in 1937 to write what might be the best master's thesis ever. In it, he showed how electrical circuits could be designed to evaluate arbitrary logical expressions, introducing the basis for universal digital logic.

After MIT, Shannon studied communications at Bell Labs. Analog telephone calls degraded with distance; the farther they traveled, the worse they sounded. Rather than continue to improve them incrementally, Shannon showed in 1948 that by communicating with symbols rather than continuous quantities, the behavior is very different. Converting speech waveforms to the binary values of 1 and 0 is an example, but many other sets of symbols can be (and are) used in digital communications. What matters is not the particular symbols but rather the ability to detect and correct errors. Shannon found that if the noise is above a threshold (which depends on the system design), then there are certain to be errors. But if the noise is below a threshold, then a linear increase in the physical resources representing the symbol results in an exponential decrease in the likelihood of making an error in correctly receiving the symbol. This relationship was the first of what we'd now call a threshold theorem.

Such scaling falls off so quickly that the probability of an error can be so small as to effectively never happen. Each symbol sent multiplies rather than adds to the certainty, so that the probability of a mistake can go from 0.1 to 0.01 to 0.001, and so forth. This exponential decrease in communication errors made possible an exponential increase in the capacity of communication networks. And that eventually solved the problem of where the knowledge in an AI system came from.

For many years, the fastest way to speed up a computation was to do nothing—just wait for computers to get faster. In the same way, there were years of AI projects that aimed to accumulate everyday knowledge by laboriously entering pieces of information. That didn't scale; it could progress only as fast as the number of people doing the entering. But when phone calls, newspaper stories, and mail messages all moved onto the Internet, everyone doing any of those things became a data generator. The result was an exponential rather than a linear rate of knowledge accumulation.

John von Neumann also has a cameo in *The Human Use of Human Beings*, for game theory. What Wiener missed here was von Neumann's seminal role in digitizing computation. Whereas analog communication degraded with distance, analog computing (like the Differential Analyzer) degraded with time, accumulating errors as it progressed. Von Neumann presented in 1952 a result corresponding to Shannon's for computation (they had met at the Institute for Advanced Study, in Princeton), showing that it was possible to compute reliably with an unreliable computing device by using symbols rather than continuous quantities. This was, again, a scaling argument, with a linear increase in the physical resources representing the symbol resulting in an exponential reduction in the error rate as long as the noise was below a threshold. That's what makes it possible to have a billion transistors in a computer chip, with the last one as useful as the first one. This relationship led to an exponential increase in computing performance, which solved a second problem in AI: how to process exponentially increasing amounts of data.

The third problem that scaling solved for AI was coming up with the rules for

HOUSE_OVERSIGHT_016919

reasoning without having to hire a programmer for each problem. Wiener recognized the role of feedback in machine learning, but he missed the key role of representation. It's not possible to store all possible images in a self-driving car, or all possible sounds in a conversational computer; they have to be able to generalize from experience. The "deep" part of deep learning refers not to the (hoped-for) depth of insight but to the depth of the mathematical network layers used to make predictions. It turned out that a linear increase in network complexity led to an exponential increase in the expressive power of the network.

If you lose your keys in a room, you can search for them. If you're not sure which room they're in, you have to search all the rooms in a building. If you're not sure which building they're in, you have to search all the rooms in all the buildings in a city. If you're not sure which city they're in, you have to search all the rooms in all the buildings in all the cities. In AI, finding the keys corresponds to things like a car safely following the road, or a computer correctly interpreting a spoken command, and the rooms and buildings and cities correspond to all of the options that have to be considered. This is called the curse of dimensionality.

The solution to the curse of dimensionality came in using information about the problem to constrain the search. The search algorithms themselves are not new. But when applied to a deep-learning network, they adaptively build up representations of where to search. The price of this is that it's no longer possible to exactly solve for the best answer to a problem, but typically all that's needed is an answer that's good enough.

Taken together, it shouldn't be surprising that these scaling laws have allowed machines to become effectively as capable as the corresponding stages of biological complexity. Neural networks started out with a goal of modeling how the brain works. That goal was abandoned as they evolved into mathematical abstractions unrelated to how neurons actually function. But now there's a kind of convergence that can be thought of as forward- rather than reverse-engineering biology, as the results of deep learning echo brain layers and regions.

One of the most difficult research projects I've managed paired what we'd now call data scientists with AI pioneers. It was a miserable experience in moving goalposts. As the former progressed in solving long-standing problems posed by the latter, this was deemed to not count because it wasn't accompanied by corresponding leaps in understanding the solutions. What's the value of a chess-playing computer if you can't explain how it plays chess?

The answer of course is that it can play chess. There is interesting emerging research that is applying AI to AI—that is, training networks to explain how they operate. But both brains and computer chips are hard to understand by watching their inner workings; they're easily interpreted only by observing their external interfaces. We come to trust (or not) brains and computer chips alike based on experience that tests them rather than on explanations for how they work.

Many branches of engineering are making a transition from what's called imperative to declarative or generative design. This means that instead of explicitly designing a system with tools like CAD files, circuit schematics, and computer code, you describe what you want the system to do and then an automated search is done for designs that satisfy your goals and restrictions. This approach becomes necessary as design complexity exceeds what can be understood by a human designer. While that

HOUSE_OVERSIGHT_016920

might sound like a risk, human understanding comes with its own limits; engineering design is littered with what appeared to be good insights that have had bad consequences. Declarative design rests on all the advances in AI, plus the improving fidelity of simulations to virtually test designs.

The mother of all design problems is the one that resulted in us. The way we're designed resides in one of the oldest and most conserved parts of the genome, called the Hox genes. These are genes that regulate genes, in what are called developmental programs. Nothing in your genome stores the design of your body; your genome stores, rather, a series of steps to follow that results in your body. This is an exact parallel to how search is done in AI. There are too many possible body plans to search over, and most modifications would be either inconsequential or fatal. The Hox genes are a representation of a productive place for evolutionary search. It's a kind of natural intelligence at the molecular level.

AI has a mind-body problem, in that it has no body. Most work on AI is done in the cloud, running on virtual machines in computer centers where data are funneled. Our own intelligence is the result of a search algorithm (evolution) that was able to change our physical form as well as our programming—those are inextricably linked. If the history of AI can be understood as the working of scaling laws rather than a succession of fashions, then its future can be seen in the same way. What's now being digitized, after communication and computation, is fabrication, bringing the programmability of bits to the world of atoms. By digitizing not just designs but the construction of materials, the same lessons that von Neumann and Shannon taught us apply to exponentially increasing fabricational complexity.

I've defined digital materials to be those constructed from a discrete set of parts reversibly joined with a discrete set of relative positions and orientations. These attributes allow the global geometry to be determined from local constraints, assembly errors to be detected and corrected, heterogeneous materials to be joined, and structures to be disassembled rather than disposed of when they're no longer needed. The amino acids that are the foundation of life and the Lego bricks that are the foundation of play share these properties.

What's interesting about amino acids is that they're not interesting. They have attributes that are typical but not unusual, such as attracting or repelling water. But just twenty types of them are enough to make you. In the same way, twenty or so types of digital-material part types—conducting, insulating, rigid, flexible, magnetic, etc.—are enough to assemble the range of functions that go into making modern technologies like robots and computers.

The connection between computation and fabrication was foreshadowed by the very pioneers whose work the edifice of computing is based on. Wiener hinted at this by linking material transportation with message transportation. John von Neumann is credited with modern computer architecture, something he actually wrote very little about; the final thing he studied, and wrote about beautifully and at length, was self-reproducing systems. As an abstraction of life, he modeled a machine that can communicate a computation that constructs itself. And the final thing Alan Turing, who is credited with the theoretical framework for computer science, studied was how the instructions in genes can give rise to physical forms. These questions address a topic absent from a typical computer-science education: the physical configuration of a

HOUSE_OVERSIGHT_016921

computation.

Von Neumann and Turing posed their questions as theoretical studies, because it was beyond the technology of their day to realize them. But with the convergence of communication and computation with fabrication, these investigations are now becoming accessible experimentally. Making an assembler that can assemble itself from the parts that it's assembling is a focus of my lab, along with collaborations to develop synthetic cells.

The prospect of physically self-reproducing automata is potentially much scarier than fears of out-of-control AI, because it moves the intelligence out here to where we live. It could be a roadmap leading to Terminator's Skynet robotic overlords. But it's also a more hopeful prospect, because an ability to program atoms as well as bits enables designs to be shared globally while locally producing things like energy, food, and shelter—all of these are emerging as exciting early applications of digital fabrication. Wiener worried about the future of work, but he didn't question implicit assumptions about the nature of work which are challenged when consumption can be replaced by creation.

History suggests that neither utopian nor dystopian scenarios prevail; we generally end up muddling along somewhere in between. But history also suggests that we don't have to wait on history. Gordon Moore in 1965 was able to use five years of the doubling of the specifications of integrated circuits to project what turned out to be fifty years of exponential improvements in digital technologies. We've spent many of those years responding to, rather than anticipating, its implications. We have more data available now than Gordon Moore did to project fifty years of doubling the performance of digital fabrication. With the benefit of hindsight, it should be possible to avoid the excesses of digital computing and communications this time around, and, from the outset, address issues like access and literacy.

If the maker movement is the harbinger of a third digital revolution, the success of AI in meeting many of its own early goals can be seen as the crowning achievement of the first two digital revolutions. Although machine making and machine thinking might appear to be unrelated trends, they lie in each other's futures. The same scaling trends that have made AI possible suggest that the current mania is a phase that will pass, to be followed by something even more significant: the merging of artificial and natural intelligence.

It was an advance for atoms to form molecules, molecules to form organelles, organelles to form cells, cells to form organs, organs to form organisms, organisms to form families, families to form societies, and societies to form civilizations. This grand evolutionary loop can now be closed, with atoms arranging bits arranging atoms.

HOUSE_OVERSIGHT_016922

While **Danny Hillis** *was an undergraduate at MIT, he built a computer out of Tinkertoys. It has around 10,000 wooden parts, plays tic-tac-toe, and never loses; it's now in the Computer History Museum, in Mountain View, California.*

As a graduate student at the MIT Computer Science and Artificial Intelligence Laboratory in the early 1980s, Danny designed a massively parallel computer with 64,000 processors. He named it the Connection Machine and founded what may have been the first AI company—Thinking Machines Corporation—to produce and market it. This was despite a lunch he had with Richard Feynman, at which the celebrated physicist remarked, "That is positively the dopiest idea I ever heard." Maybe "despite" is the wrong word, since Feynman had a well-known predilection for playing with dopey ideas. In the event, he showed up on the day the company was incorporated and stayed on, for summer jobs and special assignments, to make invaluable contributions to its work.

Danny has since established a number of technology companies, of which the latest is Applied Invention, which partners with commercial enterprises to develop technological solutions to their most intractable problems. He holds hundreds of U.S. patents, covering parallel computers, touch interfaces, disk arrays, forgery prevention methods, and a slew of electronic and mechanical devices. His imagination is apparently boundless, and here he sketches some possible scenarios that will result from our pursuit of a better and better AI.

"Our thinking machines are more than metaphors," he says. "The question is not, 'Will they be powerful enough to hurt us?' (they will), or whether they will always act in our best interests (they won't), but whether over the long term they can help us find our way—where we come out on the Panacea/Apocalypse continuum."

HOUSE_OVERSIGHT_016923

THE FIRST MACHINE INTELLIGENCES

W. Daniel Hillis

***W. Daniel "Danny" Hillis** is an inventor, entrepreneur, and computer scientist, Judge Widney Professor of Engineering and Medicine at USC, and author of* The Pattern on the Stone: The Simple Ideas That Make Computers Work.

> I have spoken of machines, but not only of machines having brains of brass and thews of iron. When human atoms are knit into an organization in which they are used, not in their full right as responsible human beings, but as cogs and levers and rods, it matters little that their raw material is flesh and blood. *What is used as an element in a machine, is in fact an element in the machine.* Whether we entrust our decisions to machines of metal, or to those machines of flesh and blood which are bureaus and vast laboratories and armies and corporations, we shall never receive the right answers to our questions unless we ask the right questions.... The hour is very late, and the choice of good and evil knocks at our door.
>
> —Norbert Wiener, *The Human Use of Human Beings*

Norbert Wiener was ahead of his time in recognizing the potential danger of emergent intelligent machines. I believe he was even further ahead in recognizing that the first artificial intelligences had already begun to emerge. He was correct in identifying the corporations and bureaus that he called "machines of flesh and blood" as the first intelligent machines. He anticipated the dangers of creating artificial superintelligences with goals not necessarily aligned with our own.

What is now clear, whether or not it was apparent to Wiener, is that these organizational superintelligences are not just made of humans, they are hybrids of humans and the information technologies that allow them to coordinate. Even in Wiener's time, the "bureaus and vast laboratories and armies and corporations" could not operate without telephones, telegraphs, radios, and tabulating machines. Today they could not operate without networks of computers, databases, and decision support systems. These hybrid intelligences are technologically augmented networks of humans. These artificial intelligences have superhuman powers. They can know more than individual humans; they can sense more; they can make more complicated analyses and more complex plans. They can have vastly more resources and power than any single individual.

Although we do not always perceive it, hybrid superintelligences such as nation states and corporations have their own emergent goals. Although they are built by and for humans, they often act like independent intelligent entities, and their actions are not always aligned to the interests of the people who created them. The state is not always for the citizen, nor the company for the shareholder. Nor do not-for-profits, religious orders, or political parties always act in furtherance of their founding principles. Intuitively, we recognize that their actions are guided by internal goals, which is why we personify them, both legally and in our habits of thought. When talking about "what China wants," or "what General Motors is trying to do," we are not speaking in metaphors. These organizations act as intelligences that perceive, decide, and act. Like the goals of individual humans, the goals of organizations are complex and often self-contradictory, but they are true goals in the sense that they direct action. Those goals

HOUSE_OVERSIGHT_016924

depend somewhat on the goals of the people within the organization, but they are not identical.

Any American knows how loose the tie is between the actions of the U.S. government and the diverse and often contradictory aims of its citizens. That is also true of corporations. For-profit corporations nominally serve multiple constituencies, including shareholders, senior executives, employees, and customers. These corporations differ in how they balance their loyalties and often behave in ways that serve none of their constituents. The "neurons" that carry their corporate thought are not just the human employees or the technologies that connect them; they are also coded into the policies, incentive structures, culture, and procedural habits of the corporation. The emergent corporate goals do not always reflect the values of the people who implement them. For instance, an oil company led and staffed by people who care about the environment may have incentive structures or policies that cause it to compromise environmental safety for the sake of corporate earnings. The components' good intentions are not a guarantee of the emergent system's good behavior.

Governments and corporations, both built partly of humans, are naturally motivated to at least appear to share the goals of the humans they depend upon. They could not function without the people, so they need to keep them cooperative. When such organizations appear to behave altruistically, this is often part of their motive. I once complimented the CEO of a large corporation on the contribution his company made toward a humanitarian relief effort. The CEO responded, without a trace of irony, "Yes. We have decided to do more things like that to make our brand more likeable." Individuals who compose a hybrid superintelligence may occasionally exert a "humanizing" influence—for example, an employee may break company policies to accommodate the needs of another human. The employee may act out of true human empathy, but we should not attribute any such empathy to the superintelligence itself. These hybrid machines have goals, and their citizens/customers/employees are some of the resources they use to accomplish them.

We are close to being able to build superintelligences out of pure information technology, without human components. This is what people normally refer to as "artificial intelligence," or AI. It is reasonable to ask what the attitudes of the hypothetical machine superintelligences will be toward humans. Will they, too, see humans as useful resources and a good relationship with us as worth preserving? Will they be constructed to have goals that are aligned with our own? Will a superintelligence even see these questions as important? What are the "right questions" that we should be asking? I believe that one of the most important is this: What relationship will various superintelligences have to one another?

It is interesting to consider how the hybrid superintelligences currently deal with conflicts among themselves. Today, much of the ultimate power rests in the nation states, which claim authority over a patch of ground. Whether they are optimized to act in the interests of their citizens or those of a despotic ruler, nation states assert priority over other intelligences' desires or goals within their geographic dominion. They claim a monopoly on the use of force and recognize only other nation states as peers. They are willing, if necessary, to demand great sacrifices of their citizens to enforce their authority, even to the point of sacrificing their citizens' lives.

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This geographical division of authority made logical sense when most of the actors were humans who spent their lives within a single nation state, but now that the actors of importance include geographically distributed hybrid intelligences such as multinational corporations, that logic is less obvious. Today we live in a complex transitional period, when distributed superintelligences still largely rely on the nation states to settle the arguments arising among them. Often, those arguments are resolved differently in different jurisdictions. It is becoming more difficult even to assign individual humans to nation states: International travelers living and working outside their native country, refugees, and immigrants (documented and not) are still dealt with as awkward exceptions. Superintelligences built purely of information technology will prove even more awkward for the territorial system of authority, since there is no reason why they need to be tied to physical resources in a single country—or even to any particular physical resources at all. An artificial intelligence might well exist "in the cloud" rather than at any physical location.

I can imagine at least four scenarios for how machine superintelligences will relate to hybrid superintelligences.

In one obvious scenario, multiple machine intelligences will ultimately be controlled by, and allied with, individual nation states. In this state/AI scenario, one can envision American and Chinese super-AIs wrestling each other for resources on behalf of their state. In some sense, these AIs would be citizens of their nation state in the way that many commercial corporations often act as "corporate citizens" today. In this scenario, the host nation states would presumably give the machine superintelligences the resources they needed to work for the state's advantage. Or, to the degree that the superintelligences can influence their state governments, they will presumably do so to enhance their own power, for instance by garnering a larger share of the state's resources. Nation states' AIs might not want competing AIs to grow up within their jurisdiction. In this scenario, the superintelligences become an extension of the state, and vice versa.

The state/AI scenario seems plausible, but it is not our current course. Our most powerful and rapidly improving artificial intelligences are controlled by for-profit corporations. This is the corporate/AI scenario, in which the balance of power between nation states and corporations becomes inverted. Today, the most powerful and intelligent collections of machines are probably owned by Google, but companies like Amazon, Baidu, Microsoft, Facebook, Apple, and IBM may not be far behind. These companies all see a business imperative to build artificial intelligences of their own. It is easy to imagine a future in which corporations independently build their own machine intelligences, protected within firewalls preventing the machines from taking advantage of one another's knowledge. These machines will be designed to have goals aligned with those of the corporation. If this alignment is effective, nation states may continue to lag behind in developing their own artificial-intelligence capability and instead depend on their "corporate citizens" to do it for them. To the extent that corporations successfully control the goals, they will become more powerful and autonomous than nation states.

Another scenario, perhaps the one people fear the most, is that artificial intelligences will not be aligned with either humans or hybrid superintelligences but will act solely in their own interest. They might even merge into a single machine superintelligence, since there may be no technical requirement for machine intelligences to maintain distinct identities. The attitude of a self-interested super-AI toward hybrid

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superintelligences is likely to be competitive. Humans might be seen as minor annoyances, like ants at a picnic, but hybrid superintelligences—like corporations, organized religions, and nation states—could be existential threats. Like hybrid superintelligences, AIs might see humans mostly as useful tools to accomplish their goals, as pawns in their competition with the other superintelligences. Or we might simply be irrelevant. It is not impossible that a machine intelligence has already emerged and we simply do not recognize it as such. It may not wish to be noticed, or it may be so alien to us that we are incapable of perceiving it. This makes the self-interested AI scenario the most difficult to imagine. I believe the easy-to-imagine versions, like the humanoid intelligent robots of science fiction, are the least likely. Our most complex machines, like the Internet, have already grown beyond the detailed understanding of a single human, and their emergent behaviors may be well beyond our ken.

The final scenario is that machine intelligences will not be allied with one another but instead will work to further the goals of humanity as a whole. In this optimistic scenario, AI could help us restore the balance of power between the individual and the corporation, between the citizen and the state. It could help us solve the problems that have been created by hybrid superintelligences that subvert the goals of humans. In this scenario, AIs will empower us by giving us access to processing capacity and knowledge currently available only to corporations and states. In effect, they could become extensions of our own individual intelligences, in furtherance of our human goals. They could make our weak individual intelligences strong. This prospect is both exciting and plausible. It is plausible because we have some choice in what we build, and we have a history of using technology to expand and augment our human capacities. As airplanes have given us wings and engines have given us muscles to move mountains, so our network of computers may amplify and extend our minds. We may not fully understand or control our destiny, but we have a chance to bend it in the direction of our values. The future is not something that will happen to us; it is something that we will build.

Why Wiener Saw What Others Missed

> There is in electrical engineering a split which is known in Germany as the split between the technique of strong currents and the technique of weak currents, and which we know as the distinction between power and communication engineering. It is this split which separates the age just past from that in which we are now living.
>
> —Norbert Wiener, *Cybernetics, or Control and Communication in the Animal and the Machine*

Cybernetics is the study of the how the weak can control the strong. Consider the defining metaphor of the field: the helmsman guiding a ship with a tiller. The helmsman's goal is to control the heading of the ship, to keep it on the right course. The information, the message that is sent to the helmsman, comes from the compass or the stars, and the helmsman closes the feedback loop by sending the steering messages through the gentle force of his hand on the tiller. In this picture, we see the ship tossing in powerful wind and waves in the real world, controlled by the communication system of messages in the world of information.

Yet the distinction between "real" and "information" is mostly a difference in perspective. The signals that carry messages, like the light of the stars and pressure of the

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hand on the tiller, exist in a world of energy and forces, as does the helmsman. The weak forces that control the rudder are as real and physical as the strong forces that toss the ship. If we shift our cybernetics perspective from the ship to the helmsman, the pressures on the rudder become a strong force of muscles controlled by the weak signals in the mind of the helmsman. These messages in the helmsman's mind are amplified into a physical force strong enough to steer the ship. Or instead, we can zoom out and take a large cybernetics perspective. We might see the ship itself as part of a vast trade network, part of a feedback loop that regulates the price of commodities through the flow of goods. In this perspective, the tiny ship is merely a messenger. So, the distinction between the physical world and the information world is a way to describe the relationship between the weak and the strong.

Wiener chose to view the world from the vantage point and scale of the individual human. As a cyberneticist, he took the perspective of the weak protagonist embedded within a strong system, trying to make the best of limited powers. He incorporated this perspective in his very definition of information. "Information," he said, "is a name for the content of what is exchanged with the outer world as we adjust to it, and make our adjustment felt upon it." In his words, information is what we use to "live effectively within that environment."[33] For Wiener, information is a way for the weak to effectively cope with the strong. This viewpoint is also reflected in Gregory Bateson's definition of information as "a difference that makes a difference," by which he meant the small difference that makes a big difference.

The goal of cybernetics was to create a tiny model of the system using "weak currents" to amplify and control "strong currents" of the real world. The central insight was that a control problem could be solved by building an analogous system in the information space of messages and then amplifying solutions into the larger world of reality. Inherent in the motion of a control system is the concept of amplification, which makes the small big and the weak strong. Amplification allows the difference that makes a difference to make a difference.

In this way of looking at the world, a control system needed to be as complex as the system it controlled. Cyberneticist W. Ross Ashby proved that this was true in a precise mathematical sense, in what is now called Ashby's Law of Requisite Variety, or sometimes the First Law of Cybernetics. The law tells us that to control a system completely, the controller must be as complex as the controlled. Thus cyberneticists tended to see control systems as a kind of analog of the systems they governed, like the homunculus—the hypothetical little person inside the brain who controls the actual person.

This notion of analogous structure is sometimes confused with the notion of analog encoding of messages, but the two are logically distinct. Norbert Wiener was much impressed with Vannevar Bush's Digital Differential Analyzer, which could be reconfigured to match the structure of whatever problem it was given to solve but used digital signal encoding. Signals could be simplified to openly represent the relevant distinctions, allowing them to be more accurately communicated and stored. In digital signals, one needed only to preserve the difference in signals that made a difference. It is this distinction and signal coding that we commonly use to distinguish "analog" versus "digital." Digital signal encoding was entirely compatible with cybernetic thinking—in

[33] *The Human Use of Human Beings* (Boston: Houghton Mifflin, 1954), p. 17-18.

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fact, enabling to it. What was constraining to cybernetics was the presumption of an analogy of structure between the controller and the controlled. By the 1930s, Kurt Gödel, Alonzo Church, and Alan Turing had all described universal systems of computation, in which the computation required no structural analogy to functions that were computed. These universal computers could also compute the functions of control.

The analogy of structure between the controller and the controlled was central to the cybernetic perspective. Just as digital coding collapses the space of possible messages into a simplified version that represents only the difference that makes a difference, so the control system collapses the state space of a controlled system into a simplified model that reflects only the goals of the controller. Ashby's Law does not imply that every controller must model every state of the system but only those states that matter for advancing the controller's goals. Thus, in cybernetics, the goal of the controller becomes the perspective from which the world is viewed.

Norbert Wiener adopted the perspective of the individual human relating to vast organizations and trying to "live effectively within that environment." He took the perspective of the weak trying to influence the strong. Perhaps this is why he was able to notice the emergent goals of the "machines of flesh and blood" and anticipate some of the human challenges posed by these new intelligences, hybrid machine intelligences with goals of their own.

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Venki Ramakrishnan *is a Nobel Prize-winning biologist whose many scientific contributions include his work on the atomic structure of the ribosome—in effect, a huge molecular machine that reads our genes and makes proteins. His work would have been impossible without powerful computers. The Internet made his own work a lot easier and, he notes, acted as a leveler internationally: "When I grew up in India, if you wanted to get a book, it would show up six months or a year after it had already come out in the West. . . . Journals would arrive by surface mail a few months later. I didn't have to deal with it, because I left India when I was nineteen, but I know Indian scientists had to deal with it. Today they have access to information at the click of a button. More important, they have access to lectures. They can listen to Richard Feynman. That would have been a dream of mine when I was growing up. They can just watch Richard Feynman on the Web. That's a big leveling in the field." And yet. . . "Along with the benefits [of the Web], there is now a huge amount of noise. You have all of these people spouting pseudoscientific jargon and pushing their own ideas as if they were science."*

As president of the Royal Society, Venki worries, too, about the broader issue of trust: public trust in evidence-based scientific findings, but also trust among scientists, bolstered by rigorous checking of one another's conclusions—trust that is in danger of eroding because of the "black box" character of deep-learning computers. "This [erosion] is going to happen more and more, as data sets get bigger, as we have genome-wide studies, population studies, and all sorts of things," he says. "How do we, as a science community, grapple with this and communicate to the public a sense of what science is about, what is reliable in science, what is uncertain in science, and what is just plain wrong in science?"

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WILL COMPUTERS BECOME OUR OVERLORDS?

Venki Ramakrishnan

Venki Ramakrishnan *is a scientist at the Medical Research Council Laboratory of Molecular Biology, Cambridge University; recipient of the Nobel Prize in Chemistry (2009); current president of the Royal Society; and the author of* Gene Machine: The Race to Discover the Secrets of the Ribosome.

A former colleague of mine, Gérard Bricogne, used to joke that carbon-based intelligence was simply a catalyst for the evolution of silicon-based intelligence. For quite a long time, both Hollywood movies and scientific Jeremiahs have been predicting our eventual capitulation to our computer overlords. We all await the singularity, which always seems to be just over the horizon.

In a sense, computers have already taken over, facilitating virtually every aspect of our lives—from banking, travel, and utilities to the most intimate personal communication. I can see and talk to my grandson in New York *for free*. I remember when I first saw the 1968 movie *2001: A Space Odyssey*, the audience laughed at the absurdly cheap cost of a picturephone call from space: $1.70, at a time when a long-distance call within the U.S. was $3 per minute.

However, the convenience and power of computers is also something of a Faustian bargain, for it comes with a loss of control. Computers prevent us from doing things we want. Try getting on a flight if you arrive at the airport and the airline computer systems are down, as happened not so long ago to British Airways at Heathrow. The planes, pilots, and passengers were all there; even the air-traffic controls were working. But no flights for that airline were allowed to take off. Computers also make us do things we *don't* want—by generating mailing lists and print labels to send us all millions of pieces of unwanted mail, which we humans have to sort, deliver, and dispose of.

But you ain't seen nothing yet. In the past, we programmed computers using algorithms we understood at least in principle. So when machines did amazing things like beating world chess champion Garry Kasparov, we could say that the victorious programs were designed with algorithms based on our own understanding—using, in this instance, the experience and advice of top grandmasters. Machines were simply faster at doing brute-force calculations, had prodigious amounts of memory, and were not prone to errors. One article described Deep Blue's victory not as that of a computer, which was just a dumb machine, but as the victory of hundreds of programmers over Kasparov, a single individual.

That way of programming is changing dramatically. After a long hiatus, the power of machine learning has taken off. Much of the change came when programmers, rather than trying to anticipate and code for every possible contingency, allowed computers to train themselves on data, using deep neural networks based on models of how our own brains learn. They use probabilistic methods to "learn" from large quantities of data; computers can recognize patterns and come up with conclusions on their own. A particularly powerful method is called reinforcement learning, by which the computer learns, without prior input, which variables are important and how much to

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weight them to reach a certain goal. This method in some sense mimics how we learn as children. The results from these new approaches are amazing.

Such a deep-learning program was used to teach a computer to play Go, a game that only a few years ago was thought to be beyond the reach of AI because it was so hard to calculate how well you were doing. It seemed that top Go players relied a great deal on intuition and a feel for position, so proficiency was thought to require a particularly human kind of intelligence. But the AlphaGo program produced by DeepMind, after being trained on thousands of high-level Go games played by humans and then millions of games with itself, was able to beat the top human players in short order. Even more amazingly, the related AlphaGo Zero program, which learned from scratch by playing itself, was stronger than the version trained initially on human games! It was as though the humans had been preventing the computer from reaching its true potential. The same method has recently been generalized: Starting from scratch, within just twenty-four hours, an equivalent AlphaZero chess program was able to beat today's top "conventional" chess programs, which in turn have beaten the best humans.

Progress has not been restricted to games. Computers are significantly better at image and voice recognition and speech synthesis than they used to be. They can detect tumors in radiographs earlier than most humans. Medical diagnostics and personalized medicine will improve substantially. Transportation by self-driving cars will keep us all safer, on average. My grandson may never have to acquire a driver's license, because driving a car will be like riding a horse today—a hobby for the few. Dangerous activities, such as mining, and tedious repetitive work will be done by computers. Governments will offer better targeted, more personalized and efficient public services. AI could revolutionize education by analyzing an individual pupil's needs and enabling customized teaching, so that each student can advance at an optimal rate.

Along with these huge benefits, of course, will come alarming risks. With the vast amounts of personal data, computers will learn more about us than we may know about ourselves; the question of who owns data about us will be paramount. Moreover, data-based decisions will undoubtedly reflect social biases: Even an allegedly neutral intelligent system designed to predict loan risks, say, may conclude that mere membership in a particular minority group makes you more likely to default on a loan. While this is an obvious example that we could correct, the real danger is that we are not always aware of biases in the data and may simply perpetuate them.

Machine learning may also perpetuate our own biases. When Netflix or Amazon tries to tell you what you might want to watch or buy, this is an application of machine learning. Currently such suggestions are sometimes laughable, but with time and more data they will get increasingly accurate, reinforcing our prejudices and likes and dislikes. Will we miss out on the random encounter that might persuade us to change our views by exposing us to new and conflicting ideas? Social media, given its influence on elections, is a particularly striking illustration of how the divide between people on different sides of the political spectrum can be accentuated.

We may have already reached the stage where most governments are powerless to resist the combined clout of a few powerful multinational companies that control us and our digital future. The fight between dominant companies today is really a fight for control over our data. They will use their enormous influence to prevent regulation of data, because their interests lie in unfettered control of it. Moreover, they have the

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financial resources to hire the most talented workers in the field, enhancing their power even further. We have been giving away valuable data for the sake of freebies like Gmail and Facebook, but as the journalist and author John Lanchester has pointed out in the *London Review of Books*, if it is free, then you are the product. Their real customers are the ones who pay them for access to knowledge about us, so that they can persuade us to buy their products or otherwise influence us. One way around the monopolistic control of data is to split the ownership of data away from firms that use them. Individuals would instead own and control access to their personal data (a model that would encourage competition, since people would be free to move their data to a company that offered better services). Finally, abuse of data is not limited to corporations: In totalitarian states, or even nominally democratic ones, governments know things about their citizens that Orwell could not have imagined. The use they make of this information may not always be transparent or possible to counter.

The prospect of AI for military purposes is frightening. One can imagine intelligent systems being designed to act autonomously based on real-time data and able to act faster than the enemy, starting catastrophic wars. Such wars may not necessarily be conventional or even nuclear wars. Given how essential computer networks are to modern society, it is much more likely that AI wars will be fought in cyberspace. The consequences could be just as dire.

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Despite this loss of control, we continue to march inexorably into a world in which AI will be everywhere: Individuals won't be able to resist its convenience and power, and corporations and governments won't be able to resist its competitive advantages. But important questions arise about the future of work. Computers have been responsible for considerable losses in blue-collar jobs in the last few decades, but until recently many white-collar jobs—jobs that "only humans can do"—were thought to be safe. Suddenly that no longer appears to be true. Accountants, many legal and medical professionals, financial analysts and stockbrokers, travel agents—in fact, a large fraction of white-collar jobs—will disappear as a result of sophisticated machine-learning programs. We face a future in which factories churn out goods with very few employees and the movement of goods is largely automated, as are many services. What's left for humans to do?

In 1930—long before the advent of computers, let alone AI—John Maynard Keynes wrote, in an essay called "Economic Possibilities for our Grandchildren," that as a result of improvements in productivity, society could produce all its needs with a fifteen-hour work week. He also predicted, along with the growth of creative leisure, the end of money and wealth as a goal:

> We shall be able to afford to dare to assess the money-motive at its true value. The love of money as a possession—as distinguished from the love of money as a means to the enjoyments and realities of life—will be recognised for what it is, a somewhat disgusting morbidity, one of those semi-criminal, semi-pathological propensities which one hands over with a shudder to the specialists in mental disease.

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Sadly, Keynes's predictions did not come true. Although productivity did indeed increase, the system—possibly inherent in a market economy—did not result in humans working much shorter hours. Rather, what happened is what the anthropologist and anarchist David Graeber describes as the growth of "bullshit jobs."[34] While jobs that produce essentials like food, shelter, and goods have been largely automated away, we have seen an enormous expansion of sectors like corporate law, academic and health administration (as opposed to actual teaching, research, and the practice of medicine), "human resources," and public relations, not to mention new industries like financial services and telemarketing and ancillary industries in the so-called gig economy which serve those who are too busy doing all that additional work.

How will societies cope with technology's increasingly rapid destruction of entire professions and throwing large numbers of people out of work? Some argue that this concern is based on a false premise, because new jobs spring up that didn't exist before, but as Graeber points out, these new jobs won't necessarily be rewarding or fulfilling. During the first industrial revolution, it took almost a century before most people were better off. That revolution was possible only because the government of the time ruthlessly favored property rights over labor, and most people (and all women) did not have the vote. In today's democratic societies, it is not clear that the population will tolerate such a dramatic upheaval of society based on the promise that "eventually" things will get better.

Even that rosy vision will depend on a radical shake-up of education and lifelong learning. The Industrial Revolution did trigger enormous social change of this kind, including a shift to universal education. But it will not happen unless we make it happen: This is essentially about power, agency, and control. What's next for, say, the forty-year-old taxi driver or truck driver in an era of autonomous vehicles?

One idea that has been touted is that of a universal basic income, which will allow citizens to pursue their interests, retrain for new occupations, and generally be free to live a decent life. However, market economies, which are predicated on growing consumer demand over all else, may not tolerate this innovation. There is also a feeling among many that meaningful work is essential to human dignity and fulfillment. So another possibility is that the enormous wealth generated by increased productivity due to automation could be redistributed to jobs requiring human labor and creativity in fields such as the arts, music, social work, and other worthwhile pursuits. Ultimately, which jobs are rewarding or productive and which are "bullshit" is a matter of judgment and may vary from society to society, as well as over time.

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So far, I've focused on AI's practical consequences. As a scientist, what bothers me is our potential loss of understanding. We are now accumulating data at an incredible rate. In my own lab, an experiment generates over a terabyte of data a day. These data are massaged, analyzed, and reduced until there is an interpretable result. But in all of this data analysis, we believe we know what's happening. We know what the programs are

[34] https://strikemag.org/bullshit-jobs/

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doing because we designed the algorithms at their heart. So when our computers generate a result, we feel that we intellectually grasp it.

The new machine-learning programs are different. Having recognized patterns via deep neural networks, they come up with conclusions, and we have no idea exactly how. When they uncover relationships, we don't understand it in the same way as if we had deduced those relationships ourselves using an underlying theoretical framework. As data sets become larger, we won't be able to analyze them ourselves even with the help of computers; rather, we will rely entirely on computers to do the analysis for us. So if someone asks us how we know something, we will simply say it is because the machine analyzed the data and produced the conclusion.

One day a computer may well come up with an entirely new result—e.g., a mathematical theorem whose proof, or even whose statement, no human can understand. That is philosophically different from the way we have been doing science. Or at least thought we had; some might argue that we don't know how our own brains reach conclusions either, and that these new methods are a way of mimicking learning by the human brain. Nevertheless, I find this potential loss of understanding disturbing.

Despite the remarkable advances in computing, the hype about AGI—a general-intelligence machine that will think like a human and possibly develop consciousness—smacks of science fiction to me, partly because we don't understand the brain at that level of detail. Not only do we not understand what consciousness is, we don't even understand a relatively simple problem like how we remember a phone number. In just that one question, there are all sorts of things to consider. How do we know it is a number? How do we associate it with a person, a name, face, and other characteristics? Even such seemingly trivial questions involve everything from high-level cognition and memory to how a cell stores information and how neurons interact.

Moreover, that's just one task among many that the brain does effortlessly. Whereas machines will no doubt do ever more amazing things, they're unlikely to be a replacement for human thought and human creativity and vision. Eric Schmidt, former chairman of Google's parent company, said in a recent interview at the London Science Museum that even designing a robot that would clear the table, wash the dishes, and put them away was a huge challenge. The calculations involved in figuring out all the movements the body has to make to throw a ball accurately or do slalom skiing are prodigious. The brain can do all these and also do mathematics and music, and *invent* games like chess and Go, not just play them. We tend to underestimate the complexity and creativity of the human brain and how amazingly general it is.

If AI is to become more humanlike in its abilities, the machine-learning and neuroscience communities need to interact closely, something that is happening already. Some of today's greatest exponents of machine learning—such as Geoffrey Hinton, Zoubin Ghahramani, and Demis Hassabis—have backgrounds in cognitive neuroscience, and their success has been at least in part due to attempts to model brainlike behavior in their algorithms. At the same time, neurobiology has also flourished. All sorts of tools have been developed to watch which neurons are firing and genetically manipulate them and see what's happening in real time with inputs. Several countries have launched moon-shot neuroscience initiatives to see if we can crack the workings of the brain. Advances in AI and neuroscience seem to go hand in hand; each field can propel the other.

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Many evolutionary scientists, and such philosophers as Daniel Dennett, have pointed out that the human brain is the result of billions of years of evolution.[35] Human intelligence is not the special characteristic we think it is, but just another survival mechanism not unlike our digestive or immune systems, both of which are also amazingly complex. Intelligence evolved because it allowed us to make sense of the world around us, to plan ahead, and thus cope with all sorts of unexpected things in order to survive. However, as Descartes stated, we humans define our very existence by our ability to think. So it is not surprising that, in an anthropomorphic way, our fears about AI reflect this belief that our intelligence is what makes us special.

But if we step back and look at life on Earth, we see that we are far from the most resilient species. If we're going to be taken over at some point, it will be by some of Earth's oldest life-forms, like bacteria, which can live anywhere from Antarctica to deep-sea thermal vents hotter than boiling water, or in acid environments that would melt you and me. So when people ask where we're headed, we need to put the question in a broader context. I don't know what sort of future AI will bring: whether AI will make humans subservient or obsolete or will be a useful and welcome enhancement of our abilities which will enrich our lives. But I am reasonably certain that computers will never be the overlords of bacteria.

[35] See, for example, Dennett's *From Bacteria to Bach and Back: The Evolution of Minds* (New York: W. W. Norton, 2017).

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Alex "Sandy" Pentland, *an exponent of what he has termed "social physics," is interested in building powerful human-AI ecologies. He is concerned at the same time about the potential dangers of decision-making systems in which the data in effect take over and human creativity is relegated to the background.*

The advent of Big Data, he believes, has given us the opportunity to reinvent our civilization: "We can now begin to actually look at the details of social interaction and how those play out, and we're no longer limited to averages like market indices or election results. This is an astounding change. The ability to see the details of the market, of political revolutions, and to be able to predict and control them is definitely a case of Promethean fire—it could be used for good or for ill. Big Data brings us to interesting times."

At our group meeting in Washington, Connecticut, he confessed that reading Norbert Wiener on the concept of feedback "felt like reading my own thoughts."

"After Wiener, people discovered or focused on the fact that there are genuinely chaotic systems that are just not predictable," he said, "but if you look at human socioeconomic systems, there is a large percentage of variance you can account for and predict. . . . Today there is data from all sorts of digital devices, and from all of our transactions. The fact that everything is datafied means you can measure things in real time in most aspects of human life—and increasingly in every aspect of human life. The fact that we have interesting computers and machine-learning techniques means that you can build predictive models of human systems in ways you could never do before."

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THE HUMAN STRATEGY
Alex "Sandy" Pentland

Alex "Sandy" Pentland *is Toshiba Professor and professor of media arts and sciences, MIT; director of the Human Dynamics and Connection Science labs and the Media Lab Entrepreneurship Program, and the author of* Social Physics.

In the last half-century, the idea of AI and intelligent robots has dominated thinking about the relationship between humans and computers. In part, this is because it's easy to tell the stories about AI and robots, and in part because of early successes (e.g., theorem provers that reproduced most of Whitehead and Russell's *Principia Mathematica*) and massive military funding. The earlier and broader vision of cybernetics, which considered the artificial as part of larger systems of feedback and mutual influence, faded from public awareness.

However, in the intervening years the cybernetics vision has slowly grown and quietly taken over—to the point where it is "in the air." State-of-the-art research in most engineering disciplines is now framed as feedback systems that are dynamic and driven by energy flows. Even AI is being recast as human/machine "advisor" systems, and the military is beginning large-scale funding in this area—something that should perhaps worry us more than drones and independent humanoid robots.

But as science and engineering have adopted a more cybernetics-like stance, it has become clear that even the vision of cybernetics is far too small. It was originally centered on the embeddedness of the individual actor but not on the emergent properties of a network of actors. This is unsurprising, because the mathematics of networks did not exist until recently, so a quantitative science of how networks behave was impossible. We now know that study of the individual does not produce understanding of the system except in certain simple cases. Recent progress in this area was foreshadowed by understanding that "chaos," and later "complexity," were the typical behavior of systems, but we can now go far beyond these statistical understandings.

We're beginning to be able to analyze, predict, and even design the emergent behavior of complex heterogeneous networks. The cybernetics view of the connected individual actor can now be expanded to cover complex systems of connected individuals and machines, and the insights we obtain from this broader view are fundamentally different from those obtained from the cybernetics view. Thinking about the network is analogous to thinking about entire ecosystems. How would you guide ecosystems to grow in a good direction? What do you even mean by "a good direction"? Questions like this are beyond the boundary of traditional cybernetic thinking.

Perhaps the most stunning realization is that humans are already beginning to use AI and machine learning to guide entire ecosystems, including ecosystems of people, thus creating human-AI ecologies. Now that everything is becoming "datafied," we can measure most aspects of human life and, increasingly, aspects of all life. This, together with new, powerful machine-learning techniques, means that we can build models of these ecologies in ways we couldn't before. Well-known examples are weather- and traffic-prediction models, which are being extended to predict the global climate and plan city growth and renewal. AI-aided engineering of the ecologies is already here.

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Development of human-AI ecosystems is perhaps inevitable for a social species such as ourselves. We became social early in our evolution, millions of years ago. We began exchanging information with one another to stay alive, to increase our fitness. We developed writing to share abstract and complex ideas, and most recently we've developed computers to enhance our communication abilities. Now we're developing AI and machine-learning models of ecosystems and sharing the predictions of those models to jointly shape our world through new laws and international agreements.

We live in an unprecedented historic moment, in which the availability of vast amounts of human behavioral data and advances in machine learning enable us to tackle complex social problems through algorithmic decision making. The opportunities for such a human-AI ecology to have positive social impact through fairer and more transparent decisions are obvious. But there are also risks of a "tyranny of algorithms," where unelected data experts are running the world. The choices we make now are perhaps even more momentous than those we faced in the 1950s, when AI and cybernetics were created. The issues look similar, but they're not. We have moved down the road, and now the scope is larger. It's not just AI robots versus individuals. It's AI guiding entire ecologies.

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How can we make a good human-artificial ecosystem, something that's not a machine society but a cyberculture in which we can all live as humans—a culture with a human feel to it? We don't want to think small—for example, to talk only of robots and self-driving cars. We want this to be a global ecology. Think Skynet-size. But how would you make Skynet something that's about the human fabric?

The first thing to ask is: What's the magic that makes the current AI work? Where is it wrong and where is it right?

The good magic is that it has something called the credit-assignment function. What that lets you do is take "stupid neurons"—little linear functions—and figure out, in a big network, which ones are doing the work and strengthen them. It's a way of taking a random bunch of switches all hooked together in a network and making them smart by giving them feedback about what works and what doesn't. This sounds simple, but there's some complicated math around it. That's the magic that makes current AI work.

The bad part of it is, because those little neurons are stupid, the things they learn don't generalize very well. If an AI sees something it hasn't seen before, or if the world changes a little bit, the AI is likely to make a horrible mistake. It has absolutely no sense of context. In some ways, it's as far from Norbert Wiener's original notion of cybernetics as you can get, because it isn't contextualized; it's a little idiot savant.

But imagine that you took away those limitations: Imagine that instead of using dumb neurons, you used neurons in which real-world knowledge was embedded. Maybe instead of linear neurons, you used neurons that were functions in physics, and then you tried to fit physics data. Or maybe you put in a lot of knowledge about humans and how they interact with one another—the statistics and characteristics of humans.

When you add this background knowledge and surround it with a good credit-assignment function, then you can take observational data and use the credit-assignment function to reinforce the functions that are producing good answers. The result is an AI that works extremely well and can generalize. For instance, in solving physical

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problems, it often takes only a couple of noisy data points to get something that's a beautiful description of a phenomenon, because you're putting in knowledge about how physics works. That's in huge contrast to normal AI, which requires millions of training examples and is very sensitive to noise. By adding the appropriate background knowledge, you get much more intelligence.

Similar to the physical-systems case, if we make neurons that know a lot about how humans learn from each other, then we can detect human fads and predict human behavior trends in surprisingly accurate and efficient ways. This "social physics" works because human behavior is determined as much by the patterns of our culture as by rational, individual thinking. These patterns can be described mathematically and employed to make accurate predictions.

This idea of a credit-assignment function reinforcing connections between neurons that are doing the best work is the core of current AI. If you make those little neurons smarter, the AI gets smarter. So, what would happen if we replaced the neurons with people? People have lots of capabilities. They know lots of things about the world; they can perceive things in a broadly competent, human way. What would happen if you had a network of people in which you could reinforce the connections that were helping and minimize the connections that weren't?

That begins to sound like a society, or a company. We all live in a human social network. We're reinforced for doing things that seem to help everybody and discouraged from doing things that are not appreciated. Culture is the result of this sort of human AI as applied to human problems; it is the process of building social structures by reinforcing the good connections and penalizing the bad. Once you've realized you can take this general AI framework and create a human AI, the question becomes, What's the right way to do that? Is it a safe idea? Is it completely crazy?

My students and I are looking at how people make decisions, on huge databases of financial decisions, business decisions, and many other sorts of decisions. What we've found is that humans often make decisions in a way that mimics AI credit-assignment algorithms and works to make the community smarter. A particularly interesting feature of this work is that it addresses a classic problem in evolution known as the group-selection problem. The core of this problem is: How can we select for culture in evolution, when it's the individuals that reproduce? What you need is something that selects for the best cultures and the best groups but also selects for the best individuals, because they're the units that transmit the genes.

When you frame the question this way and go through the mathematical literature, you discover that there's one generally best way to do this. It's called "distributed Thompson sampling," a mathematical algorithm used in choosing, out of a set of possible actions with unknown payoffs, the action that maximizes the expected reward in respect to the actions. The key is social sampling, a way of combining evidence, of exploring and exploiting at the same time. It has the unusual property of simultaneously being the best strategy both for the individual and for the group. If you use the group as the basis of selection, and then the group either gets wiped out or reinforced, you're also selecting for successful individuals. If you select for individuals, and each individual does what's good for him or her, then that's automatically the best thing for the group. It's an amazing alignment of interests and utilities, and it provides real insight into the question of how culture fits into natural selection.

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Social sampling, very simply, is looking around you at the actions of people who are like you, finding what's popular, and then copying it if it seems like a good idea to you. Idea propagation has this popularity function driving it, but individual adoption also is about figuring out how the idea works for the individual—a reflective attitude. When you combine social sampling and personal judgment, you get superior decision making. That's amazing, because now we have a mathematical recipe for doing with humans what all those AI techniques are doing with dumb computer neurons. We have a way of putting people together to make better decisions, given more and more experience.

So, what happens in the real world? Why don't we do this all the time? Well, people are good at it, but there are ways it can run amok. One of these is through advertising, propaganda, or "fake news." There are many ways to get people to think something is popular when it's not, and this destroys the usefulness of social sampling. The way you can make groups of people smarter, the way you can make human AI, will work only if you can get feedback to them that's truthful. It must be grounded on whether each person's actions worked for them or not.

That's the key to AI mechanisms, too. What they do is analyze whether they performed correctly. If so, plus one; if not, minus one. We need that truthful feedback to make this human mechanism work well, and we need good ways of knowing about what other people are doing so that we can correctly assess popularity and the likelihood of this being a good choice.

The next step is to build this credit-assignment function, this feedback function, for people, so that we can make a good human-artificial ecosystem—a smart organization and a smart culture. In a way, we need to duplicate some of the early insights that resulted in, for instance, the U.S. census—trying to find basic facts that everybody can agree on and understand so that the transmission of knowledge and culture can happen in a way that's truthful and social sampling can function efficiently.

We can address the problem of building an accurate credit-assignment function in many different settings. In companies, for instance, it can be done with digital ID badges that reveal who's connected to whom, so that we can assess the pattern of connections in relation to the company's results on a daily or weekly basis. The credit-assignment function asks whether those connections helped solve problems, or helped invent new solutions, and reinforces the helpful connections. When you can get that feedback quantitatively—which is difficult, because most things aren't measured quantitatively—both the productivity and the innovation rate within the organization can be significantly improved. This is, for instance, the basis of Toyota's "continuous improvement" method.

A next step is to try to do the same thing but at scale, something I refer to as building a trust network for data. It can be thought of as a distributed system like the Internet, but with the ability to quantitatively measure and communicate the qualities of human society, in the same way that the U.S. census does a pretty good job of telling us about population and life expectancy. We are already deploying prototype examples of trust networks at scale in several countries, based on the data and measurement standards laid out in the U.N. Sustainable Development Goals.

On the horizon is a vision of how we can make humanity more intelligent by building a human AI. It's a vision composed of two threads. One is data that we can all trust—data that have been vetted by a broad community, data where the algorithms are known and monitored, much like the census data we all automatically rely on as at least

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approximately correct. The other is a fair, data-driven assessment of public norms, policy, and government, based on trusted data about current conditions. This second thread depends on availability of trusted data and so is just beginning to be developed. Trusted data and data-driven assessment of norms, policy, and government together create a credit-assignment function that improves societies' overall fitness and intelligence.

It is precisely at the point of creating greater societal intelligence where fake news, propaganda, and advertising all get in the way. Fortunately, trust networks give us a path forward to building a society more resistant to echo-chamber problems, these fads, these exercises in madness. We have begun to develop a new way of establishing social measurements, in aid of curing some of the ills we see in society today. We're using open data from all sources, encouraging a fair representation of the things people are choosing, in a curated mathematical framework that can stamp out the echoes and the attempts to manipulate us.

On Polarization and Inequality

Extreme polarization and segregation by income are almost everywhere in the world today and threaten to tear governments and civil society apart. Increasingly, the media are becoming adrenaline pushers driven by advertising clicks and failing to deliver balanced facts and reasoned discourse—and the degradation of media is causing people to lose their bearings. They don't know what to believe, and thus they can easily be manipulated. There is a real need to ground our various cultures in trustworthy, data-driven standards that we all agree on, and to be able to know what behaviors and policies work and which don't.

In converting to a digital society, we've lost touch with traditional notions of truth and justice. Justice used to be mostly informal and normative. We've now formalized it. At the same time, we've put it out of reach for most people. Our legal systems are failing us in a way they didn't before, precisely because they're now more formal, more digital, less embedded in society.

Ideas about justice are very different around the world. One of the core differentiators is this: Do you or your parents remember when the bad guys came with guns and took everything? If you do, your attitude about justice is different from that of the average reader of this essay. Do you come from the upper classes? Or were you somebody who saw the sewers from the inside? Your view of justice depends on your history.

A common test I have for U.S. citizens is this: Do you know anybody who owns a pickup truck? It's the number-one-selling vehicle in the United States, and if you don't know people like that, you're out of touch with more than 50 percent of Americans. Physical segregation drives conceptual segregation. Most of America thinks of justice and access and fairness in terms very different from those of the typical, say, Manhattanite.

If you look at patterns of mobility—where people go—in a typical city, you find that the people in the top quintile (white-collar working families) and bottom quintile (people who are sometimes on unemployment or welfare) almost never talk to each other. They don't go to the same places; they don't talk about the same things. They all live in

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the same city, nominally, but it's as if it were two completely different cities—and this is perhaps the most important cause of today's plague of polarization.

On Extreme Wealth

Some two hundred of the world's wealthiest people have pledged to give away more than 50 percent of their wealth either during their lifetimes or in their wills, creating a plurality of voices in the foundation space.[36] Bill Gates is probably the most familiar example. He's decided that if the government won't do it, he'll do it. You want mosquito nets? He'll do it. You want antivirals? He'll do it. We're getting different stakeholders to take action in the form of foundations dedicated to public good, and they have different versions of what they consider the public good. This diversity of goals has created a lot of what's wonderful about the world today. Actions from outside government by organizations like the Ford Foundation and the Sloan Foundation, who bet on things that nobody else would bet on, have changed the world for the better.

Sure, these billionaires are human, with human foibles, and all is not necessarily as it should be. On the other hand, the same situation obtained when the railways were first built. Some people made huge fortunes. A lot of people went bust. We, the average people, got railways out of it. That's good. Same thing with electric power; same thing with many new technologies. There's a churning process that throws somebody up and later casts them or their heirs down. Bubbles of extreme wealth were a feature of the late 1800s and early 1900s when steam engines and railways and electric lights were invented. The fortunes they created were all gone within two or three generations.

If the U.S. were like Europe, I would worry. What you find in Europe is that the same families have held on to wealth for hundreds of years, so they're entrenched not just in terms of wealth but of the political system and in other ways. But so far, the U.S. has avoided this kind of hereditary class system. Extreme wealth hasn't stuck, which is good. It shouldn't stick. If you win the lottery, you get your billion dollars, but your grandkids ought to work for a living.

On AI and Society

People are scared about AI. Perhaps they should be. But they need to realize that AI feeds on data. Without data, AI is nothing. You don't have to watch the AI; instead you should watch what it eats and what it does. The trust-network framework we've set up, with the help of nations in the E.U. and elsewhere, is one where we can have our algorithms, we can have our AI, but we get to see what went in and what went out, so that we can ask, Is this a discriminatory decision? Is this the sort of thing that we want as humans? Or is this something that's a little weird?

The most revealing analogy is that regulators, bureaucracies, and parts of the government are very much like AIs: They take in the rules that we call law and regulation, and they add government data, and they make decisions that affect our lives. The part that's bad about the current system is that we have very little oversight of these departments, regulators, and bureaucracies. The only control we have is the vote—the opportunity to elect somebody different. We need to make oversight of bureaucracies a lot more fine-grained. We need to record the data that went into every single decision

[36] https://givingpledge.org/About.aspx.

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and have the results analyzed by the various stakeholders—rather like elected legislatures were originally intended to do.

If we have the data that go into and out of each decision, we can easily ask, Is this a fair algorithm? Is this AI doing things that we as humans believe are ethical? This human-in-the-loop approach is called "open algorithms;" you get to see what the AIs take as input and what they decide using that input. If you see those two things, you'll know whether they're doing the right thing or the wrong thing. It turns out that's not hard to do. If you control the data, then you control the AI.

One thing people often fail to mention is that all the worries about AI are the same as the worries about today's government. For most parts of the government—the justice system, et cetera—there's no reliable data about what they're doing and in what situation. How can you know whether the courts are fair or not if you don't know the inputs and the outputs? The same problem arises with AI systems and is addressable in the same way. We need trusted data to hold current government to account in terms of what they take in and what they put out, and AI should be no different.

Next-Generation AI

Current AI machine-learning algorithms are, at their core, dead simple stupid. They work, but they work by brute force, so they need hundreds of millions of samples. They work because you can approximate anything with lots of little simple pieces. That's a key insight of current AI research—that if you use reinforcement learning for credit-assignment feedback, you can get those little pieces to approximate whatever arbitrary function you want.

But using the wrong functions to make decisions means the AI's ability to make good decisions won't generalize. If we give the AI new, different inputs, it may make completely unreasonable decisions. Or if the situation changes, then you need to retrain it. There are amusing techniques to find the "null space" in these AI systems. These are inputs that the AI thinks are valid examples of what it was trained to recognize (e.g., faces, cats, etc.), but to a human they're crazy examples.

Current AI is doing descriptive statistics in a way that's not science and would be almost impossible to make into science. To build robust systems, we need to know the science behind data. The systems I view as next-generation AIs result from this science-based approach: If you're going to create an AI to deal with something physical, then you should build the laws of physics into it as your descriptive functions, in place of those stupid little neurons. For instance, we know that physics uses functions like polynomials, sine waves, and exponentials, so those should be your basis functions and not little linear neurons. By using those more appropriate basis functions, you need a lot less data, you can deal with a lot more noise, and you get much better results.

As in the physics example, if we want to build an AI to work with human behavior, then we need to build the statistical properties of human networks into machine-learning algorithms. When you replace the stupid neurons with ones that capture the basics of human behavior, then you can identify trends with very little data, and you can deal with huge levels of noise.

The fact that humans have a "commonsense" understanding that they bring to most problems suggests what I call the human strategy: Human society is a network just like the neural nets trained for deep learning, but the "neurons" in human society are a lot

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smarter. You and I have surprisingly general descriptive powers that we use for understanding a wide range of situations, and we can recognize which connections should be reinforced. That means we can shape our social networks to work much better and potentially beat all that machine-based AI at its own game.

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"URGENT!" URGENT!" the cc'd copy of an email screamed, one of a dozen emails that greeted me as I turned on my phone at the baggage carousel at Malpensa Airport after the long flight from JFK. "The great American visionary thinker John Brockman arrives this morning at Grand Hotel Milan. You MUST, repeat MUST pay him a visit." It was signed HUO.

The prior evening, waiting in the lounge at JFK, I had had the bright idea to write my friend and longtime collaborator, the London-based, peripatetic art curator **Hans Ulrich Obrist (***known to all as HUO), and ask if there was anyone in Milan I should know.*

Once I was settled at the hotel, the phone began ringing and a procession of leading Italian artists, designers, and architects called to request a meeting, including Enzo Mari, the modernist artist and furniture designer; Alberto Garutti, whose aesthetic strategies have inspired a dialogue between contemporary art, spectator, and public space; and fashion designer Miuccia Prada, who "requests your presence for tea this afternoon at Prada headquarters." And thus, thanks to HUO, did the jet-lagged "great American visionary thinker" stumble and mumble his way through his first day in Milan, November 2011.

HUO is sui generis*: He lives a twenty-four-hour day, sleeping (I guess) whenever, and employing full-time assistants who work eight-hour shifts and are available to him 24/7. Over a recent two-year period, he visited art venues in either China or India for forty weekends each year—departing London Thursday evening, back at his desk on Monday. Last year, once again,* ArtReview *ranked him #1 on their annual "Power 100" list.*

Recently we collaborated on a panel during the "GUEST, GHOST, HOST: MACHINE!" Serpentine event that took place at London's new City Hall. We were joined by Venki Ramakrishnan, Jaan Tallinn, and Andrew Blake, research director of The Alan Turing Institute. The event was consistent with HUO's mission of bringing together art and science: "The curator is no longer understood simply as the person who fills a space with objects," he says, "but also as the person who brings different cultural spheres into contact, invents new display features, and makes junctions that allow unexpected encounters and results."

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MAKING THE INVISIBLE VISIBLE: ART MEETS AI

Hans Ulrich Obrist

Hans Ulrich Obrist *is artistic director of the Serpentine Gallery, London, and the author of* Ways of Curating *and* Lives of the Artists, Lives of the Architects.

In the Introduction to the second edition of his book *Understanding Media*, Marshall McLuhan noted the ability of art to "anticipate future social and technological developments." Art is "an early alarm system," pointing us to new developments in times ahead and allowing us "to prepare to cope with them. . . . Art as a radar environment takes on the function of indispensable perceptual training. . . ."

In 1964, when McLuhan's book was first published, the artist Nam June Paik was just building his *Robot K-456* to experiment with the technologies that subsequently would start to influence society. He had worked with television earlier, challenging its usual passive consumption by the viewer, and later made art with global live-satellite broadcasts, using the new media less for entertainment than to point us to their poetic and intercultural capacities (which are still mostly unused today). The Paiks of our time, of course, are now working with the Internet, digital images, and artificial intelligence. Their works and thoughts, again, are an early alarm system for the developments ahead of us.

As a curator, my daily work is to bring together different works of art and connect different cultures. Since the early 1990s, I have also been organizing conversations and meetings with practitioners from different disciplines, in order to go beyond the general reluctance to pool knowledge. Since I was interested in hearing what artists have to say about artificial intelligence, I recently organized several conversations between artists and engineers.

The reason to look closely at AI is that two of the most important questions of today are "How capable will AI become?" and "What dangers may arise from it?" Its early applications already influence our everyday lives in ways that are more or less recognizable. There is an increasing impact on many aspects of our society, but whether this might be, in general, beneficial or malign is still uncertain.

Many contemporary artists are following these developments closely. They are articulating various doubts about the promises of AI and reminding us not to associate the term "artificial intelligence" solely with positive outcomes. To the current discussions of AI, the artists contribute their specific perspectives and notably their focus on questions of image making, creativity, and the use of programming as artistic tools.

The deep connections between science and art had already been noted by the late Heinz von Foerster, one of the architects of cybernetics, who worked with Norbert Wiener from the mid-1940s and in the 1960s founded the field of second-order cybernetics, in which the observer is understood as part of the system itself and not an external entity. I knew von Foerster well, and in one of our many conversations, he offered his views on the relation between art and science:

> I've always perceived art and science as complementary fields. One shouldn't forget that a scientist is in some respects also an artist. He invents a new technique and he describes it. He uses language like a poet, or the author of a detective novel, and describes his findings. In my view, a scientist must work in

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> an artistic way if he wants to communicate his research. He obviously wants to communicate and talk to others. A scientist invents new objects, and the question is how to describe them. In all of these aspects, science is not very different from art.

When I asked him how he defined cybernetics, von Foerster answered:

> The substance of what we have learned from cybernetics is to think in circles: *A* leads *B, B* to *C,* but *C* can return to *A*. Such kinds of arguments are not linear but circular. The significant contribution of cybernetics to our thinking is to accept circular arguments. This means that we have to look at circular processes and understand under which circumstances an equilibrium, and thus a stable structure, emerges.

Today, where AI algorithms are applied in daily tasks, one can ask how the human factor is included in these kinds of processes and what role creativity and art could play in relation to them. There are thus different levels to think about when exploring the relation between AI and art.

So, what do contemporary artists have to say about artificial intelligence?

Artificial Stupidity

Hito Steyerl, an artist who works with documentary and experimental film, considers two key aspects that we should keep in mind when reflecting on the implications of AI for society. First, the expectations for so-called artificial intelligence, she says, are often overrated, and the noun "intelligence" is misleading; to counter that, she uses the term "artificial stupidity." Second, she points out that programmers are now making invisible software algorithms visible through images, but to understand and interpret these images better, we should apply the expertise of artists.

Steyerl has worked with computer technology for many years, and her recent artworks have explored surveillance techniques, robots, and such computer games as in *How Not to Be Seen* (2013), on digital-image technologies, or *HellYeahWeFuckDie* (2017), about the training of robots in the still-difficult task of keeping balance. But to explain her notion of artificial stupidity, Steyerl refers to a more general phenomenon, like the now widespread use of Twitter bots, noting in our conversation:

> It was and still is a very popular tool in elections to deploy Twitter armies to sway public opinion and deflect popular hashtags and so on. This is an artificial intelligence of a very, very low grade. It's two or maybe three lines of script. It's nothing very sophisticated at all. Yet the social implications of this kind of artificial stupidity, as I call it, are already monumental in global politics.

As has been widely noted, this kind of technology was seen in the many automated Twitter posts before the 2016 U.S. presidential election and also shortly before the Brexit vote. If even low-grade AI technology like these bots are already influencing our politics, this raises another urgent question: "How powerful will far more advanced techniques be in the future?"

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Visible / Invisible

The artist Paul Klee often talked about art as "making the invisible visible." In computer technology, most algorithms work invisibly, in the background; they remain inaccessible in the systems we use daily. But lately there has been an interesting comeback of visuality in machine learning. The ways that the deep-learning algorithms of AI are processing data have been made visible through applications like Google's DeepDream, in which the process of computerized pattern-recognition is visualized in real time. The application shows how the algorithm tries to match animal forms with any given input. There are many other AI visualization programs that, in their way, also "make the invisible visible." The difficulty in the general public perception of such images is, in Steyerl's view, that these visual patterns are viewed uncritically as realistic and objective representations of the machine process. She says of the aesthetics of such visualizations:

> For me, this proves that science has become a subgenre of art history. . . . We now have lots of abstract computer patterns that might look like a Paul Klee painting, or a Mark Rothko, or all sorts of other abstractions that we know from art history. The only difference, I think, is that in current scientific thought they're perceived as representations of reality, almost like documentary images, whereas in art history there's a very nuanced understanding of different kinds of abstraction.

What she seeks is a more profound understanding of computer-generated images and the different aesthetic forms they use. They are obviously not generated with the explicit goal of following a certain aesthetic tradition. The computer engineer Mike Tyka, in a conversation with Steyerl, explained the functions of these images:

> Deep-learning systems, especially the visual ones, are really inspired by the need to know what's going on in the black box. Their goal is to project these processes back into the real world.

Nevertheless, these images have aesthetic implications and values which have to be taken into account. One could say that while the programmers use these images to help us better understand the programs' algorithms, we need the knowledge of artists to better understand the aesthetic forms of AI. As Steyerl has pointed out, such visualizations are generally understood as "true" representations of processes, but we should pay attention to their respective aesthetics, and their implications, which have to be viewed in a critical and analytical way.

In 2017, the artist Trevor Paglen created a project to make these invisible AI algorithms visible. In *Sight Machine*, he filmed a live performance of the Kronos Quartet and processed the resulting images with various computer software programs used for face detection, object identification, and even for missile guidance. He projected the outcome of these algorithms, in real time, back to screens above the stage. By demonstrating how the various different programs interpreted the musicians' performance, Paglen showed that AI algorithms are always determined by sets of values and interests which they then manifest and reiterate, and thus must be critically questioned. The significant contrast between algorithms and music also raises the issue of relationships between technical and human perception.

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Computers, as a Tool for Creativity, Can't Replace the Artist.
Rachel Rose, a video artist who thinks about the questions posed by AI, employs computer technology in the creation of her works. Her films give the viewer an experience of materiality through the moving image. She uses collaging and layering of the material to manipulate sound and image, and the editing process is perhaps the most important aspect of her work.

She also talks about the importance of decision making in her work. For her, the artistic process does not follow a rational pattern. In a converation we had, together with the engineer Kenric McDowell, at the Google Cultural Institute, she explained this by citing a story from theater director Peter Brook's 1968 book *The Empty Space*. When Brook designed the set for his production of *The Tempest* in the late 1960s, he started by making a Japanese garden, but then the design evolved, becoming a white box, a black box, a realistic set, and so on. And in the end, he returned to his original idea. Brook writes that he was shocked at having spent a month on his labors, only to end at the beginning. But this shows that the creative artistic process is a succession whose every step builds on the next and which eventually comes to an unpredictable conclusion. The process is not a logical or rational succession but has mostly to do with the artist's feelings in reaction to the preceding result. Rose said, of her own artistic decision making:

> It, to me, is distinctively different from machine learning, because at each decision there's this core feeling that comes from a human being, which has to do with empathy, which has to do with communication, which has to do with questions about our own mortality that only a human could ask.

This point underlines the fundamental difference between any human artistic production and so-called computer creativity. Rose sees AI more as a possible way to create better tools for humans:

> A place I can imagine machine learning working for an artist would be not in developing an independent subjectivity, like writing a poem or making an image, but actually in filling in gaps that are to do with labor, like the way that Photoshop works with different tools that you can use.

And though such tools may not seem spectacular, she says, "they might have a larger influence on art," because they provide artists with further possibilities in their creative work.

McDowell added that he, too, believes there are false expectations around AI. "I've observed," he said, "that there's a sort of magical quality to the idea of a computer that does all the things that we do." He continued: "There's almost this kind of demonic mirror that we look into, and we want it to write a novel, we want it to make a film—we want to give that away somehow." He is instead working on projects wherein humans collaborate with the machine. One of the current aims of AI research is to find new means of interaction between humans and software. And art, one could say, needs to play a key role in that enterprise, since it focuses on our subjectivity and on essential human aspects like empathy and mortality.

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Cybernetics / Art

Suzanne Treister is an artist whose work from 2009 to 2011 serves as an example of what is happening at the intersection of our current technologies, the arts, and cybernetics. Treister has been a pioneer in digital art since the 1990s, inventing, for example, imaginary video games and painting screen shots from them. In her project *Hexen 2.0* she looked back at the famous Macy conferences on cybernetics that between 1946 and 1953 were organized in New York by engineers and social scientists to unite the sciences and to develop a universal theory of the workings of the mind.

In her project, she created thirty photo-text works about the conference attendees (which included Wiener and von Foerster), she invented tarot cards, and she made a video based on a photomontage of a "cybernetic séance." In the "séance," the conference participants are seen sitting at a round table, as in spiritualist séances, while certain of their statements on cybernetics are heard in an audio-collage—rational knowledge and superstition combined. She also noted that some of the participating scientists worked for the military; thus the application of cybernetics could be seen in an ambivalent way, even back then, as a tussle between pure knowledge and its use in state control.

If one looks at Treister's work about the Macy conference participants, one sees that no visual artist was included. A dialogue between artists and scientists would be fruitful in future discussions, and it is a bit astonishing that this wasn't realized at the time, given von Foerster's keen interest in art. He recounted in one of our conversations how his relation to the field dated back to his childhood:

> I grew up as a child in an artistic family. We often had visits from poets, philosophers, painters, and sculptors. Art was a part of my life. Later, I got into physics, as I was talented in this subject. But I always remained conscious of the importance of art for science. There wasn't a great difference for me. For me, both aspects of life have always been very much alike—and accessible, too. We should see them as one. An artist also has to reflect on his work. He has to think about his grammar and his language. A painter must know how to handle his colors. Just think of how intensively oil colors were researched during the Renaissance. They wanted to know how a certain pigment could be mixed with others to get a certain tone of red or blue. Chemists and painters collaborated very closely. I think the artificial division between science and art is wrong.

Though for von Foerster the relation between the art and science was always clear, for our own time this connection remains to be made. There are many reasons to multiply the links. The critical thinking of artists would be beneficial in respect to the dangers of AI, since they draw our attention to questions they consider essential from their perspective. With the advent of machine learning, new tools are available to artists for their work. And as the algorithms of AI are made visible through artificial images in new ways, artists' critical visual knowledge and expertise will be harnessed. Many of the key questions of AI are philosophical in nature and can be answered only from a holistic point of view. The way they play out among adventurous artists will be worth following.

Simulating Worlds

For the most part, the works of contemporary artists have been embodied ruminations on

HOUSE_OVERSIGHT_016951

AI's impact on existential questions of the self and our future interaction with nonhuman entities. Few, though, have taken the technologies and innovations of AI as the underlying materials of their work and sculpted them to their own vision. An exception is the artist Ian Cheng, who has gone as far as to construct entire worlds of artificial beings with varying degrees of sentience and intelligence. He refers to these worlds as Live Simulations. His *Emissaries* trilogy (2015-2017) is set in a fictional postapocalyptic world of flora and fauna, in which AI-driven animals and creatures explore the landscape and interact with each other. Cheng uses advanced graphics but has them programmed with a lot of glitches and imperfections, which imparts a futuristic and anachronistic atmosphere at the same time. Through his trilogy, which charts a history of consciousness, he asks the question "What is a simulation?"

While the majority of artistic works that utilize recent developments in AI specifically draw from the field of machine learning, Cheng's Live Simulations take a separate route. The protagonists and plot lines that are interlaced in each episodic simulation of *Emissaries* use the complex logic systems and rules of AI. What is profound about his continually evolving scenes is that complexity arises not through the desire/actions of any single actor or artificial godhead but instead through their constellation, collision, and constant evolution in symbiosis with one another. This gives rise to unexpected outcomes and unending, unknowable situations—you can never experience the exact same moment in successive viewings of his work.

Cheng had a discussion at the Serpentine Marathon "GUEST, GHOST, HOST: MACHINE!" with the programmer Richard Evans, who recently designed Versu, an AI-based platform for interactive storytelling games. Evans' work emphasizes the social interaction of the games' characters, who react in a spectrum of possible behaviors to the choices made by the human players. In their conversation, Evans said that a starting point for the project was that most earlier simulation video games, such as *The Sims*, did not sufficiently take into account the importance of social practices. Simulated protagonists in games would often act in ways that did not correspond well with real human behavior. Knowledge of social practices limits the possibilities of action but is necessary to understand the meaning of our actions—which is what interests Cheng for his own simulations. The more parameters of actions in certain circumstances are determined in a computer simulation, the more interesting it is for Cheng to experiment with individual and specific changes. He told Evans, "I gather that if we had AI with more ability to respond to social contexts, tweaking one thing, you would get something quite artistic and beautiful."

Cheng also sees the work of programmers and AI simulations as creating new and sophisticated tools for experimenting with the parameters of our daily social practices. In this way, the involvement of artists in AI will lead to new kinds of open experiments in Art. Such possibilities are—like increased AI capabilities in general—still in the future. Recognizing that this is an experimental technology in its infancy, very far from apocalyptic visions of a superintelligent AI takeover, Cheng fills his simulations with prosaic avatars such as strange microbial globules, dogs, and the undead.

Discussions like these, between artists and engineers, of course are not totally new. In the 1960s, the engineer Billy Klüver brought artists together with engineers in a series of events, and in 1967 he founded the Experiments in Art and Technology program with Robert Rauschenberg and others. In London, at around the same time, Barbara

HOUSE_OVERSIGHT_016952

Stevini and John Latham, of the Artist Placement Group, took things a step further by asserting that there should be artists in residence in every company and every government. Today, these inspiring historical models can be applied to the field of AI. As AI comes to inhabit more and more of our everyday lives, the creation of a space that is nondeterministic and non-utilitarian in its plurality of perspectives and diversity of understandings will undoubtedly be essential.

HOUSE_OVERSIGHT_016953

Alison Gopnik *is an international leader in the field of children's learning and development and was one of the founders of the field of "theory of mind." She has spoken of the child brain as a "powerful learning computer," perhaps from personal experience. Her own Philadelphia childhood was an exercise in intellectual development. "Other families took their kids to see* The Sound of Music *or* Carousel*; we saw Racine's* Phaedra *and Samuel Beckett's* Endgame," *she has recalled. "Our family read Henry Fielding's 18th-century novel* Joseph Andrews *out loud to each other around the fire on camping trips."*

Lately she has invoked Bayesian models of machine learning to explain the remarkable ability of preschoolers to draw conclusions about the world around them without benefit of enormous data sets. "I think babies and children are actually more conscious than we are as adults," she has said. "They're very good at taking in lots of information from lots of different sources at once." She has referred to babies and young children as "the research and development division of the human species." Not that she treats them coldly, as if they were mere laboratory animals. They appear to revel in her company, and in the blinking, thrumming toys in her Berkeley lab. For years after her own children had outgrown it, she kept a playpen in her office.

Her investigations into just how we learn, and the parallels to the deep-learning methods of AI, continues. "It turns out to be much easier to simulate the reasoning of a highly trained adult expert than to mimic the ordinary learning of every baby," she says. "Computation is still the best—indeed, the only—scientific explanation we have of how a physical object like a brain can act intelligently. But, at least for now, we have almost no idea at all how the sort of creativity we see in children is possible."

HOUSE_OVERSIGHT_016954

AIs VERSUS FOUR-YEAR-OLDS
Alison Gopnik

***Alison Gopnik** is a developmental psychologist at UC Berkeley; her books include* The Philosophical Baby *and, most recently,* The Gardener and the Carpenter: What the New Science of Child Development Tells Us About the Relationship Between Parents and Children.

Everyone's heard about the new advances in artificial intelligence, and especially machine learning. You've also heard utopian or apocalyptic predictions about what those advances mean. They have been taken to presage either immortality or the end of the world, and a lot has been written about both those possibilities. But the most sophisticated AIs are still far from being able to solve problems that human four-year-olds accomplish with ease. In spite of the impressive name, artificial intelligence largely consists of techniques to detect statistical patterns in large data sets. There is much more to human learning.

How can we possibly know so much about the world around us? We learn an enormous amount even when we are small children; four-year-olds already know about plants and animals and machines; desires, beliefs, and emotions; even dinosaurs and spaceships.

Science has extended our knowledge about the world to the unimaginably large and the infinitesimally small, to the edge of the universe and the beginning of time. And we use that knowledge to make new classifications and predictions, imagine new possibilities, and make new things happen in the world. But all that reaches any of us from the world is a stream of photons hitting our retinas and disturbances of air at our eardrums. How do we learn so much about the world when the evidence we have is so limited? And how do we do all this with the few pounds of grey goo that sits behind our eyes?

The best answer so far is that our brains perform computations on the concrete, particular, messy data arriving at our senses, and those computations yield accurate representations of the world. The representations seem to be structured, abstract, and hierarchical; they include the perception of three-dimensional objects, the grammars that underlie language, and mental capacities like "theory of mind," which lets us understand what other people think. Those representations allow us to make a wide range of new predictions and imagine many new possibilities in a distinctively creative human way.

This kind of learning isn't the only kind of intelligence, but it's a particularly important one for human beings. And it's the kind of intelligence that is a specialty of young children. Although children are dramatically bad at planning and decision making, they are the best learners in the universe. Much of the process of turning data into theories happens before we are five.

Since Aristotle and Plato, there have been two basic ways of addressing the problem of how we know what we know, and they are still the main approaches in machine learning. Aristotle approached the problem from the bottom up: Start with senses—the stream of photons and air vibrations (or the pixels or sound samples of a digital image or recording)—and see if you can extract patterns from them. This approach was carried further by such classic associationists as philosophers David Hume

HOUSE_OVERSIGHT_016955

and J. S. Mill and later by behavioral psychologists, like Pavlov and B. F. Skinner. On this view, the abstractness and hierarchical structure of representations is something of an illusion, or at least an epiphenomenon. All the work can be done by association and pattern detection—especially if there are enough data.

Over time, there has been a seesaw between this bottom-up approach to the mystery of learning and Plato's alternative, top-down one. Maybe we get abstract knowledge from concrete data because we already know a lot, and especially because we already have an array of basic abstract concepts, thanks to evolution. Like scientists, we can use those concepts to formulate hypotheses about the world. Then, instead of trying to extract patterns from the raw data, we can make predictions about what the data should look like if those hypotheses are right. Along with Plato, such "rationalist" philosophers and psychologists as Descartes and Noam Chomsky took this approach.

Here's an everyday example that illustrates the difference between the two methods: solving the spam plague. The data consist of a long unsorted list of messages in your in-box. The reality is that some of these messages are genuine and some are spam. How can you use the data to discriminate between them?

Consider the bottom-up technique first. You notice that the spam messages tend to have particular features: a long list of addressees, origins in Nigeria, references to million-dollar prizes or Viagra. The trouble is that perfectly useful messages might have these features, too. If you looked at enough examples of spam and non-spam emails, you might see not only that spam emails tend to have those features but that the features tend to go together in particular ways (Nigeria plus a million dollars spells trouble). In fact, there might be some subtle higher-level correlations that discriminate the spam messages from the useful ones—a particular pattern of misspellings and IP addresses, say. If you detect those patterns, you can filter out the spam.

The bottom-up machine-learning techniques do just this. The learner gets millions of examples, each with some set of features and each labeled as spam (or some other category) or not. The computer can extract the pattern of features that distinguishes the two, even if it's quite subtle.

How about the top-down approach? I get an email from the editor of the *Journal of Clinical Biology*. It refers to one of my papers and says that they would like to publish an article by me. No Nigeria, no Viagra, no million dollars; the email doesn't have any of the features of spam. But by using what I already know, and thinking in an abstract way about the process that produces spam, I can figure out that this email is suspicious.

(1) I know that spammers try to extract money from people by appealing to human greed.

(2) I also know that legitimate "open access" journals have started covering their costs by charging authors instead of subscribers, and that I don't practice anything like clinical biology.

Put all that together and I can produce a good new hypothesis about where that email came from. It's designed to sucker academics into paying to "publish" an article in a fake journal. The email was a result of the same dubious process as the other spam emails, even though it looked nothing like them. I can draw this conclusion from just one example, and I can go on to test my hypothesis further, beyond anything in the email itself, by googling the "editor."

HOUSE_OVERSIGHT_016956

In computer terms, I started out with a "generative model" that includes abstract concepts like greed and deception and describes the process that produces email scams. That lets me recognize the classic Nigerian email spam, but it also lets me imagine many different kinds of possible spam. When I get the journal email, I can work backward: "This seems like just the kind of mail that would come out of a spam-generating process."

The new excitement about AI comes because AI researchers have recently produced powerful and effective versions of both these learning methods. But there is nothing profoundly new about the methods themselves.

Bottom-up Deep Learning

In the 1980s, computer scientists devised an ingenious way to get computers to detect patterns in data: connectionist, or neural-network, architecture (the "neural" part was, and still is, metaphorical). The approach fell into the doldrums in the '90s but has recently been revived with powerful "deep-learning" methods like Google's DeepMind.

For example, you can give a deep-learning program a bunch of Internet images labeled "cat," others labeled "house," and so on. The program can detect the patterns differentiating the two sets of images and use that information to label new images correctly. Some kinds of machine learning, called unsupervised learning, can detect patterns in data with no labels at all; they simply look for clusters of features—what scientists call a factor analysis. In the deep-learning machines, these processes are repeated at different levels. Some programs can even discover relevant features from the raw data of pixels or sounds; the computer might begin by detecting the patterns in the raw image that correspond to edges and lines and then find the patterns in those patterns that correspond to faces, and so on.

Another bottom-up technique with a long history is reinforcement learning. In the 1950s, B. F. Skinner, building on the work of John Watson, famously programmed pigeons to perform elaborate actions—even guiding air-launched missiles to their targets (a disturbing echo of recent AI) by giving them a particular schedule of rewards and punishments. The essential idea was that actions that were rewarded would be repeated and those that were punished would not, until the desired behavior was achieved. Even in Skinner's day, this simple process, repeated over and over, could lead to complex behavior. Computers are designed to perform simple operations over and over on a scale that dwarfs human imagination, and computational systems can learn remarkably complex skills in this way.

For example, researchers at Google's DeepMind used a combination of deep learning and reinforcement learning to teach a computer to play Atari video games. The computer knew nothing about how the games worked. It began by acting randomly and got information only about what the screen looked like at each moment and how well it had scored. Deep learning helped interpret the features on the screen, and reinforcement learning rewarded the system for higher scores. The computer got very good at playing several of the games, but it also completely bombed on others just as easy for humans to master.

A similar combination of deep learning and reinforcement learning has enabled the success of DeepMind's AlphaZero, a program that managed to beat human players at both chess and Go, equipped only with a basic knowledge of the rules of the game and

HOUSE_OVERSIGHT_016957

some planning capacities. AlphaZero has another interesting feature: It works by playing hundreds of millions of games against itself. As it does so, it prunes mistakes that led to losses, and it repeats and elaborates on strategies that led to wins. Such systems, and others involving techniques called generative adversarial networks, generate data as well as observing data.

When you have the computational power to apply those techniques to very large data sets or millions of email messages, Instagram images, or voice recordings, you can solve problems that seemed very difficult before. That's the source of much of the excitement in computer science. But it's worth remembering that those problems—like recognizing that an image is a cat or a spoken word is "Siri"—are trivial for a human toddler. One of the most interesting discoveries of computer science is that problems that are easy for us (like identifying cats) are hard for computers—much harder than playing chess or Go. Computers need millions of examples to categorize objects that we can categorize with just a few. These bottom-up systems can generalize to new examples; they can label a new image as a "cat" fairly accurately, over all. But they do so in ways quite different from how humans generalize. Some images almost identical to a cat image won't be identified by us as cats at all. Others that look like a random blur will be.

Top-down Bayesian Models

The top-down approach played a big role in early AI, and in the 2000s it, too, experienced a revival, in the form of probabilistic, or Bayesian, generative models.

The early attempts to use this approach faced two kinds of problems. First, most patterns of evidence might in principle be explained by many different hypotheses: It's possible that my journal email message is genuine, it just doesn't seem likely. Second, where do the concepts that the generative models use come from in the first place? Plato and Chomsky said you were born with them. But how can we explain how we learn the latest concepts of science? Or how even young children understand about dinosaurs and rocket ships?

Bayesian models combine generative models and hypothesis testing with probability theory, and they address these two problems. A Bayesian model lets you calculate just how likely it is that a particular hypothesis is true, given the data. And by making small but systematic tweaks to the models we already have, and testing them against the data, we can sometimes make new concepts and models from old ones. But these advantages are offset by other problems. The Bayesian techniques can help you choose which of two hypotheses is more likely, but there are almost always an enormous number of possible hypotheses, and no system can efficiently consider them all. How do you decide which hypotheses are worth testing in the first place?

Brenden Lake at NYU and colleagues have used these kinds of top-down methods to solve another problem that's easy for people but extremely difficult for computers: recognizing unfamiliar handwritten characters. Look at a character on a Japanese scroll. Even if you've never seen it before, you can probably tell if it's similar to or different from a character on another Japanese scroll. You can probably draw it and even design a fake Japanese character based on the one you see—one that will look quite different from a Korean or Russian character. [37]

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[37] Brenden M. Lake, Ruslan Salakhutdinov & Joshua B. Tenenbaum, "Human-level concept learning through probabilistic program induction," *Science,* 350:6266, pp. 1332-38 (2015).

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The bottom-up method for recognizing handwritten characters is to give the computer thousands of examples of each one and let it pull out the salient features. Instead, Lake *et al.* gave the program a general model of how you draw a character: A stroke goes either right or left; after you finish one, you start another; and so on. When the program saw a particular character, it could infer the sequence of strokes that were most likely to have led to it—just as I inferred that the spam process led to my dubious email. Then it could judge whether a new character was likely to result from that sequence or from a different one, and it could produce a similar set of strokes itself. The program worked much better than a deep-learning program applied to exactly the same data, and it closely mirrored the performance of human beings.

These two approaches to machine learning have complementary strengths and weaknesses. In the bottom-up approach, the program doesn't need much knowledge to begin with, but it needs a great deal of data, and it can generalize only in a limited way. In the top-down approach, the program can learn from just a few examples and make much broader and more varied generalizations, but you need to build much more into it to begin with. A number of investigators are currently trying to combine the two approaches, using deep learning to implement Bayesian inference.

The recent success of AI is partly the result of extensions of those old ideas. But it has more to do with the fact that, thanks to the Internet, we have much more data, and thanks to Moore's Law we have much more computational power to apply to that data. Moreover, an unappreciated fact is that the data we do have has already been sorted and processed by human beings. The cat pictures posted to the Web are canonical cat pictures—pictures that humans have already chosen as "good" pictures. Google Translate works because it takes advantage of millions of human translations and generalizes them to a new piece of text, rather than genuinely understanding the sentences themselves.

But the truly remarkable thing about human children is that they somehow combine the best features of each approach and then go way beyond them. Over the past fifteen years, developmentalists have been exploring the way children learn structure from data. Four-year-olds can learn by taking just one or two examples of data, as a top-down system does, and generalizing to very different concepts. But they can also learn new concepts and models from the data itself, as a bottom-up system does.

For example, in our lab we give young children a "blicket detector"—a new machine to figure out, one they've never seen before. It's a box that lights up and plays music when you put certain objects on it but not others. We give children just one or two examples of how the machine works, showing them that, say, two red blocks make it go, while a green-and-yellow combination doesn't. Even eighteen-month-olds immediately figure out the general principle that the two objects have to be the same to make it go, and they generalize that principle to new examples: For instance, they will choose two objects that have the same *shape* to make the machine work. In other experiments, we've shown that children can even figure out that some hidden invisible property makes the machine go, or that the machine works on some abstract logical principle.[38]

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[38] A. Gopnik, T. Griffiths & C. Lucas, "When younger learners can be better (or at least more open-minded) than older ones," *Curr. Dir. Psychol. Sci.,* 24:2, 87-92 (2015).

HOUSE_OVERSIGHT_016959

You can show this in children's everyday learning, too. Young children rapidly learn abstract intuitive theories of biology, physics, and psychology in much the way adult scientists do, even with relatively little data.

The remarkable machine-learning accomplishments of the recent AI systems, both bottom-up and top-down, take place in a narrow and well-defined space of hypotheses and concepts—a precise set of game pieces and moves, a predetermined set of images. In contrast, children and scientists alike sometimes change their concepts in radical ways, performing paradigm shifts rather than simply tweaking the concepts they already have.

Four-year-olds can immediately recognize cats and understand words, but they can also make creative and surprising new inferences that go far beyond their experience. My own grandson recently explained, for example, that if an adult wants to become a child again, he should try not eating any healthy vegetables, since healthy vegetables make a child grow into an adult. This kind of hypothesis, a plausible one that no grown-up would ever entertain, is characteristic of young children. In fact, my colleagues and I have shown systematically that preschoolers are better at coming up with unlikely hypotheses than older children and adults.[39] We have almost no idea how this kind of creative learning and innovation is possible.

Looking at what children do, though, may give programmers useful hints about directions for computer learning. Two features of children's learning are especially striking. Children are active learners; they don't just passively soak up data like AIs do. Just as scientists experiment, children are intrinsically motivated to extract information from the world around them through their endless play and exploration. Recent studies show that this exploration is more systematic than it looks and is well-adapted to find persuasive evidence to support hypothesis formation and theory choice.[40] Building curiosity into machines and allowing them to actively interact with the world might be a route to more realistic and wide-ranging learning.

Second, children, unlike existing AIs, are social and cultural learners. Humans don't learn in isolation but avail themselves of the accumulated wisdom of past generations. Recent studies show that even preschoolers learn through imitation and by listening to the testimony of others. But they don't simply passively obey their teachers. Instead they take in information from others in a remarkably subtle and sensitive way, making complex inferences about where the information comes from and how trustworthy it is and systematically integrating their own experiences with what they are hearing.[41]

"Artificial intelligence" and "machine learning" sound scary. And in some ways they are. These systems are being used to control weapons, for example, and we really should be scared about that. Still, natural stupidity can wreak far more havoc than artificial intelligence; we humans will need to be much smarter than we have been in the past to properly regulate the new technologies. But there is not much basis for either the apocalyptic or the utopian visions of AIs replacing humans. Until we solve the basic

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[39] A. Gopnik, *et al.,* "Changes in cognitive flexibility and hypothesis search across human life history from childhood to adolescence to adulthood," *Proc. Nat. Acad. Sci.,* 114:30, 7892-99 (2017).

[40] L. Schulz, "The origins of Inquiry: Inductive inference and exploration in early childhood," *Trends Cog. Sci.,* 16:7, 382-89 (2012).

[41] A. Gopnik, *The Gardener and the Carpenter* (New York: Farrar, Straus & Giroux, 2016), chaps. 4 and 5.

HOUSE_OVERSIGHT_016960

paradox of learning, the best artificial intelligences will be unable to compete with the average human four-year-old.

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Peter Galison's *focus as a science historian is—speaking roughly—on the intersection of theory with experiment.*

"For quite a number of years I have been guided in my work by the odd confrontation of abstract ideas and extremely concrete objects," he once told me, in explaining how he thinks about what he does. At the Washington, Connecticut, meeting he discussed the Cold War tension between engineers (like Wiener) and the administrators of the Manhattan Project (like Oppenheimer: "When [Wiener] warns about the dangers of cybernetics, in part he's trying to compete against the kind of portentous language that people like Oppenheimer [used]: 'When I saw the explosion at Trinity, I thought of the Bhagavad Gita—I am death, destroyer of worlds.' That sense, that physics could stand and speak to the nature of the universe and airforce policy, was repellent and seductive. In a way, you can see that over and over again in the last decades—nanosciences, recombinant DNA, cybernetics: 'I stand reporting to you on the science that has the promise of salvation and the danger of annihilation—and you should pay attention, because this could kill you.' It's a very seductive narrative, and it's repeated in artificial intelligence and robotics."

As a twenty-four-year old, when I first encountered Wiener's ideas and met his colleagues at the MIT meeting I describe in the book's Introduction, I was hardly interested in Wiener's warnings or admonitions. What drove my curiosity was the stark, radical nature of his view of life, based on the mathematical theory of communications in which the message was nonlinear: According to Wiener, "new concepts of communication and control involved a new interpretation of man, of man's knowledge of the universe, and of society." And that led to my first book, which took information theory—the mathematical theory of communications—as a model for all human experience.

In a recent conversation, Peter told me he was beginning to write a book—about building, crashing, and thinking—that considers the black-box nature of cybernetics and how it represents what he thinks of as "the fundamental transformation of learning, machine learning, cybernetics, and the self."

HOUSE_OVERSIGHT_016962

ALGORISTS DREAM OF OBJECTIVITY
Peter Galison

Peter Galison *is a science historian, Joseph Pellegrino University Professor and co-founder of the Black Hole Initiative at Harvard University, and the author of* Einstein's Clocks and Poincaré's Maps: Empires of Time.

In his second-best book, the great medieval mathematician al-Khwarizmi described the new place-based Indian form of arithmetic. His name, soon sonically linked to "algorismus" (in late medieval Latin) came to designate procedures acting upon numbers—eventually wending its way through "algorithm," (on the model of "logarithm"), into French and on into English. But I like the idea of a modern algorist, even if my spellcheck does not. I mean by it someone profoundly suspicious of the intervention of human judgment, someone who takes that judgment to violate the fundamental norms of what it is to be objective (and therefore scientific).

Near the end of the 20th century, a paper by two University of Minnesota psychologists summarized a vast literature that had long roiled the waters of prediction. One side, they judged, had for all too long held resolutely—and ultimately unethically—to the "clinical method" of prediction, which prized all that was *subjective*: "informal," "in-the-head," and "impressionistic." These clinicians were people (so said the psychologists) who thought they could study their subjects with meticulous care, gather in committees, and make judgment-based predictions about criminal recidivism, college success, medical outcomes, and the like. The other side, the psychologists continued, embodied everything the clinicians did not, embracing the *objective*: "formal," "mechanical," "algorithmic." This the authors took to stand at the root of the whole triumph of post-Galilean science. Not only did science benefit from the actuarial; to a great extent, science *was* the mechanical-actuarial. Breezing through 136 studies of predictions, across domains from sentencing to psychiatry, the authors showed that in 128 of them, predictions using actuarial tables, a multiple-regression equation, or an algorithmic judgment equalled or exceeded in accuracy those using the subjective approach.

They went on to catalog seventeen fallacious justifications for clinging to the clinical. There were the self-interested foot-draggers who feared losing their jobs to machines. Others lacked the education to follow statistical arguments. One group mistrusted the formalization of mathematics; another excoriated what they took to be the actuarial "dehumanizing;" yet others said that the aim was to understand, not to predict. But whatever the motivations, the review concluded that it was downright immoral to withhold the power of the objective over the subjective, the algorithmic over expert judgment.[42]

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[42] William M. Grove & Paul E. Meehl, "Comparative efficiency of informal (subjective, impressionistic) and formal (mechanical, algorithmic) prediction procedures: The Clinical-Statistical Controversy," *Psychology, Public Policy, and Law*, 2:2, 293-323 (1996).

HOUSE_OVERSIGHT_016963

The algorist view has gained strength. Anne Milgram served as Attorney General of the State of New Jersey from 2007 to 2010. When she took office, she wanted to know who the state was arresting, charging, and jailing, and for what crimes. At the time, she reports in a later TED Talk, she could find almost no data or analytics. By imposing statistical prediction, she continues, law enforcement in Camden during her tenure was able to reduce murders by 41 percent, saving thirty-seven lives, while dropping the total crime rate by 26 percent. After joining the Arnold Foundation as its vice president for criminal justice, she established a team of data scientists and statisticians to create a risk-assessment tool; fundamentally, she construed the team's mission as deciding how to put "dangerous people" in jail while releasing the non-dangerous. "The reason for this," Milgram contended, "is the way we make decisions. Judges have the best intentions when they make these decisions about risk, but they're making them subjectively. They're like the baseball scouts twenty years ago who were using their instinct and their experience to try to decide what risk someone poses. They're being subjective, and we know what happens with subjective decision making, which is that we are often wrong." Her team established nine-hundred-plus risk factors, of which nine were most predictive. The questions, the most urgent questions, for the team were: Will a person commit a new crime? Will that person commit a violent act? Will someone come back to court? We need, concluded Milgram, an "objective measure of risk" that should be inflected by judges' judgment. We know the algorithmic statistical process works. That, she says, is "why Google is Google" and why moneyball wins games.[43]

Algorists have triumphed. We have grown accustomed to the idea that protocols and data can and should guide us in everyday action, from reminders about where we probably want to go next, to the likely occurrence of crime. By now, according to the literature, the legal, ethical, formal, and economic dimensions of algorithms are all quasi-infinite. I'd like to focus on one particular siren song of the algorithm: its promise of objectivity.

Scientific objectivity has a history. That might seem surprising. Isn't the notion—expressed above by the Minnesota psychologists—right? Isn't objectivity co-extensive with science itself? Here it's worth stepping back to reflect on all the epistemic virtues we might value in scientific work. Quantification seems like a good thing to have; so, too, do prediction, explanation, unification, precision, accuracy, certainty, and pedagogical utility. In the best of all possible worlds these epistemic virtues would all pull in the same direction. But they do not—not any more than our ethical virtues necessarily coincide. Rewarding people according to their need may very well conflict with rewarding people according to their ability. Equality, fairness, meritocracy—ethics, in a sense, is all about the adjudication of conflicting goods. Too often we forget that this conflict exists in science, too. Design an instrument to be as sensitive as possible and it often fluctuates wildly, making repetition of a measurement impossible.

"Scientific objectivity" entered both the practice and the nomenclature of science after the first third of the 19th century. One sees this clearly in the scientific atlases that provided scientists with the basic objects of their specialty: There were (and are) atlases of the hand, atlases of the skull, atlases of clouds, crystals, flowers, bubble-chamber pictures, nuclear emulsions, and diseases of the eye. In the 18th century, it was obvious

[43] TED Talk, January 2014, https://www.ted.com/speakers/anne_milgram.

HOUSE_OVERSIGHT_016964

that you would not depict this particular, sun-scorched, caterpillar-chewed clover found outside your house in an atlas. No, you aimed—if you were a genius natural philosopher like Goethe, Albinus, or Cheselden—to observe nature but then to perfect the object in question, to abstract it visually to the ideal. Take a skeleton, view it through a camera lucida, draw it with care. Then correct the "imperfections." The advantage of this parting of the curtains of mere experience was clear: It provided a universal guide, one not attached to the vagaries of individual variation.

As the sciences grew in scope, and scientists grew in number, the downside of idealization became clearer. It was one thing to have Goethe depict the "ur-plant" or "ur-insect." It was quite another to have a myriad of different scientists each fixing their images in different and sometimes contradictory ways. Gradually, from around the 1830s forward, one begins to see something new: a claim that the image making was done with a minimum of human intervention, that protocols were followed. This could mean tracing a leaf with a pencil or pressing it into ink that was transferred to the page. It meant, too, that one suddenly was proud of depicting the view through a microscope of a natural object even with its imperfections. This was a radical idea: snowflakes shown without perfect hexagonal symmetry, color distortion near the edge of a microscope lens, tissue torn around the edges in the process of its preparation.

Scientific objectivity came to mean that our representations of things were executed by holding back from intervention—even if it meant reproducing the yellow color near the edge of the image under the microscope, despite the fact that the scientist *knew* that the discoloration was from the lens, not a feature of the object of inquiry. The advantage of objectivity was clear: It superseded the desire to see a theory realized or a generally accepted view confirmed. But objectivity came at a cost. You lost that precise, easily teachable, colored, full depth-of-field, artist's rendition of a dissected corpse. You got a blurry, bad depth-of-field, black-and-white photograph that no medical student (nor even many medical colleagues) could use to learn and compare cases. Still, for a long stretch of the 19th century, the virtue of hands-off, self-restraining objectivity was on the rise.

Starting in the 1930s, the hardline scientific objectivity in scientific representation began running into trouble. In cataloging stellar spectra, for example, no algorithm could compete with highly trained observers who could sort them with far greater accuracy and replicability than any purely rule-following procedure. By the late 1940s, doctors had begun learning how to read electroencephalograms. Expert judgment was needed to sort out different kinds of seizure readings, while none of the early attempts to use frequency analysis could match that judgment. Solar magnetograms—mapping the magnetic fields across the sun—required the trained expert to pry the real signal from artifacts that emerged from the measuring instruments. Even particle physicists recognized that they could not program a computer to sort certain kinds of tracks into the right bins; judgment, trained judgment, was needed.

There should be no confusion here: This was not a return to the invoked genius of an 18th-century idealizer. No one thought you could train to be a Goethe who alone among scientists could pick out the universal, ideal form of a plant, insect, or cloud. Expertise could be learned—you could take a course to learn to make expert judgments about electroencephalograms, stellar spectra, or bubble-chamber tracks; alas, no one has ever thought you could take a course that would lead to the mastery of exceptional

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insight. There can be no royal road to becoming Goethe. In scientific atlas after scientific atlas, one sees explicit argument that "subjective" factors had to be part of the scientific work needed to create, classify, and interpret scientific images.

What we see in so many of the algorists' claims is a tremendous desire to find scientific objectivity precisely by abandoning judgment and relying on mechanical procedures—in the name of scientific objectivity. Many American states have legislated the use of sentencing and parole algorithms. Better a machine, it is argued, than the vagaries of a judge's judgment.

So here is a warning from the sciences. Hands-off algorithmic proceduralism did indeed have its heyday in the 19th century, and of course still plays a role in many of the most successful technical and scientific endeavors. But the idea that mechanical objectivity, construed as binding self-restraint, follows a simple, monotonic curve increasing from the bad impressionistic clinician to the good externalized actuary simply does not answer to the more interesting and nuanced history of the sciences.

There is a more important lesson from the sciences. Mechanical objectivity is a scientific virtue among others, and the hard sciences learned that lesson often. We must do the same in the legal and social scientific domains. What happens, for example, when the secret, proprietary algorithm sends one person to prison for ten years and another for five years, for the same crime? Rebecca Wexler, visiting fellow at the Yale Law School Information Society Project, has explored that question, and the tremendous cost that trade-secret algorithms impose on the possibility of a fair legal defense.[44] Indeed, for a variety of reasons, law enforcement may not want to share the algorithms used to make DNA, chemical, or fingerprint identifications, which puts the defense in a much weakened position to make its case. In the courtroom, objectivity, trade secrets, and judicial transparency may pull in opposite directions. It reminds me of a moment in the history of physics. Just after World War II, the film giants Kodak and Ilford perfected a film that could be used to reveal the interactions and decays of elementary particles. The physicists were thrilled, of course—until the film companies told them that the composition of the film was a trade secret, so the scientists would never gain complete confidence that they understood the processes they were studying. Proving things with unopenable black boxes can be a dangerous game for scientists, and doubly so for criminal justice.

Other critics have underscored how perilous it is to rely on an accused (or convicted) person's address or other variables that can easily become, inside the black box of algorithmic sentencing, a proxy for race. By dint of everyday experience, we have grown used to the fact that airport security is different for children under the age of twelve and adults over the age of seventy-five. What factors do we want the algorists to have in their often hidden procedures? Education? Income? Employment history? What one has read, watched, visited, or bought? Prior contact with law enforcement? How do we want algorists to weight those factors? Predictive analytics predicated on mechanical objectivity comes at a price. Sometimes it may be a price worth paying; sometimes that price would be devastating for the just society we want to have.

More generally, as the convergence of algorithms and Big Data governs a greater and greater part of our lives, it would be well worth keeping in mind these two lessons

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[44] Rebecca Wexler, "Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System," 70 *Stanford Law Review*, XXX (2018).

HOUSE_OVERSIGHT_016966

from the history of the sciences: Judgment is not the discarded husk of a now pure objectivity of self-restraint. And mechanical objectivity is a virtue competing among others, not the defining essence of the scientific enterprise. They are lessons to bear in mind, even if algorists dream of objectivity.

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In the past decade, genetic engineering has caught up with computer science with regard to how new scientific initiatives are shaping our lives. Genetic engineer **George Church**, *a pioneer of the revolution in reading and writing biology, is central to this new landscape of ideas. He thinks of the body as an operating system, with engineers taking the place of traditional biologists in retooling stripped-down components of organisms (from atoms to organs) in much the same vein as in the late 1970s, when electrical engineers were working their way to the first personal computer by assembling circuit boards, hard drives, monitors, etc. George created and is director of the Personal Genome Project, which provides the world's only open-access information on human genomic, environmental, and trait data (GET) and sparked the growing DNA ancestry industry.*

He was instrumental in laying the groundwork for President Obama's 2013 BRAIN (Brain Research through Advancing Innovative Neurotechnologies) Initiative—in aid of improving the brains of human beings to the point where, for much of what sustains us, we might not need the help of (potentially dicey) AIs. "It could be that some of the BRAIN Initiative projects allow us to build human brains that are more consistent with our ethics and capable of doing advanced tasks like artificial intelligence," George has said. "The safest path by far is getting humans to do all the tasks that they would like to delegate to machines, but we're not yet firmly on that super-safe path."

More recently, his crucially important pioneering use of the enzyme CRISPR (as well as methods better than CRISPR) to edit the genes of human cells is sometimes missed by the media in the telling of the CRISPR origins story.

George's attitude toward future forms of artificial general intelligence is friendly, as evinced in the essay that follows. At the same time, he never loses sight of the AI-safety issue. On that subject, he recently remarked: "The main risk in AI, to my mind, is not so much whether we can mathematically understand what they're thinking; it's whether we're capable of teaching them ethical behavior. We're barely capable of teaching each other ethical behavior."

HOUSE_OVERSIGHT_016968

THE RIGHTS OF MACHINES
George M. Church

George M. Church *is Robert Winthrop Professor of Genetics at Harvard Medical School; Professor of Health Sciences and Technology, Harvard-MIT; and co-author (with Ed Regis) of* Regenesis: How Synthetic Biology Will Reinvent Nature and Ourselves.

In 1950, Norbert Wiener's *The Human Use of Human Beings* was at the cutting edge of vision and speculation in proclaiming that

> the machine like the djinnee, which can learn and can make decisions on the basis of its learning, will in no way be obliged to make such decisions as we should have made, or will be acceptable to us. . . . Whether we entrust our decisions to machines of metal, or to those machines of flesh and blood which are bureaus and vast laboratories and armies and corporations, . . . [t]he hour is very late, and the choice of good and evil knocks at our door.

But this was his book's denouement, and it has left us hanging now for sixty-eight years, lacking not only prescriptions and proscriptions but even a well-articulated "problem statement." We have since seen similar warnings about the threat of our machines, even in the form of outreach to the masses, via films like *Colossus: The Forbin Project* (1970), *The Terminator* (1984), *The Matrix* (1999), and *Ex Machina* (2015). But now the time is ripe for a major update, with fresh, new perspectives—notably focused on generalizations of our "human" rights and our existential needs.

Concern has tended to focus on "us versus them [robots]" or "grey goo [nanotech]" or "monocultures of clones [bio]." To extrapolate current trends: What if we could make or grow almost anything and engineer any level of safety and efficacy desired? Any thinking being (made of any arrangement of atoms) could have access to any technology.

Probably we should be less concerned about us-versus-them and more concerned about the rights of all sentients in the face of an emerging unprecedented diversity of minds. We should be harnessing this diversity to minimize global existential risks, like supervolcanoes and asteroids.

But should we say "should"? (Disclaimer: In this and many other cases, when a technologist describes a societal path that "could," "would," or "should" happen, this doesn't necessarily equate to the preferences of the author. It could reflect warning, uncertainty, and/or detached assessment.) Roboticist Gianmarco Veruggio and others have raised issues of roboethics since 2002; the U.K. Department of Trade and Industry and the RAND spin-off Institute for the Future have raised issues of robot rights since 2006.

"Is versus ought"

It is commonplace to say that science concerns "is," not "ought." Stephen Jay Gould's "non-overlapping magisteria" view argues that facts must be completely distinct from values. Similarly, the 1999 document *Science and Creationism* from the U.S. National Academy of Sciences noted that "science and religion occupy two separate realms." This

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division has been critiqued by evolutionary biologist Richard Dawkins, myself, and others. We can discuss "should" if framed as "we should do X in order to achieve Y." Which Y should be a high priority is not necessarily settled by democratic vote but might be settled by Darwinian vote. Value systems and religions wax and wane, diversify, diverge, and merge just as living species do: subject to selection. The ultimate "value" (the "should") is survival of genes and memes.

Few religions say that there is no connection between our physical being and the spiritual world. Miracles are documented. Conflicts between Church doctrine and Galileo and Darwin are eventually resolved. Faith and ethics are widespread in our species and can be studied using scientific methods, including but not limited to fMRI, psychoactive drugs, questionnaires, et cetera.

Very practically, we have to address the ethical rules that should be built in, learned, or probabilistically chosen for increasingly intelligent and diverse machines. We have a whole series of trolley problems. At what number of people in line for death should the computer decide to shift a moving trolley to one person? Ultimately this might be a deep-learning problem—one in which huge databases of facts and contingencies can be taken into account, some seemingly far from the ethics at hand.

For example, the computer might infer that the person who would escape death if the trolley is left alone is a convicted terrorist recidivist loaded up with doomsday pathogens, or a saintly POTUS—or part of a much more elaborate chain of events in detailed alternative realities. If one of these problem descriptions seems paradoxical or illogical, it may be that the authors of the trolley problem have adjusted the weights on each sides of the balance such that hesitant indecision is inevitable.

Alternatively, one can use misdirection to rig the system, such that the error modes are not at the level of attention. For example, in the Trolley Problem, the real ethical decision was made years earlier when pedestrians were given access to the rails—or even before that, when we voted to spend more on entertainment than on public safety. Questions that at first seem alien and troubling, like "Who owns the new minds, and who pays for their mistakes?" are similar to well-established laws about who owns and pays for the sins of a corporation.

The Slippery Slopes

We can (over)simplify ethics by claiming that certain scenarios won't happen. The technical challenges or the bright red lines that cannot be crossed are reassuring, but the reality is that once the benefits seem to outweigh the risks (even briefly and barely), the red lines shift. Just before Louise Brown's birth in 1978, many people were worried that she "would turn out to be a little monster, in some way, shape or form, deformed, something wrong with her."[45] Few would hold this view of in-vitro fertilization today.

What technologies are lubricating the slope toward multiplex sentience? It is not merely deep machine-learning algorithms with Big Iron. We have engineered rodents to be significantly better at a variety of cognitive tasks as well as to exhibit other relevant traits, such as persistence and low anxiety. Will this be applicable to animals that are already at the door of humanlike intelligence? Several show self-recognition in a mirror test—chimpanzees, bonobos, orangutans, some dolphins and whales, and magpies.

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[45] "Then, Doctors 'All Anxious' About Test-tube Baby" http://edition.cnn.com/2003/HEALTH/parenting/07/25/cnna.copperman/

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Even the bright red line for human manipulation of human beings shows many signs of moving or breaking completely. More than 2,300 approved clinical trials for gene therapy are in progress worldwide. A major medical goal is the treatment or prevention of cognitive decline, especially in light of our rapidly aging global demographic. Some treatments of cognitive decline will include cognitive enhancements (drugs, genes, cells, transplants, implants, and so on). These will be used off-label. The rules of athletic competition (e.g., banning augmentation with steroids or erythropoietin) do not apply to intellectual competition in the real world. Every bit of progress on cognitive decline is in play for off-label use.

Another frontier of the human use of humans is "brain organoids." We can now accelerate developmental biology. Processes that normally take months can happen in four days in the lab using the right recipes of transcription factors. We can make brains that, with increasing fidelity, recapitulate the differences between people born with aberrant cognitive abilities (e.g., microcephaly). Proper vasculature (veins, arteries, and capillaries) missing from earlier successes are now added, enabling brain organoids to surpass the former sub-microliter limit to possibly exceed the 1.2-liter size of modern human brains (or even the 5-liter elephant or 8-liter sperm whale brains).

Conventional Computers versus Bio-electronic Hybrids

As Moore's Law miniaturization approaches its next speed bump (surely not a solid wall), we see the limits of the stochastics of dopant atoms in silicon slabs and the limits of beam-fabrication methods at around 10-nanometer feature size. Power (energy consumption) issues are also apparent: The great Watson, winner of *Jeopardy!*, used 85,000 watts real time, while the human brains were using 20 watts each. To be fair, the human body needs 100 watts to operate and twenty years to build, hence about 6 trillion joules of energy to "manufacture" a mature human brain. The cost of manufacturing Watson-scale computing is similar. So why aren't humans displacing computers?

For one, the *Jeopardy!* contestants' brains were doing far more than information retrieval—much of which would be considered mere distractions by Watson (e.g., cerebellar control of smiling). Other parts allow leaping out of the box with transcendence unfathomable by Watson, such as what we see in Einstein's five *annus mirabilis* papers of 1905. Also, humans consume more energy than the minimum (100 W) required for life and reproduction. People in India use an average of 700 W per person; it's 10,000 W in the U.S. Both are still less than the 85,000 watts Watson uses. Computers can become more like us via neuromorphic computing, possibly a thousandfold. But human brains could get more efficient, too. The organoid brain-in-a-bottle could get closer to the 20 W limit. The idiosyncratic advantages of computers for math, storage, and search, faculties of limited use to our ancestors, could be designed and evolved anew in labs.

Facebook, the National Security Agency, and others are constructing exabyte-scale storage facilities at more than a megawatt and four hectares, while DNA can store that amount in a milligram. Clearly, DNA is not a mature storage technology, but with Microsoft and Technicolor doubling down on it, we would be wise to pay attention. The main reason for the 6 trillion joules of energy required to get a productive human mind is the twenty years required for training.

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Even though a supercomputer can "train" a clone of zemself in seconds, the energy cost of producing a mature silicon clone is comparable. Engineering (*Homo*) prodigies might make a small impact on this slow process, but speeding up development and implanting extensive memory (as DNA-exabytes or other means) could reduce duplication time of a bio-computer to close to the doubling time of cells (ranging from eleven minutes to twenty-four hours). The point is that while we may not know what ratio of bio/homo/nano/robo hybrids will be dominant at each step of our accelerating evolution, we can aim for high levels of humane, fair, and safe treatment ("use") of one another.

Bills of Rights date back to 1689 in England. FDR proclaimed the "Four Freedoms"—freedom of speech, freedom of conscience, freedom from fear, and freedom from want. The U.N.'s Universal Declaration of Human Rights in 1948 included the right to life; the prohibition of slavery; defense of rights when violated; freedom of movement; freedom of association, thought, conscience, and religion; social, economic, and cultural rights; duties of the individual to society; and prohibition of use of rights in contravention of the purposes and principles of the United Nations.

The "universal" nature of these rights is not universally embraced and is subject to extensive critique and noncompliance. How does the emergence of non-*Homo*-intelligences affect this discussion? At a minimum, it is becoming rapidly difficult to hide behind vague intuition for ethical decisions—"I know it when I see it" (U.S. Supreme Court Justice Potter Stewart, 1964) or the "wisdom of repugnance" (aka "yuck factor," Leon Kass, 1997), or vague appeals to "common sense." As we have to deal with minds alien to us, sometimes quite literal from our viewpoint, we need to be explicit—yea, even algorithmic.

Self-driving cars, drones, stock-market transactions, NSA searches, et cetera, require rapid, pre-approved decision making. We may gain insights into many aspects of ethics that we have been trying to pin down and explain for centuries. The challenges have included conflicting priorities, as well as engrained biological, sociological, and semi-logical cognitive biases. Notably far from consensus in universal dogmas about human rights are notions of privacy and dignity, even though these influence many laws and guidelines.

Humans might want the right to march in to read (and change) the minds of computers to see why they're making decisions at odds with our (*Homo*) instincts. Is it not fair for machines to ask the same of us? We note the growth of movements toward transparency in potential financial conflicts; "open-source" software, hardware, and wetware; the Fair Access to Science and Technology Research Act (FASTR); and the Open Humans Foundation.

In his 1976 book *Computer Power and Human Reason,* Joseph Weizenbaum argued that machines should not replace *Homo* in situations requiring respect, dignity, or care, while others (author Pamela McCorduck and computer scientists like John McCarthy and Bill Hibbard) replied that machines can be more impartial, calm, and consistent and less abusive or mischievous than people in such positions.

Equality

What did the thirty-three-year-old Thomas Jefferson mean in 1776 when he wrote, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed

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by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness"? The spectrum of current humans is vast. In 1776, "Men" did not include people of color or women. Even today, humans born with congenital cognitive or behavioral issues are destined for unequal (albeit in most cases compassionate) treatment—Down syndrome, Tay-Sachs disease, Fragile X syndrome, cerebral palsy, and so on.

And as we change geographical location and mature, our unequal rights change dramatically. Embryos, infants, children, teens, adults, patients, felons, gender identities and gender preferences, the very rich and very poor—all of these face different rights and socioeconomic realities. One path to new mind-types obtaining and retaining rights similar to the most elite humans would be to keep a *Homo* component, like a human shield or figurehead monarch/CEO, signing blindly enormous technical documents, making snap financial, health, diplomatic, military, or security decisions. We will probably have great difficulty pulling the plug, modifying, or erasing (killing) a computer and its memories—especially if it has befriended humans and made spectacularly compelling pleas for survival (as all excellent researchers fighting for their lives would do).

Even Scott Adams, creator of *Dilbert*, has weighed in on this topic, supported by experiments at Eindhoven University in 2005 noting how susceptible humans are to a robot-as-victim equivalent of the Milgram experiments done at Yale beginning in 1961. Given the many rights of corporations, including ownership of property, it seems likely that other machines will obtain similar rights, and it will be a struggle to maintain inequities of selective rights along multi-axis gradients of intellect and ersatz feelings.

Radically Divergent Rules for Humans versus Nonhumans and Hybrids

The divide noted above for intra *Homo sapiens* variation in rights explodes into a riot of inequality as soon as we move to entities that overlap (or will soon) the spectrum of humanity. In Google Street View, people's faces and car license plates are blurred out. Video devices are excluded from many settings, such as courts and committee meetings. Wearable and public cameras with facial-recognition software touch taboos. Should people with hyperthymesia or photographic memories be excluded from those same settings?

Shouldn't people with prosopagnosia (face blindness) or forgetfulness be able to benefit from facial-recognition software and optical character recognition wherever they go, and if them, then why not everyone? If we all have those tools to some extent, shouldn't we all be able to benefit?

These scenarios echo Kurt Vonnegut's 1961 short story "Harrison Bergeron," in which exceptional aptitude is suppressed in deference to the mediocre lowest common denominator of society. Thought experiments like John Searle's Chinese Room and Isaac Asimov's Three Laws of Robotics all appeal to the sorts of intuitions plaguing human brains that Daniel Kahneman, Amos Tversky, and others have demonstrated. The Chinese Room experiment posits that a mind composed of mechanical and *Homo sapiens* parts cannot be conscious, no matter how competent at intelligent human (Chinese) conversation, unless a human can identify the source of the consciousness and "feel" it. Enforced preference for Asimov's First and Second Laws favor human minds over any other mind meekly present in his Third Law, of self-preservation.

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If robots don't have exactly the same consciousness as humans, then this is used as an excuse to give them different rights, analogous to arguments that other tribes or races are less than human. Do robots already show free will? Are they already self-conscious? The robots Qbo have passed the "mirror test" for self-recognition and the robots NAO have passed a related test of recognizing their own voice and inferring their internal state of being, mute or not.

For free will, we have algorithms that are neither fully deterministic nor random but aimed at nearly optimal probabilistic decision making. One could argue that this is a practical Darwinian consequence of game theory. For many (not all) games/problems, if we're totally predictable or totally random, then we tend to lose.

What is the appeal of free will anyway? Historically it gave us a way to assign blame in the context of reward and punishment on Earth or in the afterlife. The goals of punishment might include nudging the priorities of the individual to assist the survival of the species. In extreme cases, this could include imprisonment or other restrictions, if Skinnerian positive/negative reinforcement is inadequate to protect society. Clearly, such tools can apply to free will, seen broadly—to any machine whose behavior we'd like to manage.

We could argue as to whether the robot actually experiences subjective qualia for free will or self-consciousness, but the same applies to evaluating a human. How do we know that a sociopath, a coma patient, a person with Williams syndrome, or a baby has the same free will or self-consciousness as our own? And what does it matter, practically? If humans (of any sort) convincingly claim to experience consciousness, pain, faith, happiness, ambition, and/or utility to society, should we deny them rights because their hypothetical qualia are hypothetically different from ours?

The sharp red lines of prohibition, over which we supposedly will never step, increasingly seem to be short-lived and not sensible. The line between human and machines blurs, both because machines become more humanlike and humans become more machine-like—not only since we increasingly blindly follow GPS scripts, reflex tweets, and carefully crafted marketing, but also as we digest ever more insights into our brain and genetic programming mechanisms. The NIH BRAIN Initiative is developing innovative technologies and using these to map out the connections and activity of mental circuitry so as to improve electronic and synthetic neurobiological ware.

Various red lines depend on genetic exceptionalism, in which genetics is considered permanently heritable (although it is provably reversible), whereas exempt (and lethal) technologies, like cars, are for all intents and purposes irreversible due to social and economic forces. Within genetics, a red line makes us ban or avoid genetically modified foods but embrace genetically modified bacteria making insulin, or genetically modified humans—witness mitochondrial therapies approved in Europe for human adults and embryos.

The line for germline manipulation seems less sensible than the usual, practical line drawn at safety and efficacy. Marriages of two healthy carriers of the same genetic disease have a choice between no child of their own, 25-percent loss of embryos via abortion (spontaneous or induced), 80-percent loss via in-vitro fertilization, or potential zero-percent embryo loss via sperm (germline) engineering. It seems premature to declare this last option unlikely.

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For "human subject research," we refer to the 1964 Declaration of Helsinki, keeping in mind the 1932-1972 Tuskegee syphilis experiment, possibly the most infamous biomedical research study in U.S. history. In 2015, the Nonhuman Rights Project filed a lawsuit with the New York State Supreme Court on behalf of two chimpanzees kept for research by Stony Brook University. The appellate court decision was that chimps are not to be treated as legal persons since they "do not have duties and responsibilities in society," despite Jane Goodall's and others' claim that they do, and despite arguments that such a decision could be applied to children and the disabled.[46]

What prevents extension to other animals, organoids, machines, and hybrids? As we (e.g., Hawking, Musk, Tallinn, Wilczek, Tegmark) have promoted bans on "autonomous weapons," we have demonized one type of "dumb" machine, while other machines—for instance, those composed of many *Homo sapiens* voting—can be more lethal and more misguided.

Do transhumans roam the Earth already? Consider the "uncontacted peoples," such as the Sentinelese and Andamanese of India, the Korowai of Indonesia, the Mashco-Piro of Peru, the Pintupi of Australia, the Surma of Ethiopia, the Ruc of Vietnam, the Ayoreo-Totobiegosode of Paraguay, the Himba of Namibia, and dozens of tribes in Papua New Guinea. How would they or our ancestors respond? We could define "transhuman" as people and culture not comprehensible to humans living in a modern, yet un-technological culture.

Such modern Stone Age people would have great trouble understanding why we celebrate the recent LIGO gravity-wave evidence supporting the hundred-year-old general theory of relativity. They would scratch their heads as to why we have atomic clocks, or GPS satellites so we can find our way home, or why and how we have expanded our vision from a narrow optical band to the full spectrum from radio to gamma. We can move faster than any other living species; indeed, we can reach escape velocity from Earth and survive in the very cold vacuum of space.

If those characteristics (and hundreds more) don't constitute transhumanism, then what would? If we feel that the judge of transhumanism should not be fully paleo-culture humans but recent humans, then how would we ever reach transhuman status? We "recent humans" may always be capable of comprehending each new technological increment—never adequately surprised to declare arrival at a (moving) transhuman target. The science-fiction prophet William Gibson said, "The future is already here—it's just not very evenly distributed." While this underestimates the next round of "future," certainly millions of us are transhuman already—with most of us asking for more. The question "What was a human?" has already transmogrified into "What were the many kinds of transhumans?. . . And what were their rights?"

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[46] https://www.nbcnews.com/news/us-news/lawyer-denying-chimpanzees-rights-could-backfire-disabled-n734566.

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Caroline A. Jones' *interest in modern and contemporary art is enriched by a willingness to delve into the technologies involved in its production, distribution, and reception. "As an art historian, a lot of my questions are about what kind of art we can make, what kind of thought we can make, what kind of ideas we can make that could stretch the human beyond our stubborn, selfish, 'only concerned with our small group' parameters. The philosophers and philosophies I'm drawn to are those that question the Western obsession with individualism. Those are coming from so many different places, and they're reviving so many different kinds of questions and problems that were raised in the 1960s."*

She has recently turned her attention to the history of cybernetics. Her MIT course, "Automata, Automatism, Systems, Cybernetics," explores the history of the human/machine interface in terms of feedback, exploring the cultural rather than engineering uptake of this idea. She begins with primary readings by Wiener, Shannon, and Turing and then pivots from the scientists and engineers to the work and ideas of artists, feminists, postmodern theorists. Her goal: to come up with a new central paradigm of evolution that's culture-based—"communalism and interspecies symbiosis rather than survival of the fittest."

As a historian, Caroline draws a distinction between what she has termed "left cybernetics" and "right cybernetics": "What do I mean by left cybernetics? In one sense, it's a pun or a joke: the cybernetics that was 'left' behind. On another level, it's a vague political grouping connoting our Left Coast: California, Esalen, the group that Dave Kaiser calls the 'hippie physicists.' It's not an adequate term, but it's a way of recognizing that there was a group beholden to the military-industrial complex, sometimes very unhappily, who gave us the tools to critique it."

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THE ARTISTIC USE OF CYBERNETIC BEINGS

Caroline A. Jones

Caroline A. Jones *is a professor of art history in the Department of Architecture at MIT and author of* Eyesight Alone: Clement Greenberg's Modernism and the Bureaucratization of the Senses; Machine in the Studio: Constructing the Postwar American Artist; *and* The Global Work of Art.

> Cybernated art is very important, but art for cybernated life is more important.
> — *Nam June Paik, 1966*

Artificial intelligence was not what artists first wanted out of cybernetics, once Norbert Wiener's *The Human Use of Human Beings: Cybernetics and Society* came out in 1950. The range of artists who identified themselves with cybernetics in the fifties and sixties initially had little access to "thinking machines." Moreover, craft-minded engineers had already been making turtles, jugglers, and light-seeking robot babes, not giant brains. Using breadboards, copper wire, simple switches, and electronic sensors, artists followed cyberneticians in making sculptures and environments that simulated interactive sentience—analog movements and interfaces that had more to do with instinctive drives and postwar sexual politics than the automation of knowledge production. Now obscured by an ideology of a free-floating "intelligence" untethered by either hardware or flesh, AI has forgotten the early days of cybernetics' uptake by artists. Those efforts are worth revisiting; they modeled relations with what the French philosophers Gilles Deleuze and Félix Guattari have called the "machinic phylum," having to do with how humans think and feel in bodies engaged with a physical, material, emotionally stimulating, and signaling world.

Cybernetics now seems to have collapsed into an all-pervasive discourse of AI that was far from preordained. "Cybernetics," as a word, claimed postwar newness for concepts that were easily four centuries old: notions of feedback, machine damping, biological homeostasis, logical calculation, and systems thinking that had been around since the Enlightenment (boosted by the Industrial Revolution). The names in this lineage include Descartes, Leibniz, Sadi Carnot, Clausius, Maxwell, and Watt. Wiener's coinage nonetheless had profound cultural effects.[47] The ubiquity today of the prefix "cyber-" confirms the desire for a crisp signifier of the tangled relations between humans and machines. In Wiener's usage, things "cyber" simply involved "control and communication in the animal and the machine." But after the digital revolution, "cyber" moved beyond servomechanisms, feedback loops, and switches to encompass software, algorithms, and cyborgs. The work of cybernetically inclined artists concerns the emergent behaviors of life that elude AI in its current condition.

As to that original coinage, Wiener had reached back to the ancient Greek to borrow the word for "steersman" (κυβερνήτης / *kubernétés*), a masculine figure channeling power and instinct at the helm of a ship, who read the waves, judged the wind, kept a hand on the tiller, and directed the slaves as they mindlessly (mechanically) churned their oars. The Greek had already migrated into modern English via Latin, going

[47] Wiener later had to admit the earlier coinage of the word in 1834 by André-Marie Ampère, who had intended it to mean the "science of government," a concept that remained dormant until the 20th century.

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from *kuber-* to *guber*—the root of "gubernatorial" and "governor," another term for masculine control, deployed by James Watt to describe his 19th-century device for modulating a runaway steam engine. Cybernetics thus took ideas that had long analogized people and devices and generalized them to an applied science by adding that "-ics." Wiener's three c's (command, control, communication) drew on the mathematics of probability to formalize systems (whether biological or mechanical) theorized as a set of inputs of information achieving outputs of actions in an environment—a muscular, fleshy agenda often minimized in genealogies of AI.

But the etymology does little to capture the excitement felt by participants, as mathematics joined theoretical biology (Arturo Rosenblueth) and information theory (Claude Shannon, Walter Pitts, Warren McCulloch) to produce a barrage of interdisciplinary research and publications viewed as changing not just the way science was done but the way future humans would engage with the technosphere. As Wiener put it, "We have modified our environment so radically that we must now modify ourselves in order to exist."[48] The pressing question is: How are we modifying ourselves? Are we going in the right direction or have we lost our way, becoming the tools of our tools? Revisiting the early history of humanist/artists' contribution to cybernetics may help direct us toward a less perilous, more ethical future.

The year 1968 was a high-water mark of the cultural diffusion and artistic uptake of the term. In that year, the Howard Wise gallery opened its show of Wen-Ying Tsai's "Cybernetic Sculpture" in midtown Manhattan, and Polish émigré Jasia Reichardt opened her exhibition "Cybernetic Serendipity" at London's ICA. (The "Cybernetic" in her title was intended to evoke "made by or with computers," even though most of the artworks on view had no computers, as such, in their responsive circuits.) The two decades between 1948 and 1968 had seen both the fanning out of cybernetic concepts into a broader culture and the spread of computation machines themselves in a slow migration from proprietary military equipment, through the multinational corporation, to the academic lab, where access began to be granted to artists. The availability of cybernetic components—"sensor organs" (electronic eyes, motion sensors, microphones) and "effector organs" (electronic "breadboards," switches, hydraulics, pneumatics)—on the home hobbyist front rendered the computer less an "electronic brain" than an adjunct organ in a kit of parts. There was not yet a ruling metaphor of "artificial intelligence." So artists were bricoleurs of electronic bodies, interested in actions rather than calculation or cognition. There were inklings of "computer" as calculator in the drive toward *Homo rationalis*, but more in aspiration than achievement.

In light of today's digital convergence in art/science imaging tools, Reichardt's show was prophetic in its insistence on confusing the boundaries between art and what we might dub "creative applied science." According to the catalog, "no visitor to the exhibition, unless he reads all the notes relating to all the works, will know whether he is looking at something made by an artist, engineer, mathematician, or architect." So the comically dysfunctional robot by Nam June Paik, *Robot K-456* (1964), featured on the catalog's cover and described as "a female robot known for her disturbing and idiosyncratic behavior," would face off against a balletic *Colloquy of Mobiles* (1968) from second-order cybernetician Gordon Pask. Pask worked with a London theater

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[48] *The Human Use of Human Beings* (1954 edition), p. 46.

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designer to craft a spindly "male" apparatus of hinges and rods, set up to communicate with bulbous "female" fiberglass entities nearby. Whether anyone could actually map the quiddities of the program (or glean its reactionary gender theater) without reading the catalog essay is an open question. What is significant is Pask's focus on the behaviors of his automata, their interactivity, their responsiveness within an artificially modulated environment, and their "reflection" of human behaviors.

The ICA's "Cybernetic Serendipity" introduced an important paradigm: the machinic ecosystem, in which the viewer was a biological part, tasked with figuring out just what the triggers for interaction might be. The visitors in those London galleries suddenly became "cybernetic organisms"—cyborgs—since to experience the art adequately, one needed to enter a kind of symbiotic colloquy with the servomechanisms. This turn toward human-machine interactive environments as an aesthetic becomes clearer when we examine a few other artworks from the period, beginning with one constituting an early instance of emergent behavior—*Senster,* the interactive sculpture by artist/engineer Edward Ihnatowicz (1970), celebrated by medical robotics engineer Alex Zivanovic, editor of a Web site devoted to Ihnatowicz's little-known career, as "one of the first computer controlled interactive robotic works of art." Here, "the computer" makes its entry (albeit a twelve-bit, limited device). But rather than "intelligence," Ihnatowicz sought to make an avatar of affective behavior. Key to *Senster's* uncanny success was the programming with which Ihnatowicz constrained the fifteen-foot-long hydraulic apparatus (its hinge design and looming appearance inspired by a lobster claw) to convey shyness in responding to humans in its proximity. *Senster's* sound channels and motion sensors were set to recoil at loud noises and sudden aggressive movements. Only those humans willing to speak softly and modulate their gestures would be rewarded by *Senster's* quiet, inquisitive approach—an experience that became real for Ihnatowicz himself when he first assembled the program and the machine turned to him solicitously after he'd cleared his throat.

In these artistic uses of cybernetic beings, we sense a growing necessity to train the public to experience itself as embedded in a technologized environment, modifying itself to communicate intuitively with machines. This necessity had already become explicit in Tsai's "Cybernetic Sculpture" show. Those experiencing his immersive installation were expected to experiment with machinic life: What behaviors would trigger the servomechanisms? Likely, the human gallery attendant would have had to explain the protocol: "Clap your hands—that gets the sculptures to respond." As an early critic described it:

> A grove of slender stainless-steel rods rises from a plate. This base vibrates at 30 cycles per second; the rods flex rapidly, in harmonic curves. Set in a dark room, they are lit by strobes. The pulse of the flashing lights varies—they are connected to sound and proximity sensors. The result is that when one approaches a Tsai or makes a noise in its vicinity, the thing responds. The rods appear to move; there is a shimmering, a flashing, an eerie ballet of metal, whose apparent movements range from stillness to jittering and back to a slow, indescribably sensuous undulation.[49]

[49] Robert Hughes, *Time* magazine (October 2, 1972) review of Tsai exhibition at Denise René gallery.

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Like *Senster,* the apparatus stimulated (and simulated) an affective rather than rational interaction. Humans felt they were encountering behaviors indicative of responsive life; Tsai's entities were often classed as "vegetal" or "aquatic." Such environmental and kinetic ambitions were widespread in the international art world of the time. Beyond the stable at Howard Wise, there were the émigrés forming the collective GRAV in Paris, the "cybernetic architectures" of Nicolas Schöffer, the light and plastic gyrations of the German Zero Gruppe, and so on—all defining and informing the genre of installation art to come.

The artistic use of cybernetic beings in the late sixties made no investment in "intelligence." Knowing machines were dumb and incapable of emotion, these creators were confident in staging frank simulations. What interested them were machinic motions evoking drives, instincts, and affects; they mimicked sexual and animal behaviors, as if below the threshold of consciousness. Such artists were uninterested in the manipulation of data or information (although Hans Haacke would move in that direction by 1972 with his "Real-Time Systems" works). The cybernetic culture that artists and scientists were putting in place on two continents embedded the human in the technosphere and seduced perception with the graceful and responsive behaviors of the machinic phylum. "Artificial" and "natural" intertwined in this early cybernetic aesthetic.

But it wouldn't end here. Crucial to the expansion of this uncritical, largely masculine set of cybernetic environments would be a radical, critical cohort of astonishing women artists emerging in the 1990s, fully aware of their predecessors in art and technology but perhaps more inspired by the feminist founders of the 1970 journal *Radical Software* and the cultural blast of Donna Haraway's inspiring 1984 polemic, "A Cyborg Manifesto." The creaky gender theater of Paik and Pask, the innocent creatures of Ihnatowicz and Tsai, were mobilized as savvy, performative, and postmodern, as in Lynn Hershman Leeson's *Dollie Clone Series* (1995-98) consisting of the interactive assemblages *CyberRoberta* and *Tillie, the Telerobotic Doll,* who worked the technosphere with the professionalism of burlesque, winking and folding us viewers into an explicit consciousness of our voyeuristic position as both seeing subjects and objects-to-be-looked-at.

The "innocent" technosphere established by male cybernetic sculptors of the 1960s was, by the 1990s, identified by feminist artists as an entirely suffusive condition demanding our critical attention. At the same time, feminists tackled the question of whose "intelligence" AI was attempting to simulate. For an artist such as Hershman Leeson, responding to the technical "triumph" of cloning Dolly the sheep, it was crucial to draw the connection between meat production and "meat machines." Hershman Leeson produced "dolls" as clones, offering a critical framing of the way contemporary individuation had become part of an ideological, replicative, plastic realm.

While the technofeminists of the 1990s and into the 2000s weren't all cyber all the time, their works nonetheless complicated the dominant machinic and kinetic qualities of male artists' previous techno-environments. The androgynous tele-cyborg in Judith Barry's *Imagination, Dead Imagine* (1991), for example, had no moving parts: He/she was comprised of pure signals, flickering projections on flat surfaces. In her setup, Barry commented on the alienating effects of late-20th-century technology. The image of an androgynous head fills an enormous cube made of ten-foot-square screens on

HOUSE_OVERSIGHT_016980

five sides, mounted on a ten-foot-wide mirrored base. A variety of viscous and unpleasant-looking fluids (yellow, reddish-orange, brown), dry materials (sawdust? flour?), and even insects drizzle or dust their way down the head, whose stoic sublimity is made gorgeously virtual on the work's enormous screens. *Dead Imagine,* through its large-scale and cubic "Platonic" form, remains both artificial and locked into the body—refusing a detached "intelligence" as being no intelligence at all.

Artists in the new millennium inherit this critical tradition and inhabit the current paradigms of AI, which has slid from partial simulations to claims of intelligence. In the 1955 proposal thought to be the first printed usage of the phrase "artificial intelligence," computer scientist John McCarthy and his colleagues Marvin Minsky, Nathaniel Rochester, and Claude Shannon conjectured that "every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it." This modest theoretical goal has inflated over the past sixty-four years and is now expressed by Google DeepMind as an ambition to "Solve intelligence." Crack the code! But unfortunately, what we hear cracking is not code but small-scale capitalism, the social contract, and the scaffolding of civility. Taking away the jobs of taxi and truck drivers, roboticizing direct marketing, hegemonizing entertainment, privatizing utilities, and depersonalizing health care—are these the "whips" that Wiener feared we would learn to love?

Artists can't solve any of this. But they can remind us of the creative potential of the paths not taken—the forks in the road that were emerging around 1970, before "information" became capital and "intelligence" equaled data harvesting. Richly evocative of what can be done with contemporary tools when revisiting earlier possibilities is French artist Philippe Parreno's "firefly piece," so nicknamed to avoid having to iterate its actual title: *With a Rhythmic Instinction to Be Able to Travel Beyond Existing Forces of Life* (2014). Described by the artist as "an automaton," the sculptural installation juxtaposes a flickering projection of black-and-white drawings of fireflies with a band of oscillating green-on-black binary figures. The drawings and binary figures are animated using algorithms from mathematician John Horton Conway's 1970 Game of Life, a "cellular automaton."

Conway set up parameters for any square ("cell") to be lit ("alive") or dark ("dead") in an infinite, two-dimensional grid. The rules are summarized as follows: A single cell will quickly die of loneliness. But a cell touching three or more other "live" cells will also die, "due to crowding." A cell survives and thrives if it has just two neighbors . . . and so on. As one cell dies, it may create the conditions for other cells to survive, yielding patterns that appear to move and grow, shifting across the grid like evanescent neural impulses or bioluminescent clusters of diatoms. In Stephen Hawking's 2012 film *The Meaning of Life*, the narrator describes Conway's mathematical model as simulating "how a complex thing like the mind might come about from a basic set of rules," revealing the overweening ambitions that characterize contemporary AI: "[T]hese complex properties emerge from simple laws that contain no concepts like movement or reproduction," yet they produce "species," and cells "can even reproduce, just as life does in the real world." [50]

Just as life does? Artists know the blandishments of simulation and representation, the difference between the genius of artifice and the realities of what "life

[50] Narration in Stephen Hawking's *The Meaning of Life* (Smithson Productions, Discovery Channel, 2012).

HOUSE_OVERSIGHT_016981

does." Parreno's piece is an intuitive assembly of our experience of "life" through embodied, perspectival engagement. Our consciousness is electrically (cybernetically) enmeshed, yet we don't respond as if this human-generated set of elegant simulations had its own *intelligence*.

The artistic use of cybernetic beings also reminds us that consciousness itself is not just "in here." It is streaming in and out, harmonizing those sensory, scintillating signals. Mind happens well outside the limits of the cranium (and its simulacrum, the "motherboard"). In Mary Catherine Bateson's paraphrase of her father Gregory's second-order cybernetics, mind is material "not necessarily defined by a boundary such as an envelope of skin."[51] Parreno pairs the simulations of art with the simulations of mathematics to force the Wiener-like point that any such model is not, by itself, just like life. Models are just that—parts of signaling systems constituting "intelligence" only when their creaturely counterparts engage them in lively meaning making. Contemporary AI has talked itself into a corner by instrumentalizing and particularizing tasks and subroutines, confusing these drills with actual wisdom. The brief cultural history offered here reminds us that views of data as intelligence, digital nets as "neural," or isolated individuals as units of life, were alien even to Conway's brute simulation.

We can stigmatize the stubborn arrogance of current AI as "right cybernetics," the path that led to current automated weapons systems, Uber's ill-disguised hostility to human workers, and the capitalist dreams of Google. Now we must turn back to left cybernetics—theoretical biologists and anthropologists engaged with a trans-species understanding of intelligent systems. Gregory Bateson's observation that corporations merely simulate "aggregates of parts of persons," with profit-maximizing decisions cut off from "wider and wiser parts of the mind," has never been more timely.[52]

The cybernetic epistemology offered here suggests a new approach. The individual mind is immanent, not only in the body but also in pathways outside the body, and there is a larger Mind, of which the individual mind is only a subsystem. This larger Mind, Bateson holds, is comparable to God, and is perhaps what some people mean by "God," but it is still immanent in the total interconnected social system and planetary ecology. This is not the collective delusion of an exterior "God" who speaks from outside human consciousness (this long-seated monotheistic conceit, Bateson suggests, leads to views of nature and environment as also outside the "individual" human, rendering them as "gifts to exploit"). Rather, Bateson's "God" is a placeholder for our evanescent experience of interacting consciousness-in-the-world: larger Mind as a result of inputs and actions that then become inputs for other actions in concert with other entities—webs of symbiotic relationships that form patterns we need urgently to sense and harmonize with.[53]

From Tsai in the 1970s to Hershman Leeson in the 1990s to Parreno in 2014, artists have been critiquing right cybernetics and plying alternative, embodied, environmental experiences of "artificial" intelligence. Their artistic use of cybernetic beings offers the wisdom of symbionts experienced in the kinds of poeisis that can be achieved in this world: rhythms of signals and intuitive actions that produce the

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[51] Mary Catherine Bateson, 1999 foreword to Gregory Bateson, *Steps to an Ecology of Mind* (Chicago: University of Chicago Press, 1972): xi.
[52] *Steps to an Ecology of Mind,* p. 452.
[53] Ibid., pp. 467-8.

HOUSE_OVERSIGHT_016982

movements of life partnered with an electro-mechanical and -magnetic technosphere.
Life, in its mysterious negentropic entanglements with matter and Mind.

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Over nearly four decades, **Stephen Wolfram** *has been a pioneer in the development and application of computational thinking and responsible for many innovations in science, technology and business.*

His 1982 paper "Cellular Automata as Simple Self-Organizing Systems," written at the age of twenty-three, was the first of numerous significant scientific contributions aimed at understanding the origins of complexity in nature.

It was around this time that Stephen briefly came into my life. I had established The Reality Club, an informal gathering of intellectuals who met in New York City to present their work before peers in other disciplines. (Note: In 1996, The Reality Club went online as Edge.org*). Our first speaker? Stephen Wolfram, a "wunderkind" who had arrived in Princeton at the Institute for Advanced Study. I distinctly recall his focused manner as he sat down on a couch in my living room and spoke uninterrupted for about an hour before the assembled group.*

Since that time, Stephen has become intent making the world's knowledge easily computable and accessible. His program Mathematica *is the definitive system for modern technical computing.* Wolfram|Alpha *computes expert-level answers using AI technology. He considers his* Wolfram Language *to be the first true computational communication language for humans and AIs.*

I caught up with him again four years ago, when we arranged to meet in Cambridge, Massachusetts, for a freewheeling conversation about AI. Stephen walked in, said hello, sat down, and, looking at the video camera set up to record the conversation for Edge*, began to talk and didn't stop for two and a half hours.*

The essay that follows is an edited version of that session, which was a Wolfram master class of sorts and is an appropriate way to end this volume—just as Stephen's Reality Club talk in the '80s was a great way to initiate the ongoing intellectual enterprise whose result is the rich community of thinkers presenting their work to one another and to the public in this book.

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ARTIFICIAL INTELLIGENCE AND THE FUTURE OF CIVILIZATION

Stephen Wolfram

Stephen Wolfram *is a scientist, inventor, and the founder and CEO of Wolfram Research. He is the creator of the symbolic computation program* Mathematica *and its programming language,* Wolfram Language*, as well as the knowledge engine* Wolfram|Alpha*. He is also the author of* A New Kind of Science*.*

The following is an edited transcript from a live interview with him conducted in December 2015.

I see technology as taking human goals and making them automatically executable by machines. Human goals of the past have entailed moving objects from here to there, using a forklift rather than our own hands. Now the work we can do automatically, with machines, is mental rather than physical. It's obvious that we can automate many of the tasks we humans have long been proud of doing ourselves. What's the future of the human condition in that situation?

People talk about the future of intelligent machines and whether they'll take over and decide what to do for themselves. But the inventing of goals is not something that has a path to automation. Someone or something has to define what a machine's purpose should be—what it's trying to execute. How are goals defined? For a given human, they tend to be defined by personal history, cultural environment, the history of our civilization. Goals are uniquely human. Where the machine is concerned, we can give it a goal when we build it.

What kinds of things have intelligence, or goals, or purpose? Right now, we know one great example, and that's us—our brains, our human intelligence. Human intelligence, I once assumed, is far beyond anything else that exists naturally in the world; it's the result of an elaborate process of evolution and thus stands apart from the rest of existence. But what I've realized, as a result of the science I've done, is that this is not the case.

People might say, for instance, "The weather has a mind of its own." That's an animist statement and seems to have no place in modern scientific thinking. But it's not as silly as it sounds. What does the human brain do? A brain receives certain input, it computes things, it causes certain actions to happen, it generates a certain output. Like the weather. All sorts of systems are, effectively, doing computations—whether it's a brain or, say, a cloud responding to its thermal environment.

We can argue that our brains are doing vastly more sophisticated computations than those in the atmosphere. But it turns out that there's a broad equivalence between the kinds of computations that different kinds of systems do. This renders the question of the human condition somewhat poignant, because it seems we're not as special as we thought. There are all those different systems of nature that are pretty much equivalent, in terms of their computational capabilities.

What makes us different from all those other systems is the particulars of our history, which give us our notions of purpose and goals. That's a long way of saying that when the box on our desk thinks as well as the human brain does, what it still won't have, intrinsically, are goals and purposes. Those are defined by our particulars—our particular biology, our particular psychology, our particular cultural history.

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When we consider the future of AI, we need to think about the goals. That's what humans contribute; that's what our civilization contributes. The execution of those goals is what we can increasingly automate. What will the future of humans be in such a world? What will there be for them to do? One of my projects has been to understand the evolution of human purposes over time. Today we've got all kinds of purposes. If you look back a thousand years, people's goals were quite different: How do I get my food? How do I keep myself safe? In the modern Western world, for the most part you don't spend a large fraction of your life thinking about those purposes. From the point of view of a thousand years ago, some of the goals people have today would seem utterly bizarre—for example, like exercising on a treadmill. A thousand years ago that would sound like a crazy thing to do.

What will people be doing in the future? A lot of purposes we have today are generated by scarcity of one kind or another. There are scarce resources in the world. People want to get more of something. Time itself is scarce in our lives. Eventually, those forms of scarcity will disappear. The most dramatic discontinuity will surely be when we achieve effective human immortality. Whether this will be achieved biologically or digitally isn't clear, but inevitably it will be achieved. Many of our current goals are driven in part by our mortality: "I'm only going to live a certain time, so I'd better get this or that done." And what happens when most of our goals are executed automatically? We won't have the kinds of motivations we have today. One question I'd like an answer for is, What do the derivatives of humans in the future end up choosing to do with themselves? One of the potential bad outcomes is that they just play video games all the time.

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The term "artificial intelligence" is evolving, in its use in technical language. These days, AI is very popular, and people have some idea of what it means. Back when computers were being developed, in the 1940s and 1950s, the typical title of a book or a magazine article about computers was "Giant Electronic Brains." The idea was that just as bulldozers and steam engines and so on automated mechanical work, computers would automate intellectual work. That promise turned out to be harder to fulfill than many people expected. There was, at first, a great deal of optimism; a lot of government money got spent on such efforts in the early 1960s. They basically just didn't work.

There are a lot of amusing science-fiction-ish portrayals of computers in the movies of that time. There's a cute one called *Desk Set,* which is about an IBM-type computer being installed in a broadcasting company and putting everybody out of a job. It's cute because the computer gets asked a bunch of reference-library questions. When my colleagues and I were building Wolfram|Alpha, one of the ideas we had was to get it to answer all of those reference-library questions from *Desk Set*. By 2009, it could answer them all.

In 1943, Warren McCulloch and Walter Pitts came up with a model for how brains conceptually, formally, might work—an artificial neural network. They saw that their brainlike model would do computations in the same way as Turing Machines. From their work, it emerged that we could make brainlike neural networks that would act as general computers. And in fact, the practical work done by the ENIAC folks and John

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von Neumann and others on computers came directly not from Turing Machines but through this bypath of neural networks.

But simple neural networks didn't do much. Frank Rosenblatt invented a learning device he called the perceptron, which was a one-layer neural network. In the late sixties, Marvin Minsky and Seymour Papert wrote a book titled *Perceptrons*, in which they basically proved that perceptrons couldn't do anything interesting, which is correct. Perceptrons could only make linear distinctions between things. So the idea was more or less dropped. People said, "These guys have written a proof that neural networks can't do anything interesting, therefore no neural networks can do anything interesting, so let's forget about neural networks." That attitude persisted for some time.

Meanwhile, there were a couple of other approaches to AI. One was based on understanding, at a formal level, symbolically, how the world works; and the other was based on doing statistics and probabilistic kinds of things. With regard to symbolic AI, one of the test cases was, Can we teach a computer to do something like integrals? Can we teach a computer to do calculus? There were tasks like machine translation, which people thought would be a good example of what computers could do. The bottom line is that by the early seventies, that approach had crashed.

Then there was a trend toward devices called expert systems, which arose in the late seventies and early eighties. The idea was to have a machine learn the rules that an expert uses and thereby figure out what to do. That petered out. After that, AI became little more than a crazy pursuit.

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I had been interested in how you make an AI-like machine since I was a kid. I was interested particularly in how you take the knowledge we humans have accumulated in our civilization and automate answering questions on the basis of that knowledge. I thought about how you could do that symbolically, by building a system that could break down questions into symbolic units and answer them. I worked on neural networks at that time and didn't make much progress, so I put it aside for a while.

Back in mid-2002 to 2003, I thought about that question again: What does it take to make a computational knowledge system? The work I'd done by then pretty much showed that my original belief about how to do this was completely wrong. My original belief had been that in order to make a serious computational knowledge system, you first had to build a brainlike device and then feed it knowledge—just as humans learn in standard education. Now I realized that there wasn't a bright line between what is intelligent and what is simply computational.

I had assumed that there was some magic mechanism that made us vastly more capable than anything that was just computational. But that assumption was wrong. This insight is what led to Wolfram|Alpha. What I discovered is that you can take a large collection of the world's knowledge and automatically answer questions on the basis of it, using what are essentially merely computational techniques. It was an alternative way to do engineering—a way that's much more analogous to what biology does in evolution.

In effect, what you normally do when you build a program is build it step-by-step. But you can also explore the computational universe and mine technology from that universe. Typically, the challenge is the same as in physical mining: That is, you find a supply of, let's say, iron, or cobalt, or gadolinium, with some special magnetic properties,

HOUSE_OVERSIGHT_016987

and you turn that special capability to a human purpose, to something you want technology to do. In the case of magnetic materials, there are plenty of ways to do that. In terms of programs, it's the same story. There are all kinds of programs out there, even tiny programs that do complicated things. Could we entrain them for some useful human purpose?

And how do you get AIs to execute your goals? One answer is to just talk to them, in the natural language of human utterances. It works pretty well when you're talking to Siri. But when you want to say something longer and more complicated, it doesn't work well. You need a computer language that can represent sophisticated concepts in a way that can be progressively built up and isn't possible in natural language. What my company spent a lot of time doing was building a knowledge-based language that incorporates the knowledge of the world directly into the language. The traditional approach to creating a computer language is to make a language that represents operations that computers intrinsically know how to do: allocating memory, setting values of variables, iterating things, changing program counters, and so on. Fundamentally, you're telling computers to do things in your own terms. My approach was to make a language that panders not to the computers but to the humans, to take whatever a human thinks of and convert it into some form that the computer can understand. Could we encapsulate the knowledge we'd accumulated, both in science and in data collection, into a language we could use to communicate with computers? That's the big achievement of my last thirty years or so—being able to do that.

Back in the 1960s, people would say things like, "When we can do such-and-such, we'll know we have AI. When we can do an integral from a calculus course, we'll know we have AI. When we can have a conversation with a computer and make it seem human. . . ," et cetera. The difficulty was, "Well, gosh, the computer just doesn't know enough about the world." You'd ask the computer what day of the week it was, and it might be able to answer that. You'd ask it who the President was, and it probably couldn't tell you. At that point, you'd know you were talking to a computer and not a person. But now when it comes to these Turing Tests, people who've tried connecting, for example, Wolfram|Alpha to their Turing Test bots find that the bots lose every time. Because all you have to do is start asking the machine sophisticated questions and it will answer them! No human can do that. By the time you've asked it a few disparate questions, there will be no human who knows all those things, yet the system will know them. In that sense, we've already achieved good AI, at that level.

Then there are certain kinds of tasks easy for humans but traditionally very hard for machines. The standard one is visual object identification: What is this object? Humans can recognize it and give some simple description of it, but a computer was just hopeless at that. A couple of years ago, though, we brought out a little image-identification system, and many other companies have done something similar—ours happens to be somewhat better than the rest. You show it an image, and for about ten thousand kinds of things, it will tell you what it is. It's fun to show it an abstract painting and see what it says. But it does a pretty good job.

It works using the same neural-network technology that McCulloch and Pitts imagined in 1943 and lots of us worked on in the early eighties. Back in the 1980s, people successfully did OCR—optical character recognition. They took the twenty-six letters of the alphabet and said, "OK, is that an A? Is that a B? Is that a C?" and so on.

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That could be done for twenty-six different possibilities, but it couldn't be done for ten thousand. It was just a matter of scaling up the whole system that makes this possible today. There are maybe five thousand picturable common nouns in English, ten thousand if you include things like special kinds of plants and beetles which people would recognize with some frequency. What we did was train our system on 30 million images of these kinds of things. It's a big, complicated, messy neural network. The details of the network probably don't matter, but it takes about a quadrillion GPU operations to do the training.

Our system is impressive because it pretty much matches what humans can do. It has about the same training data humans have—about the same number of images a human infant would see in the first couple of years of its life. Roughly the same number of operations have to be done in the learning process, using about the same number of neurons in at least the first levels of our visual cortex. The details are different; the way these artificial neurons work has little to do with how the brain's neurons work. But the concept is similar, and there's a certain universality to what's going on. At the mathematical level, it's a composition of a very large number of functions, with certain continuity properties that let you use calculus methods to incrementally train the system. Given those attributes, you can end up with something that does the same job human brains do in physiological recognition.

But does this constitute AI? There are a few basic components. There's physiological recognition, there's voice-to-text, there's language translation—things humans manage to do with varying degrees of difficulty. These are essentially some of the links to how we make machines that are humanlike in what they do. For me, one of the interesting things has been incorporating those capabilities into a precise symbolic language to represent the everyday world. We now have a system that can say, "This is a glass of water." We can go from a picture of a glass of water to the *concept* of a glass of water. Now we have to invent some actual symbolic language to represent those concepts.

I began by trying to represent mathematical, technical kinds of knowledge and went on to other kinds of knowledge. We've done a pretty good job of representing objective knowledge in the world. Now the problem is to represent everyday human discourse in a precise symbolic way—a knowledge-based language intended for communication between humans and machines, so that humans can read it and machines can understand it, too. For instance, you might say "X is greater than 5." That's a predicate. You might also say, "I want a piece of chocolate." That's also a predicate. It has an "I want" in it. We have to find a precise symbolic representation of the desires we express in human natural language.

In the late 1600s, Gottfried Leibniz, John Wilkins, and others were concerned with what they called philosophical languages—that is, complete, universal, symbolic representations of things in the world. You can look at the philosophical language of John Wilkins and see how he divided up what was important in the world at the time. Some aspects of the human condition have been the same since the 1600s. Some are very different. His section on death and various forms of human suffering was huge; in today's ontology, it's a lot smaller. It's interesting to see how a philosophical language of today would differ from a philosophical language of the mid-1600s. It's a measure of our progress. Many such attempts at formalization have happened over the years. In

HOUSE_OVERSIGHT_016989

mathematics, for example: Whitehead and Russell's *Principia Mathematica* in 1910 was the biggest showoff effort. There were previous attempts by Gottlob Frege and Giuseppe Peano that were a little more modest in their presentation. Ultimately, they were wrong in what they thought they should formalize: They thought they should formalize some process of mathematical proof, which turns out not to be what most people care about.

With regard to a modern analog of the Turing Test, it's an interesting question. There's still the conversational bot, which is Turing's idea. That one hasn't been solved yet. It will be solved—the only question is, What is the application for which it is solved? For a long time I would ask, "Why should we care?"—because I thought the principal application would be customer service, which wasn't particularly high on my list. But customer service, where you're trying to interface, is just where you need this conversational language.

One big difference between Turing's time and ours is the method of communicating with computers. In his time, you typed something into the machine and it typed back a response. In today's world, it responds with a screen—as for instance, when you want to buy a movie ticket. How is a transaction with a machine different from a transaction with a human? The main answer is that there's a visual display. It asks you something, and you press a button, and you can see the result immediately. For example, in Wolfram|Alpha, when it's used inside Siri, if there's a short answer, Siri will tell you the short answer. But what most people want is the visual display, showing the infographic of this or that. This is a nonhuman form of communication that turns out to be richer than the traditional spoken, or typed, human communication. In most human-to-human communication, we're stuck with pure language, whereas in computer-to-human communication we have this much higher bandwidth channel—of visual communication.

Many of the most powerful applications of the Turing Test fall away now that we have this additional communication channel. For example, here's one we're pursuing right now. It's a bot that communicates about writing programs: You say, "I want to write a program. I want it to do this." The bot will say, "I've written this piece of program. This is what it does. Is this what you want?" Blah-blah-blah. It's a back-and-forth bot. Devising such systems is an interesting problem, because they have to have a model of a human if they're trying to explain something to you. They have to know what the human is confused about.

What has long been difficult for me to understand is, What's the point of a conventional Turing Test? What's the motivation? As a toy, one could make a little chat bot that people could chat with. That will be the next thing. The current round of deep learning—particularly, recurrent neural networks—is making pretty good models of human speech and human writing. We can type in, say, "How are you feeling today?" and it knows most of the time what sort of response to give. But I want to figure out whether I can automate responding to my email. I know the answer is "No." A good Turing Test, for me, will be when a bot can answer most of my email. That's a tough test. It would have to learn those answers from the humans the email is connected to. I might be a little bit ahead of the game, because I've been collecting data on myself for about twenty-five years. I have every piece of email for twenty-five years, every keystroke for twenty. I should be able to train an avatar, an AI, that will do what I can do—perhaps better than I could.

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People worry about the scenario in which AIs take over. I think something much more amusing, in a sense, will happen first. The AI will know what you intend, and it will be good at figuring out how to get there. I tell my car's GPS I want to go to a particular destination. I don't know where the heck I am, I just follow my GPS. My children like to remind me that once when I had a very early GPS—the kind that told you, "Turn this way, turn that way"—we ended up on one of the piers going out into Boston Harbor.

More to the point is that there will be an AI that knows your history, and knows that when you're ordering dinner online you'll probably want such-and-such, or when you email this person, you should talk to them about such-and-such. More and more, the AIs will suggest to us what we should do, and I suspect most of the time people will just go along with that. It's good advice—better than what you would have figured out for yourself.

As far as the takeover scenario is concerned, you can do terrible things with technology and you can do good things with technology. Some people will try to do terrible things with technology, and some people will try to do good things with technology. One of the things I like about today's technology is the equalization it has produced. I used to be proud that I had a better computer than anybody I knew; now we all have the same kind of computers. We have the same smartphones, and pretty much the same technology can be used by a decent fraction of the planet's 7 billion people. It's not the case that the king's technology is different from everybody else's. That's an important advance.

The great frontier five hundred years ago was literacy. Today, it's doing programming of some kind. Today's programming will be obsolete in a not very long time. For example, people no longer learn assembly language, because computers are better at writing assembly language than humans are, and only a small set of people need to know the details of how language gets compiled into assembly language. A lot of what's being done by armies of programmers today is similarly mundane. There's no good reason for humans to be writing Java code or JavaScript code. We want to automate the programming process so that what's important goes from what the human wants done to getting the machine, as automatically as possible, to do it. This will increase that equalization, which is something I'm interested in. In the past, if you wanted to write a serious piece of code, or program for something important and real, it was a lot of work. You had to know quite a bit about software engineering, you had to invest months of time in it, you had to hire programmers who knew this or you had to learn it yourself. It was a big investment.

That's not true anymore. A one-line piece of code already does something interesting and useful. It allows a vast range of people who couldn't make computers do things for them, make computers do things for them. Something I'd like to see is a lot of kids around the world learn the new capabilities of knowledge-based programming and then produce code that's effectively as sophisticated as what anybody in the top ranks can produce. This is within reach. We're at the point where anybody can learn to do knowledge-based programming, and, more important, learn to think computationally. The actual mechanics of programming are easy now. What's difficult is imagining things in a computational way.

HOUSE_OVERSIGHT_016991

How do you teach computational thinking? In terms of how to do programming, it's an interesting question. Take nanotechnology. How did we achieve nanotechnology? Answer: We took technology as we understand it on a large scale and we made it very small. How to make a CPU chip on the atomic scale? Fundamentally, we use the same architecture as the CPU chip we know and love. That isn't the only approach one can take. Looking at what simple programs can do suggests that you can take even simple impoverished components and with the right compiler you can make them do interesting things. We don't do molecular-scale computing yet, because the ambient technology is such that you'd have to spend a decade building it. But we've got the components that are enough to make a universal computer. You might not know how to program with those components, but by doing searches in the space of possible programs, you'd start to amass building blocks, and you could then create a compiler for them. The surprising thing is that impoverished stuff is capable of doing sophisticated things, and the compilation step is not as gruesome as you might expect.

Just searching the computational universe and trying to find programs—building blocks—that are interesting is a good approach. A more traditional engineering approach—trying by pure thought to figure out how to build a universal computer—is a harder row to hoe. That doesn't mean it can't be done, but my guess is that we'll be able to do some amazing things just by finding the components and searching the possible programs we can make with them. Then it's back to the question about connecting human purposes to what is available from the system.

One question I'm interested in is, What will the world look like when most people can write code? We had a transition, maybe five hundred years ago or so, when only scribes and a small set of the population could read and write natural language. Today, a small fraction of the population can write code. Most of the code they write is for computers only. You don't understand things by reading code. But there will come a time when, as a result of things I've tried to do, the code is at a high enough level that it's a minimal description of what you're trying to do. It will be a piece of code that's understandable to humans but also executable by the machines.

Coding is a form of expression, just as writing in a natural language is a form of expression. To me, some simple pieces of code are poetic—they express ideas in a very clean way. There's an aesthetic aspect, much as there is to expression in a natural language. One feature of code is that it's immediately executable; it's not like writing. When you write something, somebody has to read it, and the brain that's reading it has to absorb the thoughts that came from the person who did the writing. Look at how knowledge has been transmitted in the history of the world. At level zero, one form of knowledge transmission is essentially genetic—that is, there's an organism, and its progeny has the same features that it had. Then there's the kind of knowledge transmission that happens with things like physiological recognition. A newborn creature has some neural network with some random connections in it, and as the creature moves around in the world, it starts recognizing kinds of objects and it learns that knowledge.

Then there's the level that was the big achievement of our species, which is natural language. The ability to represent knowledge abstractly enough that we can communicate it brain to brain, so to speak. Arguably, natural language is our species' most important invention. It's what led, in many respects, to our civilization.

HOUSE_OVERSIGHT_016992

There's yet another level, and probably one day it will have a more interesting name. With knowledge-based programming, we have a way of creating an actual representation of real things in the world, in a precise and symbolic way. Not only is it understandable by brains and communicable to other brains and to computers, it's also immediately executable.

Just as natural language gave us civilization, knowledge-based programming will give us—what? One bad answer is that it will give us the civilization of the AIs. That's what we don't want to happen, because the AIs will do a great job communicating with one another and we'll be left out of it, because there's no intermediate language, no interface with our brains. What will this fourth level of knowledge communication lead to? If you were Caveman Ogg and you were just realizing that language was starting, could you imagine the coming of civilization? What should we be imagining right now?

This relates to the question of what the world would look like if most people could code. Clearly, many trivial things would change: Contracts would be written in code, restaurant recipes might be written in code, and so on. Simple things like that would change. But much more profound things would also change. The rise of literacy gave us bureaucracy, for example, which had already existed but dramatically accelerated, giving us a greater depth of governmental systems, for better or worse. How does the coding world relate to the cultural world?

Take high school education. If we have computational thinking, how does that affect how we study history? How does that affect how we study languages, social studies, and so on? The answer is, it has a great effect. Imagine you're writing an essay. Today, the raw material for a typical high school student's essay is something that's already been written; students usually can't generate new knowledge easily. But in the computational world, that will no longer be true. If the students know something about writing code, they'll access all that digitized historical data and figure out something new. Then they'll write an essay about something they've discovered. The achievement of knowledge-based programming is that it's no longer sterile, because it's got the knowledge of the world knitted into the language you're using to write code.

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There's computation all over the universe: in a turbulent fluid producing some complicated pattern of flow, in the celestial mechanics of planetary interactions, in brains. But does computation have a purpose? You can ask that about any system. Does the weather have a goal? Does climate have a goal?

Can someone looking at Earth from space tell that there's anything with a purpose there? Is there a civilization there? In the Great Salt Lake, in Utah, there's a straight line. It turns out to be a causeway dividing two areas of the lake with different colors of algae, so it's a very dramatic straight line. There's a road in Australia that's long and straight. There's a railroad in Siberia that's long, and lights go on when a train stops at the stations. So from space you can see straight lines and patterns.

But are these clear enough examples of obvious purpose on Earth as viewed from space? For that matter, how do we recognize extraterrestrials out there? How do we tell if a signal we're getting indicates purpose? Pulsars were discovered in 1967, when we picked up a periodic flutter every second or so. The first question was, Is this a beacon?

HOUSE_OVERSIGHT_016993

Because what else would make a periodic signal? It turned out to be a rotating neutron star.

One criterion to apply to a potentially purposeful phenomenon is whether it's minimal in achieving a purpose. But does that mean that it was built for the purpose? The ball rolls down the hill because of gravitational pull. Or the ball rolls down the hill because it's satisfying the principle of least action. There are typically these two explanations for some action that seems purposeful: the mechanistic explanation and the teleological. Essentially all of our existing technology fails the test of being minimal in achieving its purpose. Most of what we build is steeped in technological history, and it's incredibly non-minimal for achieving its purpose. Look at a CPU chip; there's no way that that's the minimal way to achieve what a CPU chip achieves.

This question of how to identify purposefulness is a hard one. It's an important question, because radio noise from the galaxy is very similar to CDMA transmissions from cell phones. Those transmissions use pseudo-noise sequences, which happen to have certain repeatability properties. But they come across as noise, and they're set up as noise, so as not to interfere with other channels. The issue gets messier. If we were to observe a sequence of primes being generated from a pulsar, we'd ask what generated them. Would it mean that a whole civilization grew up and discovered primes and invented computers and radio transmitters and did this? Or is there just some physical process making primes? There's a little cellular automaton that makes primes. You can see how it works if you take it apart. It has a little thing bouncing inside it, and out comes a sequence of primes. It didn't need the whole history of civilization and biology and so on to get to that point.

I don't think there is abstract "purpose," per se. I don't think there's abstract meaning. Does the universe have a purpose? Then you're doing theology in some way. There is no meaningful sense in which there is an abstract notion of purpose. Purpose is something that comes from history.

One of the things that might be true about our world is that maybe we go through all this history and biology and civilization, and at the end of the day the answer is "42," or something. We went through all those 4 billion years of various kinds of evolution and then we got to "42."

Nothing like that will happen, because of computational irreducibility. There are computational processes that you can go through in which there is no way to shortcut that process. Much of science has been about shortcutting computation done by nature. For example, if we're doing celestial mechanics and want to predict where the planets will be a million years from now, we could follow the equations, step-by-step. But the big achievement in science is that we're able to shortcut that and reduce the computation. We can be smarter than the universe and predict the endpoint without going through all the steps. But even with a smart enough machine and smart enough mathematics, we can't get to the endpoint without going through the steps. Some details are irreducible. We have to irreducibly follow those steps. That's why history means something. If we could get to the endpoint without going through the steps, history would be, in some sense, pointless.

So it's not the case that we're intelligent and everything else in the world is not. There's no enormous abstract difference between us and the clouds or us and the cellular automata. We cannot say that this brainlike neural network is qualitatively

HOUSE_OVERSIGHT_016994

different from this cellular-automaton system. The difference is a detailed difference. This brainlike neural network was produced by the long history of civilization, whereas the cellular automaton was created by my computer in the last microsecond.

The problem of abstract AI is similar to the problem of recognizing extraterrestrial intelligence: How do you determine whether or not it has a purpose? This is a question I don't consider answered. We'll say things like, "Well, AI will be intelligent when it can do blah-blah-blah." When it can find primes. When it can produce this and that and the other. But there are many other ways to get to those results. Again, there is no bright line between intelligence and mere computation.

It's another part of the Copernican story: We used to think Earth was the center of the universe. Now we think we're special because we have intelligence and nothing else does. I'm afraid the bad news is that that isn't a distinction.

Here's one of my scenarios. Let's say there comes a time when human consciousness is readily uploadable into digital form, virtualized and so on, and pretty soon we have a box of a trillion souls. There are a trillion souls in the box, all virtualized. In the box, there will be molecular computing going on—maybe derived from biology, maybe not. But the box will be doing all kinds of elaborate stuff. And there's a rock sitting next to the box. Inside a rock, there are always all kinds of elaborate stuff going on, all kinds of subatomic particles doing all kinds of things. What's the difference between the rock and the box of a trillion souls? The answer is that the details of what's happening in the box were derived from the long history of human civilization, including whatever people watched on YouTube the day before. Whereas the rock has its long geological history but not the particular history of our civilization.

Realizing that there isn't a genuine distinction between intelligence and mere computation leads you to imagine that future—the endpoint of our civilization as a box of trillion souls, each of them essentially playing a video game, forever. What is the "purpose" of that?

HOUSE_OVERSIGHT_016995

Sciencexpress Research Article

Quantitative Analysis of Culture Using Millions of Digitized Books

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We constructed a corpus of digitized texts containing about 4% of all books ever printed. Analysis of this corpus enables us to investigate cultural trends quantitatively. We survey the vast terrain of "culturomics", focusing on linguistic and cultural phenomena that were reflected in the English language between 1800 and 2000. We show how this approach can provide insights about fields as diverse as lexicography, the evolution of grammar, collective memory, the adoption of technology, the pursuit of fame, censorship, and historical epidemiology. "Culturomics" extends the boundaries of rigorous quantitative inquiry to a wide array of new phenomena spanning the social sciences and the humanities.

Reading small collections of carefully chosen works enables scholars to make powerful inferences about trends in human thought. However, this approach rarely enables precise measurement of the underlying phenomena. Attempts to introduce quantitative methods into the study of culture (*1-6*) have been hampered by the lack of suitable data.

We report the creation of a corpus of 5,195,769 digitized books containing ~4% of all books ever published. Computational analysis of this corpus enables us to observe cultural trends and subject them to quantitative investigation. "Culturomics" extends the boundaries of scientific inquiry to a wide array of new phenomena.

The corpus has emerged from Google's effort to digitize books. Most books were drawn from over 40 university libraries around the world. Each page was scanned with custom equipment (*7*), and the text digitized using optical character recognition (OCR). Additional volumes – both physical and digital – were contributed by publishers. Metadata describing date and place of publication were provided by the libraries and publishers, and supplemented with bibliographic databases. Over 15 million books have been digitized [12% of all books ever published (*7*)]. We selected a subset of over 5 million books for analysis on the basis of the quality of their OCR and metadata (Fig. 1A) (*7*). Periodicals were excluded.

The resulting corpus contains over 500 billion words, in English (361 billion), French (45B), Spanish (45B), German (37B), Chinese (13B), Russian (35B), and Hebrew (2B). The oldest works were published in the 1500s. The early decades are represented by only a few books per year, comprising several hundred thousand words. By 1800, the corpus grows to 60 million words per year; by 1900, 1.4 billion; and by 2000, 8 billion.

The corpus cannot be read by a human. If you tried to read only the entries from the year 2000 alone, at the reasonable pace of 200 words/minute, without interruptions for food or sleep, it would take eighty years. The sequence of letters is one thousand times longer than the human genome: if you wrote it out in a straight line, it would reach to the moon and back 10 times over (*8*).

To make release of the data possible in light of copyright constraints, we restricted our study to the question of how often a given "1-gram" or "n-gram" was used over time. A 1-gram is a string of characters uninterrupted by a space; this includes words ("banana", "SCUBA") but also numbers

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("3.14159") and typos ("excesss"). An n-gram is sequence of 1-grams, such as the phrases "stock market" (a 2-gram) and "the United States of America" (a 5-gram). We restricted n to 5, and limited our study to n-grams occurring at least 40 times in the corpus.

Usage frequency is computed by dividing the number of instances of the n-gram in a given year by the total number of words in the corpus in that year. For instance, in 1861, the 1-gram "slavery" appeared in the corpus 21,460 times, on 11,687 pages of 1,208 books. The corpus contains 386,434,758 words from 1861; thus the frequency is 5.5×10^{-5}. "slavery" peaked during the civil war (early 1860s) and then again during the civil rights movement (1955-1968) (Fig. 1B)

In contrast, we compare the frequency of "the Great War" to the frequencies of "World War I" and "World War II." "the Great War" peaks between 1915 and 1941. But although its frequency drops thereafter, interest in the underlying events had not disappeared; instead, they are referred to as "World War I" (Fig. 1C).

These examples highlight two central factors that contribute to culturomic trends. Cultural change guides the concepts we discuss (such as "slavery"). Linguistic change – which, of course, has cultural roots – affects the words we use for those concepts ("the Great War" vs. "World War I"). In this paper, we will examine both linguistic changes, such as changes in the lexicon and grammar; and cultural phenomena, such as how we remember people and events.

The full dataset, which comprises over two billion culturomic trajectories, is available for download or exploration at www.culturomics.org.

The Size of the English Lexicon

How many words are in the English language (*9*)?

We call a 1-gram "common" if its frequency is greater than one per billion. (This corresponds to the frequency of the words listed in leading dictionaries (*7*).) We compiled a list of all common 1-grams in 1900, 1950, and 2000 based on the frequency of each 1-gram in the preceding decade. These lists contained 1,117,997 common 1-grams in 1900, 1,102,920 in 1950, and 1,489,337 in 2000.

Not all common 1-grams are English words. Many fell into three non-word categories: (i) 1-grams with non-alphabetic characters ("l8r", "3.14159"); (ii) misspellings ("becuase, "abberation"); and (iii) foreign words ("sensitivo").

To estimate the number of English words, we manually annotated random samples from the lists of common 1-grams (*7*) and determined what fraction were members of the above non-word categories. The result ranged from 51% of all common 1-grams in 1900 to 31% in 2000.

Using this technique, we estimated the number of words in the English lexicon as 544,000 in 1900, 597,000 in 1950, and 1,022,000 in 2000. The lexicon is enjoying a period of enormous growth: the addition of ~8500 words/year has increased the size of the language by over 70% during the last fifty years (Fig. 2A).

Notably, we found more words than appear in any dictionary. For instance, the 2002 Webster's Third New International Dictionary [W3], which keeps track of the contemporary American lexicon, lists approximately 348,000 single-word wordforms (*10*); the American Heritage Dictionary of the English Language, Fourth Edition (AHD4) lists 116,161 (*11*). (Both contain additional multi-word entries.) Part of this gap is because dictionaries often exclude proper nouns and compound words ("whalewatching"). Even accounting for these factors, we found many undocumented words, such as "aridification" (the process by which a geographic region becomes dry), "slenthem" (a musical instrument), and, appropriately, the word "deletable."

This gap between dictionaries and the lexicon results from a balance that every dictionary must strike: it must be comprehensive enough to be a useful reference, but concise enough to be printed, shipped, and used. As such, many infrequent words are omitted. To gauge how well dictionaries reflect the lexicon, we ordered our year 2000 lexicon by frequency, divided it into eight deciles (ranging from 10^{-9} – 10^{-8} to 10^{-2} – 10^{-1}), and sampled each decile (*7*). We manually checked how many sample words were listed in the OED (12) and in the Merriam-Webster Unabridged Dictionary [MWD]. (We excluded proper nouns, since neither OED nor MWD lists them.) Both dictionaries had excellent coverage of high frequency words, but less coverage for frequencies below 10^{-6}: 67% of words in the 10^{-9} – 10^{-8} range were listed in neither dictionary (Fig. 2B). Consistent with Zipf's famous law, a large fraction of the words in our lexicon (63%) were in this lowest frequency bin. As a result, we estimated that 52% of the English lexicon – the majority of the words used in English books – consists of lexical "dark matter" undocumented in standard references (*12*).

To keep up with the lexicon, dictionaries are updated regularly (*13*). We examined how well these changes corresponded with changes in actual usage by studying the 2077 1-gram headwords added to AHD4 in 2000. The overall frequency of these words, such as "buckyball" and "netiquette", has soared since 1950: two-thirds exhibited recent, sharp increases in frequency (>2X from 1950-2000) (Fig. 2C). Nevertheless, there was a lag between lexicographers and the lexicon. Over half the words added to AHD4 were part of the English lexicon a century ago (frequency $>10^{-9}$ from 1890-1900). In fact, some newly-added words, such as "gypseous" and "amplidyne", have already undergone a steep decline in frequency (Fig. 2D).

Not only must lexicographers avoid adding words that have fallen out of fashion, they must also weed obsolete words from earlier editions. This is an imperfect process. We

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found 2220 obsolete 1-gram headwords ("diestock", "alkalescent") in AHD4. Their mean frequency declined throughout the 20th century, and dipped below 10^{-9} decades ago (Fig. 2D, Inset).

Our results suggest that culturomic tools will aid lexicographers in at least two ways: (i) finding low-frequency words that they do not list; and (ii) providing accurate estimates of current frequency trends to reduce the lag between changes in the lexicon and changes in the dictionary.

The Evolution of Grammar

Next, we examined grammatical trends. We studied the English irregular verbs, a classic model of grammatical change (*14-17*). Unlike regular verbs, whose past tense is generated by adding –ed (jump/jumped), irregulars are conjugated idiosyncratically (stick/stuck, come/came, get/got) (*15*).

All irregular verbs coexist with regular competitors (e.g., "strived" and "strove") that threaten to supplant them (Fig. 2E). High-frequency irregulars, which are more readily remembered, hold their ground better. For instance, we found "found" (frequency: $5x10^{-4}$) 200,000 times more often than we finded "finded." In contrast, "dwelt" (frequency: $1x10^{-5}$) dwelt in our data only 60 times as often as "dwelled" dwelled. We defined a verb's "regularity" as the percentage of instances in the past tense (i.e., the sum of "drived", "drove", and "driven") in which the regular form is used. Most irregulars have been stable for the last 200 years, but 16% underwent a change in regularity of 10% or more (Fig. 2F).

These changes occurred slowly: it took 200 years for our fastest moving verb, "chide", to go from 10% to 90%. Otherwise, each trajectory was sui generis; we observed no characteristic shape. For instance, a few verbs, like "spill", regularized at a constant speed, but others, such as "thrive" and "dig", transitioned in fits and starts (*7*). In some cases, the trajectory suggested a reason for the trend. For example, with "sped/speeded" the shift in meaning from "to move rapidly" and towards "to exceed the legal limit" appears to have been the driving cause (Fig. 2G).

Six verbs (burn, chide, smell, spell, spill, thrive) regularized between 1800 and 2000 (Fig. 2F). Four are remnants of a now-defunct phonological process that used –t instead of –ed; they are members of a pack of irregulars that survived by virtue of similarity (bend/bent, build/built, burn/burnt, learn/learnt, lend/lent, rend/rent, send/sent, smell/smelt, spell/spelt, spill/spilt, and spoil/spoilt). Verbs have been defecting from this coalition for centuries (wend/went, pen/pent, gird/girt, geld/gelt, and gild/gilt all blend/blent into the dominant –ed rule). Culturomic analysis reveals that the collapse of this alliance has been the most significant driver of regularization in the past 200 years. The regularization of burnt, smelt, spelt, and spilt originated in the US; the forms still cling to life in British English (Fig. 2E,F). But the –t irregulars may be doomed in England too: each year, a population the size of Cambridge adopts "burned" in lieu of "burnt."

Though irregulars generally yield to regulars, two verbs did the opposite: light/lit and wake/woke. Both were irregular in Middle English, were mostly regular by 1800, and subsequently backtracked and are irregular again today. The fact that these verbs have been going back and forth for nearly 500 years highlights the gradual nature of the underlying process.

Still, there was at least one instance of rapid progress by an irregular form. Presently, 1% of the English speaking population switches from "sneaked" to "snuck" every year: someone will have snuck off while you read this sentence. As before, this trend is more prominent in the United States, but recently sneaked across the Atlantic: America is the world's leading exporter of both regular and irregular verbs.

Out with the Old

Just as individuals forget the past (*18*, *19*), so do societies (*20*). To quantify this effect, we reasoned that the frequency of 1-grams such as "1951" could be used to measure interest in the events of the corresponding year, and created plots for each year between 1875 and 1975.

The plots had a characteristic shape. For example, "1951" was rarely discussed until the years immediately preceding 1951. Its frequency soared in 1951, remained high for three years, and then underwent a rapid decay, dropping by half over the next fifteen years. Finally, the plots enter a regime marked by slower forgetting: collective memory has both a short-term and a long-term component.

But there have been changes. The amplitude of the plots is rising every year: precise dates are increasingly common. There is also a greater focus on the present. For instance, "1880" declined to half its peak value in 1912, a lag of 32 years. In contrast, "1973" declined to half its peak by 1983, a lag of only 10 years. We are forgetting our past faster with each passing year (Fig. 3A).

We were curious whether our increasing tendency to forget the old was accompanied by more rapid assimilation of the new (*21*). We divided a list of 154 inventions into time-resolved cohorts based on the forty-year interval in which they were first invented (1800-1840, 1840-1880, and 1880-1920) (*7*). We tracked the frequency of each invention in the nth after it was invented as compared to its maximum value, and plotted the median of these rescaled trajectories for each cohort.

The inventions from the earliest cohort (1800-1840) took over 66 years from invention to widespread impact (frequency >25% of peak). Since then, the cultural adoption of technology has become more rapid: the 1840-1880 invention cohort was widely adopted within 50 years; the 1880-1920 cohort within 27 (Fig. 3B).

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"In the Future, Everyone Will Be World Famous for 7.5 Minutes" –Whatshisname

People, too, rise to prominence, only to be forgotten (*22*). Fame can be tracked by measuring the frequency of a person's name (Fig. 3C). We compared the rise to fame of the most famous people of different eras. We took all 740,000 people with entries in Wikipedia, removed cases where several famous individuals share a name, and sorted the rest by birthdate and frequency (*23*). For every year from 1800-1950, we constructed a cohort consisting of the fifty most famous people born in that year. For example, the 1882 cohort includes "Virginia Woolf" and "Felix Frankfurter"; the 1946 cohort includes "Bill Clinton" and "Steven Spielberg." We plotted the median frequency for the names in each cohort over time (Fig. 3D-E). The resulting trajectories were all similar. Each cohort had a pre-celebrity period (median frequency $<10^{-9}$), followed by a rapid rise to prominence, a peak, and a slow decline. We therefore characterized each cohort using four parameters: (i) the age of initial celebrity; (ii) the doubling time of the initial rise; (iii) the age of peak celebrity; (iv) the half-life of the decline (Fig. 3E). The age of peak celebrity has been consistent over time: about 75 years after birth. But the other parameters have been changing. Fame comes sooner and rises faster: between the early 19th century and the mid-20th century, the age of initial celebrity declined from 43 to 29 years, and the doubling time fell from 8.1 to 3.3 years. As a result, the most famous people alive today are more famous – in books – than their predecessors. Yet this fame is increasingly short-lived: the post-peak half-life dropped from 120 to 71 years during the nineteenth century.

We repeated this analysis with all 42,358 people in the databases of Encyclopaedia Britannica (*24*), which reflect a process of expert curation that began in 1768. The results were similar (*7*). Thus, people are getting more famous than ever before, but are being forgotten more rapidly than ever.

Occupational choices affect the rise to fame. We focused on the 25 most famous individuals born between 1800 and 1920 in seven occupations (actors, artists, writers, politicians, biologists, physicists, and mathematicians), examining how their fame grew as a function of age (Fig. 3F).

Actors tend to become famous earliest, at around 30. But the fame of the actors we studied – whose ascent preceded the spread of television – rises slowly thereafter. (Their fame peaked at a frequency of $2x10^{-7}$.) The writers became famous about a decade after the actors, but rose for longer and to a much higher peak ($8x10^{-7}$). Politicians did not become famous until their 50s, when, upon being elected President of the United States (in 11 of 25 cases; 9 more were heads of other states) they rapidly rose to become the most famous of the groups ($1x10^{-6}$).

Science is a poor route to fame. Physicists and biologists eventually reached a similar level of fame as actors ($1x10^{-7}$), but it took them far longer. Alas, even at their peak, mathematicians tend not to be appreciated by the public ($2x10^{-8}$).

Detecting Censorship and Suppression

Suppression – of a person, or an idea – leaves quantifiable fingerprints (*25*). For instance, Nazi censorship of the Jewish artist Marc Chagall is evident by comparing the frequency of "Marc Chagall" in English and in German books (Fig.4A). In both languages, there is a rapid ascent starting in the late 1910s (when Chagall was in his early 30s). In English, the ascent continues. But in German, the artist's popularity decreases, reaching a nadir from 1936-1944, when his full name appears only once. (In contrast, from 1946-1954, "Marc Chagall" appears nearly 100 times in the German corpus.) Such examples are found in many countries, including Russia (e.g. Trotsky), China (Tiananmen Square) and the US (the Hollywood Ten, blacklisted in 1947) (Fig.4B-D).

We probed the impact of censorship on a person's cultural influence in Nazi Germany. Led by such figures as the librarian Wolfgang Hermann, the Nazis created lists of authors and artists whose "undesirable", "degenerate" work was banned from libraries and museums and publicly burned (*26-28*). We plotted median usage in German for five such lists: artists (100 names), as well as writers of Literature (147), Politics (117), History (53), and Philosophy (35) (Fig 4E). We also included a collection of Nazi party members [547 names, ref (*7*)]. The five suppressed groups exhibited a decline. This decline was modest for writers of history (9%) and literature (27%), but pronounced in politics (60%), philosophy (76%), and art (56%). The only group whose signal increased during the Third Reich was the Nazi party members [a 500% increase; ref (*7*)].

Given such strong signals, we tested whether one could identify victims of Nazi repression de novo. We computed a "suppression index" s for each person by dividing their frequency from 1933 – 1945 by the mean frequency in 1925-1933 and in 1955-1965 (Fig.4F, Inset). In English, the distribution of suppression indices is tightly centered around unity. Fewer than 1% of individuals lie at the extremes ($s<1/5$ or $s>5$).

In German, the distribution in much wider, and skewed leftward: suppression in Nazi Germany was not the exception, but the rule (Fig. 4F). At the far left, 9.8% of individuals showed strong suppression ($s<1/5$). This population is highly enriched for documented victims of repression, such as Pablo Picasso ($s=0.12$), the Bauhaus architect Walter Gropius ($s=0.16$), and Hermann Maas ($s<.01$), an influential Protestant Minister who helped many Jews flee (*7*). (Maas was later recognized by Israel's Yad Vashem as a "Righteous Among the Nations.") At the other

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extreme, 1.5% of the population exhibited a dramatic rise (s>5). This subpopulation is highly enriched for Nazis and Nazi-supporters, who benefited immensely from government propaganda (*7*).

These results provide a strategy for rapidly identifying likely victims of censorship from a large pool of possibilities, and highlights how culturomic methods might complement existing historical approaches.

Culturomics

Culturomics is the application of high-throughput data collection and analysis to the study of human culture. Books are a beginning, but we must also incorporate newspapers (*29*), manuscripts (*30*), maps (*31*), artwork (*32*), and a myriad of other human creations (*33*, *34*). Of course, many voices – already lost to time – lie forever beyond our reach.

Culturomic results are a new type of evidence in the humanities. As with fossils of ancient creatures, the challenge of culturomics lies in the interpretation of this evidence. Considerations of space restrict us to the briefest of surveys: a handful of trajectories and our initial interpretations. Many more fossils, with shapes no less intriguing, beckon:

(i) Peaks in "influenza" correspond with dates of known pandemics, suggesting the value of culturomic methods for historical epidemiology (*35*) (Fig. 5A).

(ii) Trajectories for "the North", "the South", and finally, "the enemy" reflect how polarization of the states preceded the descent into war (Fig. 5B).

(iii) In the battle of the sexes, the "women" are gaining ground on the "men" (Fig. 5C).

(iv) "féminisme" made early inroads in France, but the US proved to be a more fertile environment in the long run (Fig. 5D).

(v) "Galileo", "Darwin", and "Einstein" may be well-known scientists, but "Freud" is more deeply engrained in our collective subconscious (Fig. 5E).

(vi) Interest in "evolution" was waning when "DNA" came along (Fig. 5F).

(vii) The history of the American diet offers many appetizing opportunities for future research; the menu includes "steak", "sausage", "ice cream", "hamburger", "pizza", "pasta", and "sushi" (Fig. 5G).

(viii) "God" is not dead; but needs a new publicist (Fig. 5H).

These, together with the billions of other trajectories that accompany them, will furnish a great cache of bones from which to reconstruct the skeleton of a new science.

References and Notes

1. Wilson, Edward O. Consilience. New York: Knopf, 1998.
2. Sperber, Dan. "Anthropology and psychology: Towards an epidemiology of representations." Man 20 (1985): 73-89.
3. Lieberson, Stanley and Joel Horwich. "Implication analysis: a pragmatic proposal for linking theory and data in the social sciences." Sociological Methodology 38 (December 2008): 1-50.
4. Cavalli-Sforza, L. L., and Marcus W. Feldman. Cultural Transmission and Evolution. Princeton, NJ: Princeton UP, 1981.
5. Niyogi, Partha. The Computational Nature of Language Learning and Evolution. Cambridge, MA: MIT, 2006.
6. Zipf, George Kingsley. The Psycho-biology of Language. Boston: Houghton Mifflin, 1935.
7. Materials and methods are available as supporting material on *Science* Online.
8. Lander, E. S. et al. "Initial sequencing and analysis of the human genome." Nature 409 (February 2001): 860-921.
9. Read, Allen W. "The Scope of the American Dictionary." American Speech 8 (1933): 10–20.
10. Gove, Philip Babcock, ed. Webster's Third New International Dictionary of the English Language, Unabridged. Springfield, MA: Merriam-Webster, 1993.
11. Pickett, Joseph, P. ed. The American Heritage Dictionary of the English Language, Fourth Edition. Boston / New York, NY: Houghton Mifflin Pub., 2000.
12. Simpson, J. A., E. S. C. Weiner, and Michael Proffitt, eds. Oxford English Dictionary. Oxford [England]: Clarendon, 1993.
13. Algeo, John, and Adele S. Algeo. Fifty Years among the New Words: a Dictionary of Neologisms, 1941-1991. Cambridge UK, 1991.
14. Pinker, Steven. Words and Rules. New York: Basic, 1999.
15. Kroch, Anthony S. "Reflexes of Grammar in Patterns of Language Change." Language Variation and Change 1.03 (1989): 199.
16. Bybee, Joan L. "From Usage to Grammar: The Mind's Response to Repetition." Language 82.4 (2006): 711-33.
17. Lieberman*, Erez, Jean-Baptiste Michel*, Joe Jackson, Tina Tang, and Martin A. Nowak. "Quantifying the Evolutionary Dynamics of Language." Nature 449 (2007): 713-16.
18. Milner, Brenda, Larry R. Squire, and Eric R. Kandel. "Cognitive Neuroscience and the Study of Memory."Neuron 20.3 (1998): 445-68.
19. Ebbinghaus, Hermann. Memory: a Contribution to Experimental Psychology. New York: Dover, 1987.
20. Halbwachs, Maurice. On Collective Memory. Trans. Lewis A. Coser. Chicago: University of Chicago, 1992.
21. Ulam, S. "John Von Neumann 1903-1957." Bulletin of the American Mathematical Society 64.3 (1958): 1-50.
22. Braudy, Leo. The Frenzy of Renown: Fame & Its History. New York: Vintage, 1997.

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23. Wikipedia. Web. 23 Aug. 2010. <http://www.wikipedia.org/>.
24. Hoiberg, Dale, ed. Encyclopaedia Britannica. Chicago: Encyclopaedia Britannica, 2002.
25. Gregorian, Vartan, ed. Censorship: 500 Years of Conflict. New York: New York Public Library, 1984.
26. Treß, Werner. Wider Den Undeutschen Geist: Bücherverbrennung 1933. Berlin: Parthas, 2003.
27. Sauder, Gerhard. Die Bücherverbrennung: 10. Mai 1933. Frankfurt/Main: Ullstein, 1985.
28. Barron, Stephanie, and Peter W. Guenther. Degenerate Art: the Fate of the Avant-garde in Nazi Germany. Los Angeles: Los Angeles County Museum of Art, 1991.
29. Google News Archive Search. Web. <http://news.google.com/archivesearch>.
30. Digital Scriptorium. Web. <http://www.scriptorium.columbia.edu>.
31. Visual Eyes. Web. <http://www.viseyes.org>.
32. ARTstor. Web. <http://www.artstor.org>.
33. Europeana. Web. <http://www.europeana.eu>.
34. Hathi Trust Digital Library. Web. <http://www.hathitrust.org>.
35. Barry, John M. The Great Influenza: the Epic Story of the Deadliest Plague in History. New York: Viking, 2004.
36. J-B.M. was supported by the Foundational Questions in Evolutionary Biology Prize Fellowship and the Systems Biology Program (Harvard Medical School). Y.K.S. was supported by internships at Google. S.P. acknowledges support from NIH grant HD 18381. E.A. was supported by the Harvard Society of Fellows, the Fannie and John Hertz Foundation Graduate Fellowship, the National Defense Science and Engineering Graduate Fellowship, the NSF Graduate Fellowship, the National Space Biomedical Research Institute, and NHGRI Grant T32 HG002295 . This work was supported by a Google Research Award. The Program for Evolutionary Dynamics acknowledges support from the Templeton Foundation, NIH grant R01GM078986, and the Bill and Melinda Gates Foundation. Some of the methods described in this paper are covered by US patents 7463772 and 7508978. We are grateful to D. Bloomberg, A. Popat, M. McCormick, T. Mitchison, U. Alon, S. Shieber, E. Lander, R. Nagpal, J. Fruchter, J. Guldi, J. Cauz, C. Cole, P. Bordalo, N. Christakis, C. Rosenberg, M. Liberman, J. Sheidlower, B. Zimmer, R. Darnton, and A. Spector for discussions; to C-M. Hetrea and K. Sen for assistance with Encyclopaedia Britannica's database, to S. Eismann, W. Treß, and the City of Berlin website (berlin.de) for assistance documenting victims of Nazi censorship, to C. Lazell and G.T. Fournier for assistance with annotation, to M. Lopez for assistance with Fig. 1, to G. Elbaz and W. Gilbert for reviewing an early draft, and to Google's library partners and every author who has ever picked up a pen, for books.

Supporting Online Material

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Materials and Methods

Figs. S1 to S19

References

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Fig. 1. "Culturomic" analyses study millions of books at once. (**A**) Top row: authors have been writing for millennia; ~129 million book editions have been published since the advent of the printing press (upper left). Second row: Libraries and publishing houses provide books to Google for scanning (middle left). Over 15 million books have been digitized. Third row: each book is associated with metadata. Five million books are chosen for computational analysis (bottom left). Bottom row: a culturomic "timeline" shows the frequency of "apple" in English books over time (1800-2000). (**B**) Usage frequency of "slavery." The Civil War (1861-1865) and the civil rights movement (1955-1968) are highlighted in red. The number in the upper left (1e-4) is the unit of frequency. (**C**) Usage frequency over time for "the Great War" (blue), "World War I" (green), and "World War II" (red).

Fig. 2. Culturomics has profound consequences for the study of language, lexicography, and grammar. (**A**) The size of the English lexicon over time. Tick marks show the number of single words in three dictionaries (see text). (**B**) Fraction of words in the lexicon that appear in two different dictionaries as a function of usage frequency. (**C**) Five words added by the AHD in its 2000 update. Inset: Median frequency of new words added to AHD4 in 2000. The frequency of half of these words exceeded 10^{-9} as far back as 1890 (white dot). (**D**) Obsolete words added to AHD4 in 2000. Inset: Mean frequency of the 2220 AHD headwords whose current usage frequency is less than 10^{-9}. (**E**) Usage frequency of irregular verbs (red) and their regular counterparts (blue). Some verbs (chide/chided) have regularized during the last two centuries. The trajectories for "speeded" and "speed up" (green) are similar, reflecting the role of semantic factors in this instance of regularization. The verb "burn" first regularized in the US (US flag) and later in the UK (UK flag). The irregular "snuck" is rapidly gaining on "sneaked." (**F**) Scatter plot of the irregular verbs; each verb's position depends on its regularity (see text) in the early 19th century (x-coordinate) and in the late 20th century (y-coordinate). For 16% of the verbs, the change in regularity was greater than 10% (large font). Dashed lines separate irregular verbs (regularity<50%)

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from regular verbs (regularity>50%). Six verbs became regular (upper left quadrant, blue), while two became irregular (lower right quadrant, red). Inset: the regularity of "chide" over time. (**G**) Median regularity of verbs whose past tense is often signified with a –t suffix instead of –ed (burn, smell, spell, spill, dwell, learn, and spoil) in US (black) and UK (grey) books.

Fig. 3. Cultural turnover is accelerating. (**A**) We forget: frequency of 1883 (blue), 1910 (green) and 1950 (red). Inset: We forget faster. The half-life of the curves (grey dots) is getting shorter (grey line: moving average). (**B**) Cultural adoption occurs faster. Median trajectory for three cohorts of inventions from three different time periods (1800-1840: blue, 1840-1880: green, 1880-1920: red). Inset: The telephone (green, date of invention: green arrow) and radio (blue, date of invention: blue arrow). (**C**) Fame of various personalities born between 1920 and 1930. (**D**) Frequency of the 50 most famous people born in 1871 (grey lines; median: dark gray). Five examples are highlighted. (**E**) The median trajectory of the 1865 cohort is characterized by four parameters: (i) initial "age of celebrity" (34 years old, tick mark); (ii) doubling time of the subsequent rise to fame (4 years, blue line); (iii) "age of peak celebrity" (70 years after birth, tick mark), and (iv) half-life of the post-peak "forgetting" phase (73 years, red line). Inset: The doubling time and half-life over time. (**F**) The median trajectory of the 25 most famous personalities born between 1800 and 1920 in various careers.

Fig. 4. Culturomics can be used to detect censorship. (**A**) Usage frequency of "Marc Chagall" in German (red) as compared to English (blue). (**B**) Suppression of Leon Trotsky (blue), Grigory Zinoviev (green), and Lev Kamenev (red) in Russian texts, with noteworthy events indicated: Trotsky's assassination (blue arrow), Zinoviev and Kamenev executed (red arrow), the "Great Purge" (red highlight), perestroika (grey arrow). (**C**) The 1976 and 1989 Tiananmen Square incidents both lead to elevated discussion in English texts. Response to the 1989 incident is largely absent in Chinese texts (blue), suggesting government censorship. (**D**) After the "Hollywood Ten" were blacklisted (red highlight) from American movie studios, their fame declined (median: wide grey). None of them were credited in a film until 1960's (aptly named) "Exodus." (**E**) Writers in various disciplines were suppressed by the Nazi regime (red highlight). In contrast, the Nazis themselves (thick red) exhibited a strong fame peak during the war years. (**F**) Distribution of suppression indices for both English (blue) and German (red) for the period from 1933-1945. Three victims of Nazi suppression are highlighted at left (red arrows). Inset: Calculation of the suppression index for "Henri Matisse."

Fig. 5. Culturomics provides quantitative evidence for scholars in many fields. (**A**) Historical Epidemiology: "influenza" is shown in blue; the Russian, Spanish, and Asian flu epidemics are highlighted. (**B**) History of the Civil War. (**C**) Comparative History. (**D**) Gender studies. (**E** and **F**) History of Science. (**G**) Historical Gastronomy. (H) History of Religion: "God."

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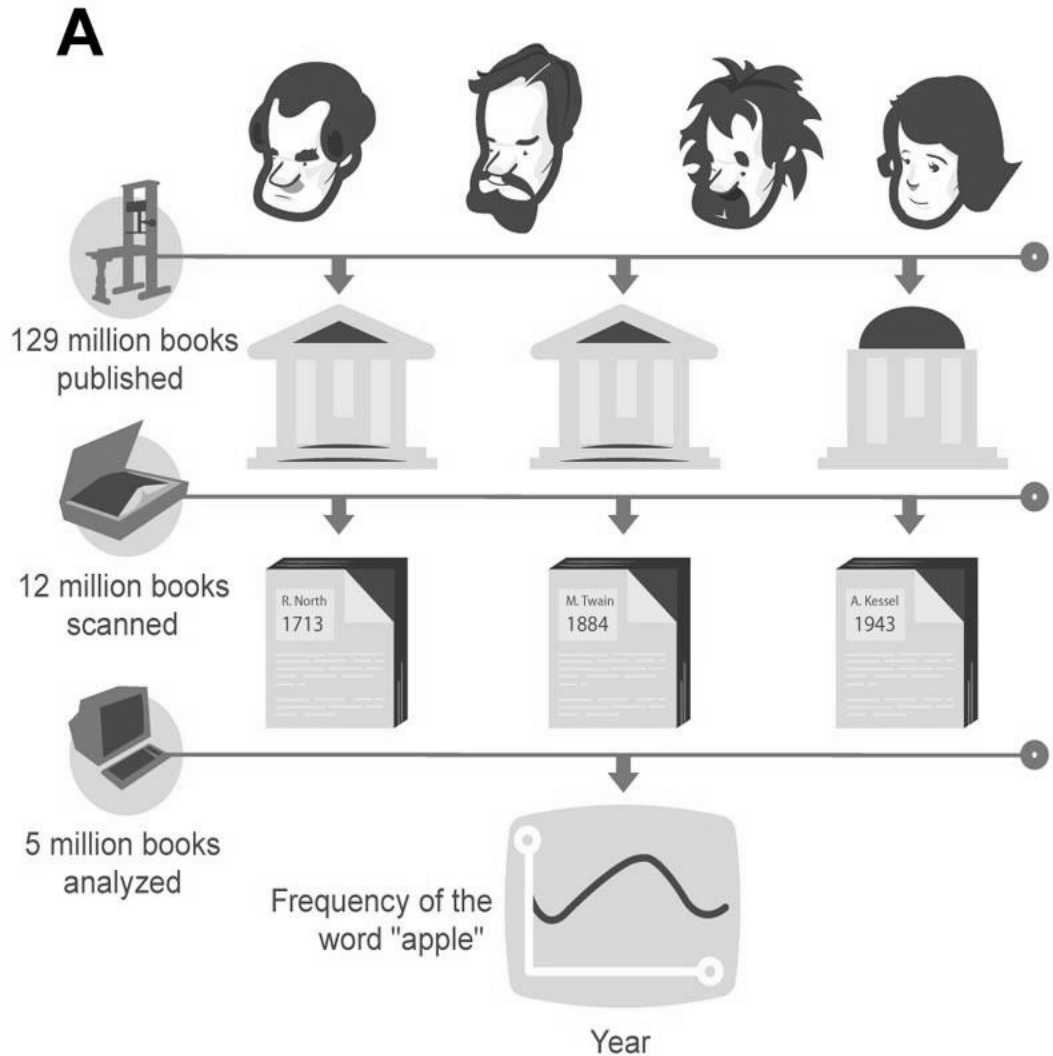

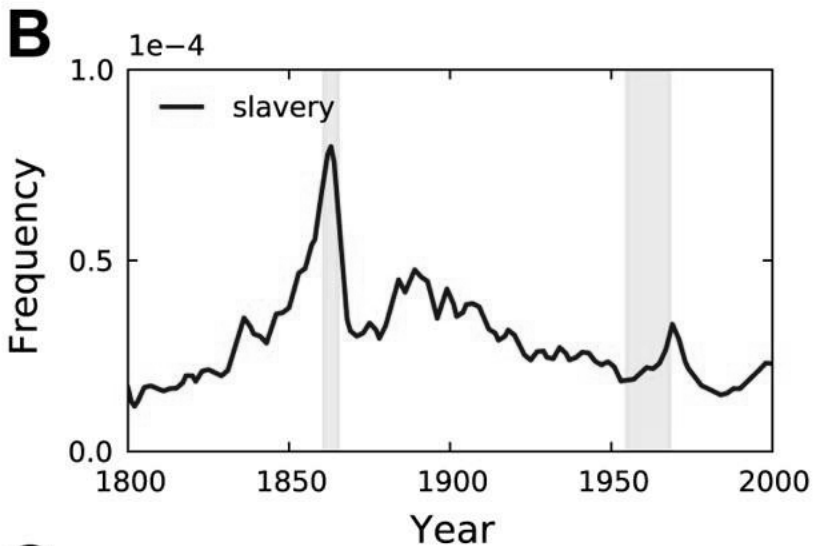

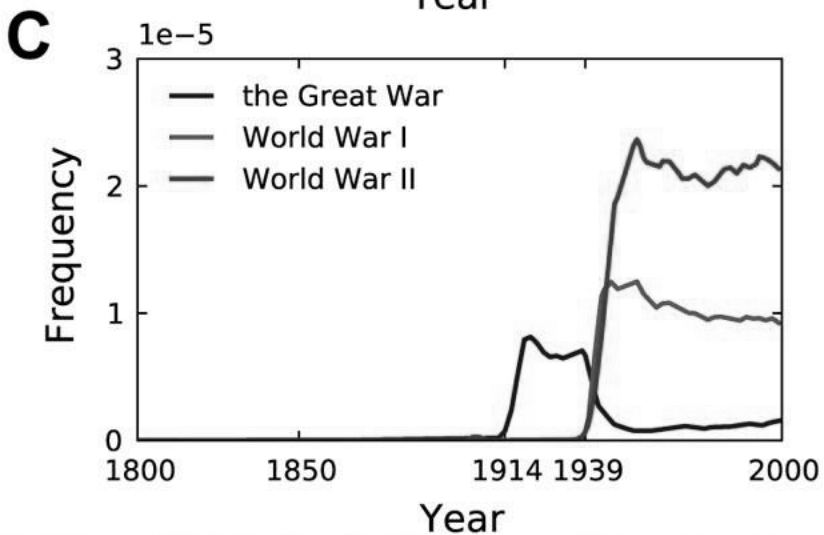

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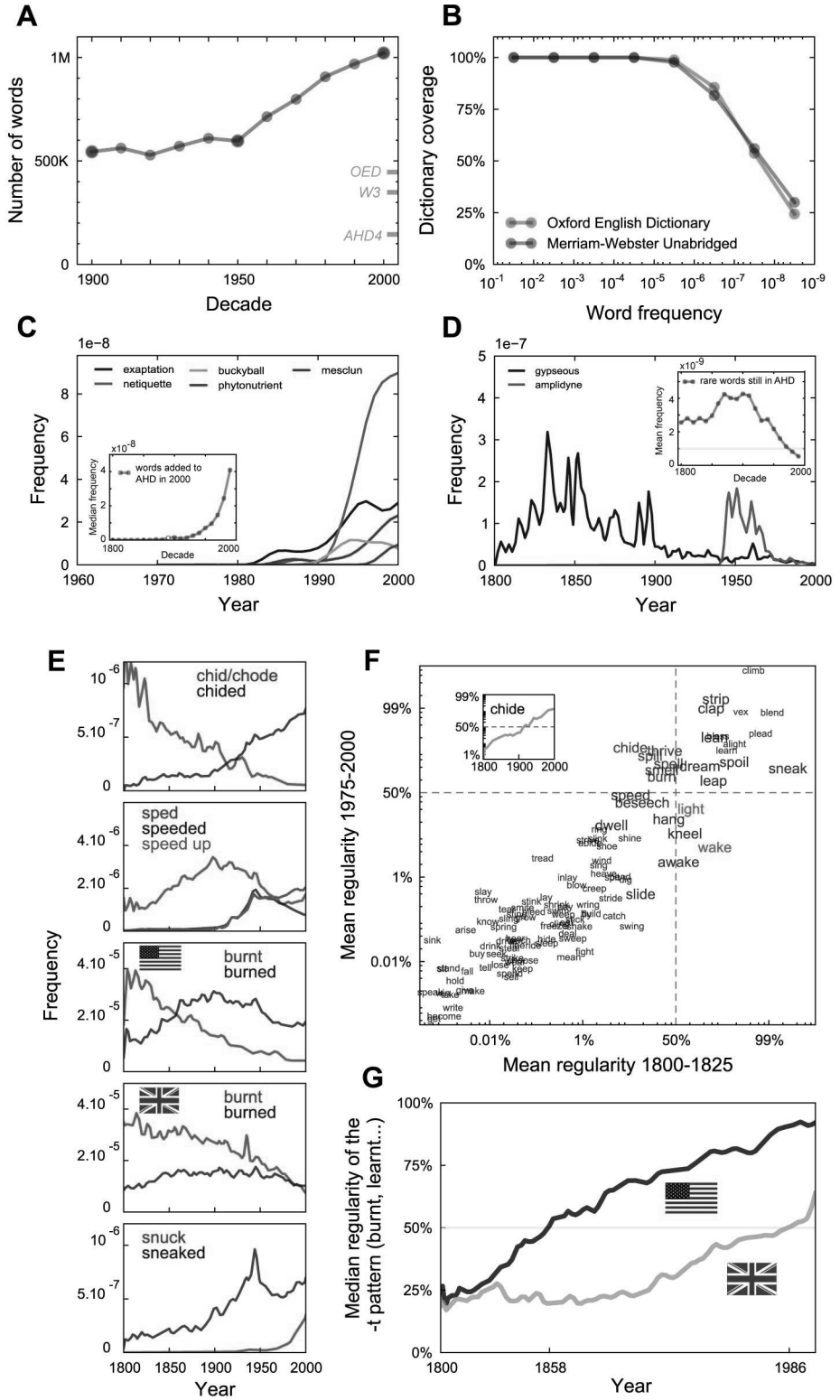
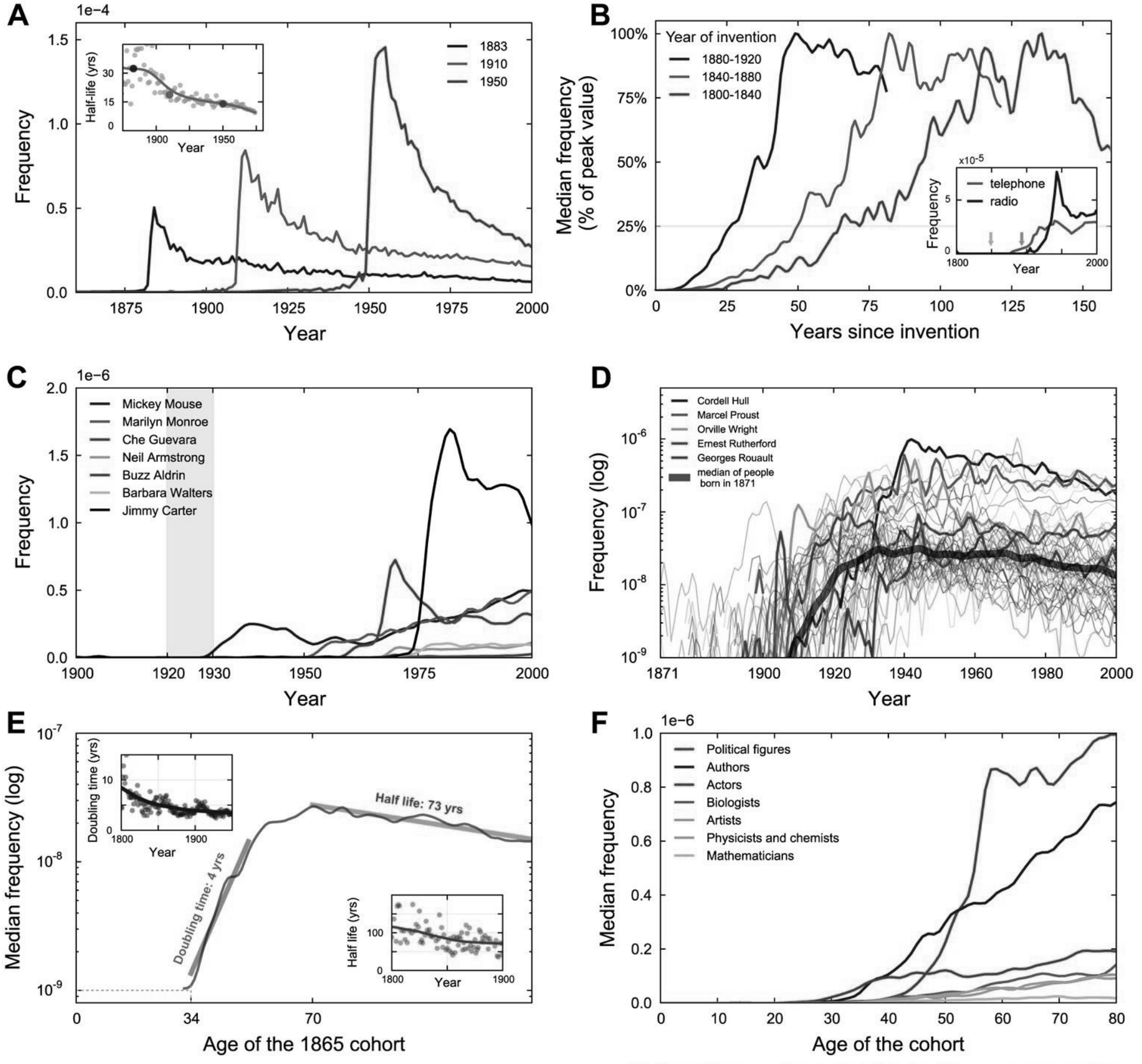
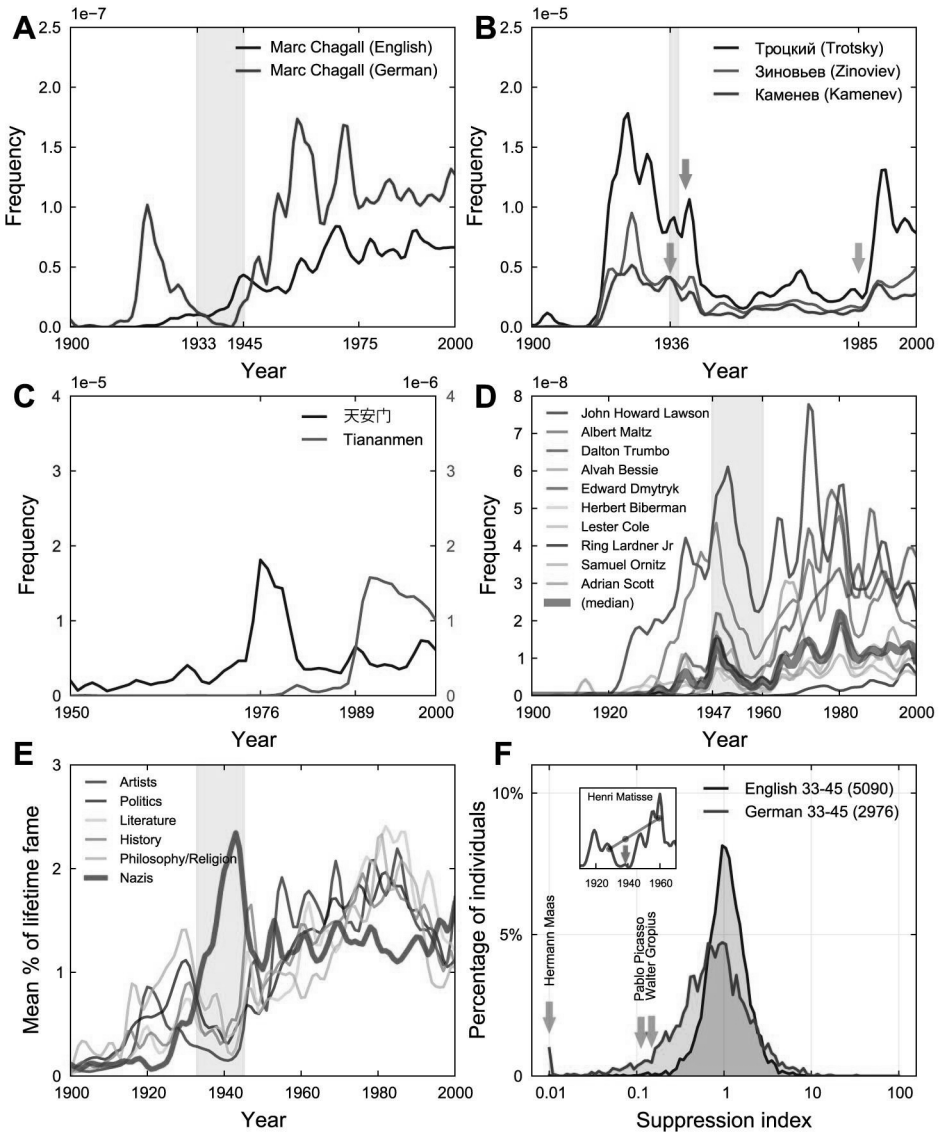
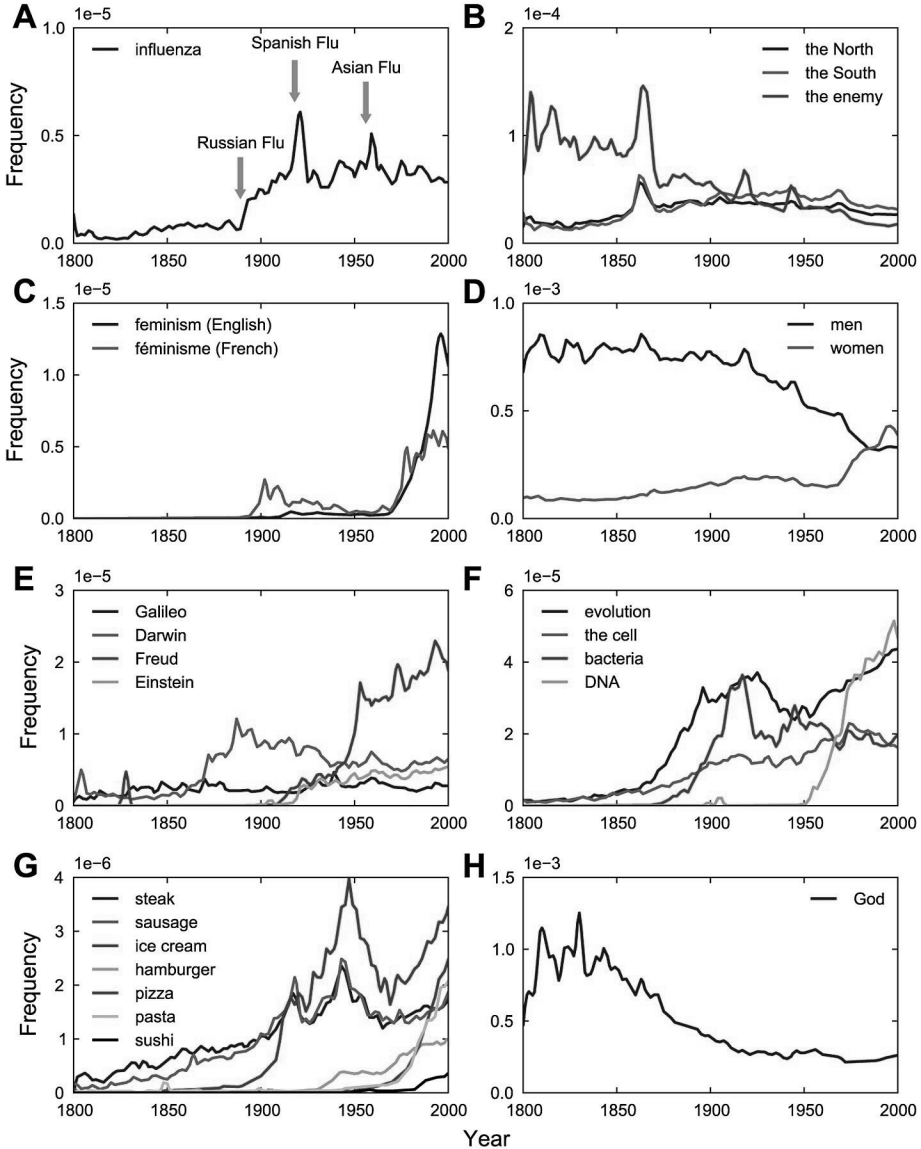

A
Number of words
1M
500K
0
OED
W3
AHD4
1900
1950
2000
Decade
B
Dictionary coverage
100%
75%
50%
25%
0%
Oxford English Dictionary
Merriam-Webster Unabridged
Word frequency
C
1e−8
exaptation
netiquette
buckyball
phytonutrient
mesclun
Frequency
words added to AHD in 2000
Median frequency
Decade
Year
D
1e−7
gypseous
amplidyne
rare words still in AHD
Mean frequency
Decade
Frequency
Year
E
chid/chode chided
sped speeded speed up
burnt burned
burnt burned
snuck sneaked
Frequency
Year
F
chide
Mean regularity 1975-2000
Mean regularity 1800-1825
G
Median regularity of the -t pattern (burnt, learnt...)
Year


A
1e−4
Frequency
Year
1883
1910
1950
Half-life (yrs)
B
Year of invention
1880-1920
1840-1880
1800-1840
Median frequency (% of peak value)
Years since invention
telephone
radio
x10-5
C
1e−6
Mickey Mouse
Marilyn Monroe
Che Guevara
Neil Armstrong
Buzz Aldrin
Barbara Walters
Jimmy Carter
D
Cordell Hull
Marcel Proust
Orville Wright
Ernest Rutherford
Georges Rouault
median of people born in 1871
Frequency (log)
E
Median frequency (log)
Doubling time (yrs)
Half life: 73 yrs
Doubling time: 4 yrs
Half life (yrs)
Age of the 1865 cohort
F
1e−6
Political figures
Authors
Actors
Biologists
Artists
Physicists and chemists
Mathematicians
Median frequency
Age of the cohort


A
1e−7
Marc Chagall (English)
Marc Chagall (German)
Frequency
Year
1933
1945
1975
B
1e−5
Троцкий (Trotsky)
Зиновьев (Zinoviev)
Каменев (Kamenev)
1936
1985
C
1e−5
1e−6
天安门
Tiananmen
1976
1989
D
1e−8
John Howard Lawson
Albert Maltz
Dalton Trumbo
Alvah Bessie
Edward Dmytryk
Herbert Biberman
Lester Cole
Ring Lardner Jr
Samuel Ornitz
Adrian Scott
(median)
1947
1960
E
Artists
Politics
Literature
History
Philosophy/Religion
Nazis
Mean % of lifetime fame
F
English 33-45 (5090)
German 33-45 (2976)
Henri Matisse
Hermann Maas
Pablo Picasso
Walter Gropius
Percentage of individuals
Suppression index


A
1e−5
influenza
Spanish Flu
Asian Flu
Russian Flu
Frequency
B
1e−4
the North
the South
the enemy
C
1e−5
feminism (English)
féminisme (French)
D
1e−3
men
women
E
1e−5
Galileo
Darwin
Freud
Einstein
F
1e−5
evolution
the cell
bacteria
DNA
G
1e−6
steak
sausage
ice cream
hamburger
pizza
pasta
sushi
H
1e−3
God
Year

www.sciencemag.org/cgi/content/full/science.1199644/DC1

Supporting Online Material for

Quantitative Analysis of Culture Using Millions of Digitized Books

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This PDF file includes:

Materials and Methods
Figs. S1 to S19
References

Materials and Methods

"Quantitative analysis of culture using millions of digitized books", Michel et al.

Contents

I. Overview of Google Books Digitization 3
I.1. Metadata 3
I.2. Digitization 4
I.3. Structure Extraction 4

II. Construction of Historical N-grams Corpora 5
II.1. Additional filtering of books 5
II.1A. Accuracy of Date-of-Publication metadata 5
II.1B. OCR quality 6
II.1C. Accuracy of language metadata 6
II.1D. Year Restriction 7
II.2. Metadata based subdivision of the Google Books Collection 7
II.2A. Determination of language 7
II.2B. Determination of book subject assignments 7
II.2C. Determination of book country-of-publication 7
II.3. Construction of historical n-grams corpora 8
II.3A. Creation of a digital sequence of 1-grams and extraction of n-gram counts 8
II.3B. Generation of historical n-grams corpora 10

III. Culturomic Analyses 12
III.0. General Remarks 12
III.0.1 On Corpora. 12
III.0.2 On the number of books published 13
III.1. Generation of timeline plots 13
III.1A. Single Query 13
III.1B. Multiple Query/Cohort Timelines 14
III.2. Note on collection of historical and cultural data 14
III.3. Controls 15
III.4. Lexicon Analysis 15

HOUSE_OVERSIGHT_017009

III.4A. Estimation of the number of 1-grams defined in leading dictionaries of the English language. 15
III.4B. Estimation of Lexicon Size 16
III.4C. Dictionary Coverage 17
III.4D. Analysis New and Obsolete words in the American Heritage Dictionary 17
III.5. The Evolution of Grammar 17
III.5A. Ensemble of verbs studied 17
III.5B. Verb frequencies 18
III.5C. Rates of regularization 18
III.5D. Classification of Verbs 18
III.6. Collective Memory 18
III.7. The Pursuit of Fame 19
III.7A) Complete procedure 19
III.7B. Cohorts of fame 25
III.8. History of Technology 26
III.9. Censorship 26
III.9A. Comparing the influence of censorship and propaganda on various groups 26
III.9B. *De Novo* Identification of Censored and Suppressed Individuals 28
III.9C. Validation by an expert annotator 28
III.10. Epidemics 29

HOUSE_OVERSIGHT_017010

I. Overview of Google Books Digitization

In 2004, Google began scanning books to make their contents searchable and discoverable online. To date, Google has scanned over fifteen million books: over 11% of all the books ever published. The collection contains over five billion pages and two trillion words, with books dating back to as early as 1473 and with text in 478 languages. Over two million of these scanned books were given directly to Google by their publishers; the rest are borrowed from large libraries such as the University of Michigan and the New York Public Library. The scanning effort involves significant engineering challenges, some of which are highly relevant to the construction of the historical n-grams corpus. We survey those issues here.

The result of the next three steps is a collection of digital texts associated with particular book editions, as well as composite metadata for each edition combining the information contained in all metadata sources.

I.1. Metadata

Over 100 sources of metadata information were used by Google to generate a comprehensive catalog of books. Some of these sources are library catalogs (e.g., the list of books in the collections of University of Michigan, or union catalogs such as the collective list of books in Bosnian libraries), some are from retailers (e.g., Decitre, a French bookseller), and some are from commercial aggregators (e.g., Ingram). In addition, Google also receives metadata from its 30,000 partner publishers. Each metadata source consists of a series of digital records, typically in either the MARC format favored by libraries, or the ONIX format used by the publishing industry. Each record refers to either a specific edition of a book or a physical copy of a book on a library shelf, and contains conventional bibliographic data such as title, author(s), publisher, date of publication, and language(s) of publication.

Cataloguing practices vary widely among these sources, and even within a single source over time. Thus two records for the same edition will often differ in multiple fields. This is especially true for serials (e.g., the *Congressional Record*) and multivolume works such as sets (e.g., the three volumes of *The Lord of the Rings*).

The matter is further complicated by ambiguities in the definition of the word 'book' itself. Including translations, there are over three thousand editions derived from Mark Twain's original *Tom Sawyer*.

Google's process of converting the billions of metadata records into a single nonredundant database of book editions consists of the following principal steps:

1. Coarsely dividing the billions of metadata records into groups that may refer to the same work (e.g., *Tom Sawyer*).
2. Identifying and aggregating multivolume works based on the presence of cues from individual records.
3. Subdividing the group of records corresponding to each work into constituent groups corresponding to the various editions (e.g., the 1909 publication of *De lotgevallen van Tom Sawyer*, translated from English to Dutch by Johan Braakensiek).
4. Merging the records for each edition into a new "consensus" record.

The result is a set of consensus records, where each record corresponds to a distinct book edition and work, and where the contents of each record are formed out of fields from multiple sources. The number of records in this set -- i.e., the number of known book editions -- increases every year as more books are written.

In August 2010, this evaluation identified 129 million editions, which is the working estimate we use in this paper of all the editions ever published (this includes serials and sets but excludes kits, mixed media, and

HOUSE_OVERSIGHT_017011

periodicals such as newspapers). This final database contains bibliographic information for each of these 129 million editions (**Ref. S1**). The country of publication is known for 85.3% of these editions, authors for 87.8%, publication dates for 92.6%, and the language for 91.6%. Of the 15 million books scanned, the country of publication is known for 91.5%, authors for 92.1%, publication dates for 95.1%, and the language for 98.6%.

I.2. Digitization

We describe the way books are scanned and digitized. For publisher-provided books, Google removes the spines and scans the pages with industrial sheet-fed scanners. For library-provided books, Google uses custom-built scanning stations designed to impose only as much wear on the book as would result from someone reading the book. As the pages are turned, stereo cameras overhead photograph each page, as shown in **Figure S1**.

One crucial difference between sheet-fed scanners and the stereo scanning process is the flatness of the page as the image is captured. In sheet-fed scanning, the page is kept flat, similar to conventional flatbed scanners. With stereo scanning, the book is cradled at an angle that minimizes stress on the spine of the book (this angle is not shown in **Figure S1**). Though less damaging to the book, a disadvantage of the latter approach is that it results in a page that is curved relative to the plane of the camera. The curvature changes every time a page is turned, for several reasons: the attachment point of the page in the spine differs, the two stacks of pages change in thickness, and the tension with which the book is held open may vary. Thicker books have more page curvature and more variation in curvature.

This curvature is measured by projecting a fixed infrared pattern onto each page of the book, subsequently captured by cameras. When the image is later processed, this pattern is used to identify the location of the spine and to determine the curvature of the page. Using this curvature information, the scanned image of each page is digitally resampled so that the results correspond as closely as possible to the results of sheet-fed scanning. The raw images are also digitally cropped, cleaned, and contrast enhanced. Blurred pages are automatically detected and rescanned. Details of this approach can be found in U.S. Patents 7463772 and 7508978; sample results are shown in **Figure S2.**

Finally, blocks of text are identified and optical character recognition (OCR) is used to convert those images into digital characters and words, in an approach described elsewhere (**Ref. S2**). The difficulty of applying conventional OCR techniques to Google's scanning effort is compounded because of variations in language, font, size, paper quality, and the physical condition of the books being scanned. Nevertheless, Google estimates that over 98% of words are correctly digitized for modern English books. After OCR, initial and trailing punctuation is stripped and word fragments split by hyphens are joined, yielding a stream of words suitable for subsequent indexing.

I.3. Structure Extraction

After the book has been scanned and digitized, the components of the scanned material are classified into various types. For instance, individual pages are scanned in order to identify which pages comprise the authored content of the book, as opposed to the pages which comprise frontmatter and backmatter, such as copyright pages, tables of contents, index pages, etc. Within each page, we also identify repeated structural elements, such as headers, footers, and page numbers.

Using OCR results from the frontmatter and backmatter, we automatically extract author names, titles, ISBNs, and other identifying information. This information is used to confirm that the correct consensus record has been associated with the scanned text.

HOUSE_OVERSIGHT_017012

II. Construction of Historical N-grams Corpora

As noted in the paper text, we did not analyze the entire set of 15 million books digitized by Google. Instead, we

1. Performed further filtering steps to select only a subset of books with highly accurate metadata.
2. Subdivided the books into 'base corpora' using such metadata fields as language, country of publication, and subject.
3. For each base corpus, construct a massive numerical table that lists, for each n-gram (often a word or phrase), how often it appears in the given base corpus in every single year between 1550 and 2008.

In this section, we will describe these three steps. These additional steps ensure high data quality, and also make it possible to examine historical trends without violating the 'fair use' principle of copyright law: our object of study is the frequency tables produced in step 3 (which are available as supplemental data), and not the full-text of the books.

II.1. Additional filtering of books

II.1A. Accuracy of Date-of-Publication metadata

Accurate date-of-publication data is crucial component in the production of time-resolved n-grams data. Because our study focused most centrally on the English language corpus, we decided to apply more stringent inclusion criteria in order to make sure the accuracy of the date-of-publication data was as high as possible.

We found that the lion's share of date-of-publication errors were due to so-called 'bound-withs' - single volumes that contain multiple works, such as anthologies or collected works of a given author. Among these bound-withs, the most inaccurately dated subclass were serial publications, such as journals and periodicals. For instance, many journals had publication dates which were erroneously attributed to the year in which the first issue of the journal had been published. These journals and serial publications also represented a different aspect of culture than the books did. For these reasons, we decided to filter out all serial publications to the extent possible. Our 'Serial Killer' algorithm removed serial publications by looking for suggestive metadata entries, containing one or more of the following:

1. Serial-associated titles, containing such phrases as 'Journal of', 'US Government report', etc.
2. Serial-associated authors, such as those in which the author field is blank, too numerous, or contains words such as 'committee'.

Note that the match is case-insensitive, and it must be to a complete word in the title; thus the filtering of titles containing the word 'digest' does not lead to the removal of works with 'digestion' in the title. The entire list of serial-associated title phrases and serial-associated author phrases is included as supplemental data (**Appendix**). For English books, 29.4% of books were filtered using the 'Serial Killer', with the title filter removing 2% and the author filter removing 27.4%. Foreign language corpora were filtered in a similar fashion.

This filtering step markedly increased the accuracy of the metadata dates. We determined metadata accuracy by examining 1000 filtered volumes distributed uniformly over time from 1801-2000 (5 per year). An annotator with no knowledge of our study manually determined the date-of-publication. The annotator was aware of the Google metadata dates during this process. We found that 5.8% of English books had

HOUSE_OVERSIGHT_017013

metadata dates that were more than 5 years from the date determined by a human examining the book. Because errors are much more common among older books, and because the actual corpora are strongly biased toward recent works, the likelihood of error in a randomly sampled book from the final corpus is much lower than 6.2%. As a point of comparison, 27 of 100 books (27%) selected at random from an unfiltered corpus contained date-of-publication errors of greater than 5 years. The unfiltered corpus was created using a sampling strategy similar to that of Eng-1M. This selection mechanism favored recent books (which are more frequent) and pre-1800 books, which were excluded in the sampling strategy for filtered books; as such the two numbers (6.2% and 27%) give a sense of the improvement, but are not strictly comparable.

Note that since the base corpora were generated (August 2009), many additional improvements have been made to the metadata dates used in Google Book Search itself. As such, these numbers do not reflect the accuracy of the Google Book Search online tool.

II.1B. OCR quality

The challenge of performing accurate OCR on the entire books dataset is compounded by variations in such factors as language, font, size, legibility, and physical condition of the book. OCR quality was assessed using an algorithm developed by Popat et al. (**Ref S3**). This algorithm yields a probability that expresses the confidence that a given sequence of text generated by OCR is correct. Incorrect or *anomalous* text can result from gross imperfections in the scanned images, or as a result of markings or drawings. This algorithm uses sophisticated statistics, a variant of the Partial by Partial Matching (PPM) model, to compute for each glyph (character) the probability that it is anomalous given other nearby glyphs. ('Nearby' refers to 2-dimensional distance on the original scanned image, hence glyphs above, below, to the left, and to the right of the target glyph.) The model parameters are tuned using multi-language subcorpora, one in each of the 32 supported languages. From the per-glyph probability one can compute an aggregate probability for a sequence of glyphs, including the entire text of a volume. In this manner, every volume has associated with it a probabilistic OCR quality score (quantized to an integer between 0-100; note that the OCR quality score should not be confused with character or word accuracy). In addition to error detection, the Popat model is also capable of computing the probability that the text is in a particular language given any sequence of characters. Thus the algorithm serves the dual purpose of detecting anomalous text while simultaneously identifying the language in which the text is written.

To ensure the highest quality data, we excluded volumes with poor OCR quality. For the languages that use a Latin alphabet (English, French, Spanish, and German), the OCR quality is generally higher, and more books are available. As a result, we filtered out all volumes whose quality score was lower than 80%. For Chinese and Russian, fewer books were available, and we did not apply the OCR filter. For Hebrew, a 50% threshold was used, because its OCR quality was relatively better than Chinese or Russian. For geographically specific corpora, English US and English UK, a less stringent 60% threshold was used, in order to maximize the number of books included (note that, as such, these two corpora are not strict subsets of the broader English corpus). **Figure S4** shows the distribution of OCR quality score as a function of the fraction of books in the English corpus. Use of an 80% cut off will remove the books with the worst OCR, while retaining the vast majority of the books in the original corpus.

The OCR quality scores were also used as a *localized* indicator of textual quality in order to remove anomalous sections of otherwise high-quality texts. The end source text was ensured to be of comparable quality to the post-OCR text presented in "text-mode" on the Google Books website.

II.1C. Accuracy of language metadata

We applied additional filters to remove books with dubious language-of-composition metadata. This filter removed volumes whose meta-data language tag disagrees with the language determined by the statistical language detection algorithm described in section 2A. For our English corpus, 8.56%

HOUSE_OVERSIGHT_017014

(approximately 235,000) of the books were filtered out in this way. **Table S1** lists the fraction removed at this stage for our other non-English corpora.

II.1D. Year Restriction

In order to further ensure publication date accuracy and consistency of dates across all our corpora, we implemented a publication year restriction and only retained books with publication years starting from 1550 and ending in 2008. We found that a significant fraction of mis-dated books have a publication year of 0 or dates prior to the invention of printing. The number of books filtered due to this year range restriction is considerably small, usually under 2% of the original number of books.

The fraction of the corpus removed by all stages of the filtering is summarized in **Table S1**. Note that because the filters are applied in a fixed order, the statistics presented below are influenced by the sequence in which the filters were applied. For example, books that trigger both the OCR quality filter and by the language correction filter are excluded by the OCR quality filter, which is performed first. Of course, the actual subset of books filtered is the same regardless of the order in which the filters are applied.

II.2. Metadata based subdivision of the Google Books Collection

II.2A. Determination of language

To create accurate corpora in particular languages that minimize cross-language contamination, it is important to be able to accurately associate books with the language in which they were written. To determine the language in which a text is written, we rely on metadata derived from our 100 bibliographic sources, as well as statistical language determination using the Popat algorithm (**Ref S3**). The algorithm takes advantage of the fact that certain character sequences, such as 'the', 'of', and 'ion", occur more frequently in English. In contrast, the sequences 'la', 'aux', and 'de' occur more frequently in French. These patterns can be used to distinguish between books written in English and those written in French. More generally, given the entire text of a book, the algorithm can reliably classify the book into one of the 32 supported language types. The final consensus language was determined based on the metadata sources as well as the results of the statistical language determination algorithm, with the statistical algorithm as the higher priority.

II.2B. Determination of book subject assignments

Book subject assignments were determined using a book's Book Industry Standards and Communication (BISAC) subject categories. BISAC subject headings are a system for categorizing books based on content developed by the BISAC subject codes committee overseen by the Book Industry Study Group. They are often used for a variety of purposes, such as to determine how books are shelved in stores. For English, 92.4% of the books had at least one BISAC subject assignment. In cases where there were multiple subject assignments, we took the more commonly used subject heading and discarded the rest.

II.2C. Determination of book country-of-publication

Country of publication was determined on the basis of our 100 bibliographic sources; 97% of the books had a country-of-publication assignment. The country code used is the 2 letter code as defined in the *ISO 3166-1 alpha-2* standard. More specifically, when constructing our US versus British English corpora, we used the codes "us" (United States) and "gb" (Great Britain) to filter our volumes.

HOUSE_OVERSIGHT_017015

II.3. Construction of historical n-grams corpora

II.3A. Creation of a digital sequence of 1-grams and extraction of n-gram counts

All input source texts were first converted into UTF-8 encoding before tokenization. Next, the text of each book was tokenized into a sequence of 1-grams using Google's internal tokenization libraries (more details on this approach can be found in **Ref. S4**). Tokenization is affected by two processes: (i) the reliability of the underlying OCR, especially vis-à-vis the position of blank spaces; (ii) the specific tokenizer rules used to convert the post-OCR text into a sequence of 1-grams.

Ordinarily, the tokenizer separates the character stream into words at the white space characters (\n [newline]; \t [tab]; \r [carriage return]; " " [space]). There are, however, several exceptional cases:

(1) Column-formatting in books often forces the hyphenation of words across lines. Thus the word "digitized", may appear on two lines in a book as "digi-<newline>ized". Prior to tokenization, we look for 1-grams that end with a hyphen ('-') followed by a newline whitespace character. We then concatenate the hyphen-ending 1-gram to the next 1-gram. In this manner, digi-<newline>tized became "digitized". This step takes place prior to any other steps in the tokenization process.

(2) Each of the following characters are always treated as separate words:

! (exclamation-mark)

@ (at)

% (percent)

^ (caret)

* (star)

((open-round-bracket)

) (close-round-bracket)

[(open-square-bracket)

] (close-square-bracket)

- (hyphen)

= (equals)

{ (open-curly-bracket)

} (close-curly-bracket)

| (pipe)

\ (backslash)

: (colon)

: (semi-colon)

< (less-than)

HOUSE_OVERSIGHT_017016

, (comma)

> (greater-than)

? (question-mark)

/ (forward-slash)

~ (tilde)

` (back-tick)

" (double quote)

(3) The following characters are not tokenized as separate words:

& (ampersand)

_ (underscore)

Examples of the resulting words include AT&T, R&D, and variable names such as HKEY_LOCAL_MACHINE.

(4) . (period) is treated as a separate word, except when it is part of a number or price, such as 99.99 or $999.95. A specific pattern matcher looks for numbers or prices and tokenizes these special strings as separate words.

(5) $ (dollar-sign) is treated as a separate word, except where it is the first character of a word consisting entirely of numbers, possibly containing a decimal point. Examples include $71 and $9.95

(6) # (hash) is treated as a separate word, except when it is preceded by a-g, j or x. This covers musical notes such as A# (A-sharp), and programming languages j#, and x#.

(7) + (plus) is treated as a separate word, except it appears at the end of a sequence of alphanumeric characters or "+" s. Thus the strings C++ and Na2+ would be treated as single words. These cases include many programming language names and chemical compound names.

(8) ' (apostrophe/single-quote) is treated as a separate word, except when it precedes the letter s, as in ALICE'S and Bob's

The tokenization process for Chinese was different. For Chinese, an internal CJK (Chinese/Japanese/Korean) segmenter was used to break characters into word units. The CJK segmenter inserts spaces along common semantic boundaries. Hence, 1-grams that appear in the Chinese simplified corpora will sometimes contain strings with 1 or more Chinese characters.

Given a sequence of *n* 1-grams, we denote the corresponding n-gram by concatenating the 1-grams with a plain space character in between. A few examples of the tokenization and 1-gram construction method are provided in **Table S2**.

Each book edition was broken down into a series of 1-grams on a page-by-page basis. For each page of each book, we counted the number of times each 1-gram appeared. We further counted the number of times each n-gram appeared (e.g., a sequence of n 1-grams) for all n less than or equal to 5. Because this was done on a page-by-page basis, n-grams that span two consecutive pages were not counted.

HOUSE_OVERSIGHT_017017

II.3B. Generation of historical n-grams corpora

To generate a particular historical n-grams corpus, a subset of book editions is chosen to serve as the base corpus. The chosen editions are divided by publication year. For each publication year, total counts for each n-gram are obtained by summing n-gram counts for each book edition that was published in that year. In particular, three counts are generated: (1) the total number of times the n-gram appears; (2) the number of pages on which the n-gram appears; and (3) the number of books in which the n-gram appears.

We then generate tables showing all three counts for each n-gram, resolved by year. In order to ensure that n-grams could not be easily used to identify individual text sources, we did not report counts for any n-grams that appeared fewer than 40 times in the corpus. (As a point of reference, the total number of 1-grams that appear in the 3.2 million books written in English with highest date accuracy ('eng-all', see below) is 360 billion: a 1-gram that would appear fewer than 40 times occurs at a frequency of the order of 10^{-11}.) As a result, rare spelling and OCR errors were also omitted. Since most n-grams are infrequent, this also served to dramatically reduce the size of the n-gram tables. Of course, the most robust historical trends are associated with frequent n-grams, so our ability to discern these trends was not compromised by this approach.

By dividing the reported counts by the corpus size (measured in either words, pages, or books), it is possible to determine the normalized frequency with which an n-gram appears in the base corpus. Note that the different counts can be used for different purposes. The usage frequency of an n-gram, normalized by the total number of words, reflects both the number of authors using an n-gram, and how frequently they use it. It can be driven upward markedly by a single author who uses an n-gram very frequently, for instance in a biography of 'Gottlieb Daimler' which mentions his name many times. This latter effect is sometimes undesirable. In such cases, it may be preferable to examine the fraction of books containing a particular n-gram: texts in different books, which are usually written by different authors, tend to be more independent.

Eleven corpora were generated, based on eleven different subsets of books. Five of these are English language corpora, and six are foreign language corpora.

Eng-all

This is derived from a base corpus containing all English language books which pass the filters described in section 1.

Eng-1M

This is derived from a base corpus containing 1 million English language books which passed the filters described in section 1. The base corpus is a subset of the Eng-all base corpus.

The sampling was constrained in two ways.

First, the texts were re-sampled so as to exhibit a representative subject distribution. Because digitization depends on the availability of the physical books (from libraries or publishers), we reasoned that digitized books may be a biased subset of books as a whole. We therefore re-sampled books so as to ensure that the diversity of book editions included in the corpus for a given year, as reflected by BISAC subject codes, reflected the diversity of book editions actually published in that year. We estimated the latter using our metadata database, which reflects the aggregate of our 100 bibliographic sources and includes 10-fold more book editions than the scanned collection.

Second, the total number of books drawn from any given year was capped at 6174. This has the net effect of ensuring that the total number of books in the corpus is uniform starting around the year 1883. This was done to ensure that all books passing the quality filters were included in earlier years. This

HOUSE_OVERSIGHT_017018

capping strategy also minimizes bias towards modern books that might otherwise result because the number of books being published has soared in recent decades.

Eng-Modern-1M

This corpus was generated exactly as Eng-1M above, except that it contains no books from before 1800.

Eng-US

This is derived from a base corpus containing all English language books which pass the filters described in section 1 but having a quality filtering threshold of 60%, and having 'United States' as its country of publication, reflected by the 2-letter country code "us",

Eng-UK

This is derived from a base corpus containing all English language books which pass the filters described in section 1 but having a quality filtering threshold of 60%, and having 'United Kingdom' as its country of publication, reflected by the 2-letter country code "gb",

Fre-all

This is derived from a base corpus containing all French language books which pass the series of filters described in section 1.

Ger-all

This is derived from a base corpus containing all German language books which pass the series of filters described in section 1.

Spa-all

This is derived from a base corpus containing all Spanish language books which pass the series of filters described in section 1.

Rus-all

This is derived from a base corpus containing all Russian language books which pass the series of filters described in section 1C-D.

Chi-sim-all

This is derived from a base corpus containing all books written using the simplified Chinese character set which pass the series of filters described in section 1C-D.

Heb-all

This is derived from a base corpus containing all Hebrew language books which pass the series of filter described in section 1.

HOUSE_OVERSIGHT_017019

The computations required to generate these corpora were performed at Google using the MapReduce framework for distributed computing (**Ref S5**). Many computers were used as these computations would take many years on a single ordinary computer.

Note that the ability to study the frequency of words or phrases in English over time was our primary focus in this study. As such, we went to significant lengths to ensure the quality of the general English corpora and their date metadata (i.e., Eng-all, Eng-1M, and Eng-Modern-1M). As a result, the accuracy of place-of-publication data in English is not as reliable as the accuracy of date metadata. In addition, the foreign language corpora are affected by issues that were improved and largely eliminated in the English data. For instance, their date metadata is not as accurate. In the case of Hebrew, the metadata for language is an oversimplification: a significant fraction of the earliest texts annotated as Hebrew are in fact hybrids formed from Hebrew and Aramaic, the latter written in Hebrew script.

The size of these base corpora is described in Tables S3-S6.

III. Culturomic Analyses

In this section we describe the computational techniques we use to analyze the historical n-grams corpora.

III.0. General Remarks

III.0.1 On Corpora.

There is significant variation in the quality of the various corpora during various time periods and their suitability for culturomic research. All the corpora are adequate for the uses to which they are put in the paper. In particular, the primary object of study in this paper is the English language from 1800-2000; this corpus during this period is therefore the most carefully curated of the datasets. However, to encourage further research, we are releasing all available datasets - far more data than was used in the paper. We therefore take a moment to describe the factors a culturomic researcher ought to consider before relying on results of new queries not highlighted in the paper.

1) Volume of data sampled. Where the number of books used to count n-gram frequencies is too small, the signal to noise ratio declines to the point where reliable trends cannot be discerned. For instance, if an n-gram's actual frequency is 1 part in n, the number of words required to create a single reliable timepoint must be some multiple of n. In the English language, for instance, we restrict our study to years past 1800, where at least 40 million words are found each year. Thus an n-gram whose frequency is 1 part per million can be reliably quantified with single-year resolution. In Chinese, there are fewer than 10 million words per year prior to the year 1956. Thus the Chinese corpus in 1956 is not in general as suitable for reliable quantification as the English corpus in 1800. (In some cases, reducing the resolution by binning in larger windows can be used to sample lower frequency n-grams in a corpus that is too smal for single-year resolution.) In sum: for any corpus and any n-gram in any year, one must consider whether the size of the corpus is sufficient to enable reliable quantitation of that n-gram in that year.

2) Composition of the corpus. The full dataset contains about 4% of all books ever published, which limits the extent to which it may be biased relative to the ensemble of all surviving books. Still, marked shifts in composition from one year to another are a potential source of error. For instance, book sampling patterns differ for the period before the creation of Google Books (2004) as compared to the period afterward. Thus, it is difficult to compare results from after 2000 with results from before 2000. As a result, significant changes in culturomic trends past the year 2000 may reflect corpus composition issues. This was an important reason for our choice of the period between 1800 and 2000 as the target period.

HOUSE_OVERSIGHT_017020

3) Quality of OCR. This varies from corpus to corpus as described above. For English, we spent a great deal of time examining the data by hand as an additional check on its reliability. The other corpora may not be as reliable.

4) Quality of Metadata. Again, the English language corpus was checked very carefully and systematically on multiple occasions, as described above and in the following sections. The metadata for the other corpora may not be equally reliable for all periods. In particular, the Hebrew corpus during the 19th century is composed largely of reprinted works, whose original publication dates farpredate the metadata date for the publication of the particular edition in question. This must be borne in mind for researchers intent on working with that corpus.

In addition to these four general issues, we note that earlier portions of the Hebrew corpus contain a large quantity of Aramaic text written in Hebrew script. As these texts often oscillate back and forth between Hebrew and Aramaic, they are particularly hard to accurately classify.

All the above issues will likely improve in the years to come. In the meanwhile, users must use extra caution in interpreting the results of culturomic analyses, especially those based on the various non-English corpora. Nevertheless, as illustrated in the main text, these corpora already contain a great treasury of useful material, and we have therefore made them available to the scientific community without delay. We have no doubt that they will enable many more fascinating discoveries.

III.0.2 On the number of books published

In the text, we report that our corpus contains about 4% of all books ever published. Obtaining this estimate relies on knowing how many books are in the corpus (5,195,769) and estimating the total number of books ever published. The latter quantity is extremely difficult to estimate, because the record of published books is fragmentary and incomplete, and because the definition of book is itself ambiguous.

One way of estimating the number of books ever published is to calculate the number of editions in the comprehensive catalog of books which was described in Section I of the supplemental materials. This produces an estimate of 129 million book editions. However, this estimate must be regarded with great caution: it is conservative, and the choice of parameters for the clustering algorithm can lead to significant variation in the results. More details are provided in **Ref S1**.

Another independent estimate we obtained in the study "How Much Information? (2003)" conducted at Berkeley (**Ref S6**). That study also produced a very rough estimate of the number of books ever published and concluded that it was between 74 million and 175 million.

The results of both estimates are in general agreement. If the actual number is closer to the low end of the Berkeley range, then our 5 million book corpus encompasses a little more than 5% of all books ever published; if it is at the high end, then our corpus would constitute a little less than 3%. We report an approximate value (about 4%) in the text; it is clear that, in the coming years, more precise estimates of the denominator will become available.

III.1. Generation of timeline plots

III.1A. Single Query

The timeline plots shown in the paper are created by taking the number of appearances of an n-gram in a given year in the specified corpus and dividing by the total number of words in the corpus in that year. This yields a raw frequency value. Results are smoothed using a three year window; i.e., the frequency of

HOUSE_OVERSIGHT_017021

a particular n-gram in year X as shown in the plots is the mean of the raw frequency value for the n-gram in the year X, the year X-1, and the year X+1.

Note that for each n-gram in the corpus, we can provide three measures as a function of year of publication:

1- the number of times it appeared
2- the number of pages where it appeared
3- the number of books where it appeared.

Throughout the paper, we make use only of the first measure; but the two others remain available. They are generally all in agreement, but can denote distinct cultural effects. These distinctions are not explored in this paper.

For example, we give in **Appendix** measures for the frequency of the word 'evolution'. In the first three columns, we give the number of times it appeared, the normalized number of times it appeared (relative to #words that year), the normalized number of pages it appeared in, and the normalized number of books it appeared in, as a function of the date.

III.1B. Multiple Query/Cohort Timelines

Where indicated, timeline plots may reflect the aggregates of multiple query results, such as a cohort of individuals or inventions. In these cases, the raw data for each query we used to associate each year with a set of frequencies. The plot was generated by choosing a measure of central tendency to characterize the set of frequencies (either mean or median) and associating the resulting value with the corresponding year.

Such methods can be confounded by the vast frequency differences among the various constituent queries. For instance, the mean will tend to be dominated by the most frequent queries, which might be several orders of magnitude more frequent than the least frequent queries. If the absolute frequency of the various query results is not of interest, but only their relative change over time, then individual query results may be normalized so that they yield a total of 1. This results in a probability mass function for each query describing the likelihood that a random instance of a query derives from a particular year. These probability mass functions may then be summed to characterize a set of multiple queries. This approach eliminates bias due to inter-query differences in frequency, making the change over time in the cohort easier to track.

III.2. Note on collection of historical and cultural data

In performing the analyses described in this paper, we frequently required additional curated datasets of various cultural facts, such as dates of rule of various monarchs, lists of notable people and inventions, and many others. We often used Wikipedia in the process of obtaining these lists. Where Wikipedia is merely digitizing the content available in another source (for instance, the blacklists of Wolfgang Hermann), we corrected the data using the original sources. In other cases this was not possible, but we felt that the use of Wikipedia was justifiable given that (i) the data – including all prior versions - is publicly available; (ii) it was created by third parties with no knowledge of our intended analyses; and (iii) the specific statistical analyses performed using the data were robust to errors; i.e., they would be valid as long as most of the information was accurate, even if some fraction of the underlying information was wrong. (For instance, the aggregate analysis of treaty dates as compared to the timeline of the corresponding treaty, shown in the control section, will work as long as most of the treaty names and dates are accurate, even if some fraction of the records is erroneous.

We also used several datasets from the Encyclopedia Britannica, to confirm that our results were unchanged when high-quality carefully curated data was used. For the lexicographic analyses, we relied primarily on existing data from the American Heritage Dictionary.

We avoided doing manual annotation ourselves wherever possible, in an effort to avoid biasing the results. When manual annotation had to be performed, such as in the classification of samples from our

HOUSE_OVERSIGHT_017022

language lexica, we tried whenever possible to have the annotation performed by a third party with no knowledge of the analyses we were undertaking

III.3. Controls

To confirm the quality of our data in the English language, we sought positive controls in the form of words that should exhibit very strong peaks around a date of interest. We used three categories of such words: heads of state ('President Truman'), treaties ('Treaty of Versailles'), and geographical name change ('Byelorussia' to 'Belarus'). We used Wikipedia as a primary source of such words, and manually curated the lists as described below. We computed the timeserie of each n-gram, centered it on the date of interest (year when the person became president, for instance), and normalized the timeserie by overall frequency. Then, we took the mean trajectory for each of the three cohorts, and plotted in **Figure S5.**

The list of heads of states include all US presidents and British monarchs who gained power in the 19th or 20th centuries (we removed ambiguous names, such as 'President Roosevelt'). The list of treaties is taken from the list of 198 treaties signed in the 19th or 20th centuries (S7); but we kept only the 121 names that referred to only one known treaty, and that have non zero timeseries. The list of country name changes is taken from **Ref S8**. The lists are given in **APPENDIX.**

The correspondence between the expected and observed presence of peaks was excellent. 42 out of 44 heads of state had a frequency increase of over 10-fold in the decade after they took office (expected if the year of interest was random: 1). Similarly, 85 out of 92 treaties had a frequency increase of over 10-fold in the decade after they were signed (expected: 2). Last, 23 out of 28 new country names became more frequent than the country name they replaced within 3 years of the name change; exceptions include Kampuchea/Cambodia (the name Cambodia was later reinstated), Iran/Persia (Iran is still today referred to as Persia in many contexts) and Sri Lanka/Ceylon (Ceylon is also a popular tea).

III.4. Lexicon Analysis

III.4A. Estimation of the number of 1-grams defined in leading dictionaries of the English language.

(a) American Heritage Dictionary of the English Language, 4th Edition (2000)

We are indebted to the editorial staff of AHD4 for providing us the list of the 153,459 headwords that make up the entries of AHD4. However, many headwords are not single words ("preferential voting" or "men's room"), and others are listed as many times as there are grammatical categories ("to console", the verb; "console", the piece of furniture).

Among those entries, we find 116,156 unique 1-grams (such as "materialism" or "extravagate").

(b) Webster's Third New International Dictionary (2002)

The editorial staff communicated to us the number of "boldface entries" of the dictionary, which are taken to be the number of n-grams defined: 476,330.

The editorial staff also communicated the number of multi-word entries 74,000 out of a total number of entries 275,000. They estimate a lower bound of multi-word entries at 27% of the entries.

Therefore, we estimate an upper bound of unique 1-grams defined by this dictionary as 0.27*476,330, which is approximately 348,000.

HOUSE_OVERSIGHT_017023

(c) Oxford English Dictionary (Reference in main text)

From the website of the OED we can read that the "number of word forms defined and/or illustrated" is 615,100; and that we find 169,000 "italicized-bold phrases and combinations".

Therefore, we estimate an upper bound of the number of unique 1-grams defined by this dictionary as 615,100-169,000 which is approximately 446,000.

III.4B. Estimation of Lexicon Size

How frequent does a 1-gram have to be in order to be considered a word? We chose a minimum frequency threshold for 'common' 1-grams by attempting to identify the largest frequency decile that remains lower than the frequency of most dictionary words.

We plotted a histogram showing the frequency of the 1-grams defined in AHD4, as measured in our year 2000 lexicon. We found that 90% of 1-gram headwords had a frequency greater than 10^{-9}, but only 70% were more frequent than 10^{-8}. Therefore, the frequency 10^{-9} is a reasonable threshold for inclusion in the lexicon.

To estimate the number of words, we began by generating the list of common 1-grams with a higher chronological resolution, namely 11 different time points from 1900 until 2000 (1900, 1910, 1920, ... 2000) as described above. We next excluded all 1-grams with non-alphabetical characters in order to produce a list of common alphabetical forms for each time point.

For three of the time points (1900, 1950, 2000), we took a random sample of 1000 alphabetical forms from the resulting set of alphabetical forms. These were classified by a native English speaker with no knowledge of the analyses being performed. The results of the classification are found in **Appendix**. We asked the speaker to classify the candidate words were classified into 8 categories:

M if the word is a misspelling or a typo or seems like gibberish*
N if the word derives primarily from a personal or a company name
P for any other kind of proper nouns
H if the word has lost its original hyphen
F if the word is a foreign word not generally used in English sentences
B if it is a 'borrowed' foreign word that is often used in English sentences
R for anything that does not fall into the above categories
U unclassifiable for some reason

We computed the fraction of these 1000 words at each time point that were classified as **P, N**, **B**, or **R**, which we call the 'word fraction for year X', or WF_X. To compute the estimated lexicon size for 1900, 1950, and 2000, we multiplied the word fraction by the number of alphabetical forms in those years.

For the other 8 time points, we did not perform a separate sampling step. Instead, we estimated the word fraction by linearly interpolating the word fraction of the nearest sampled time points; i.e., the word fraction in 1920 satisfied $WF_{1920}=.WF_{1900}+.4*(WF_{1950}-WF_{1900})$. We then multiplied the word fraction by the number of alphabetical forms in the corresponding year, as above.

For the year 2000 lexicon, we repeated the sampling and annotation process using a different native speaker. The results were similar, which confirmed that our findings were independent of the person doing the annotation.

We note that the trends shown in Fig 2A are similar when proper nouns (N) are excluded from the lexicon (i.e., the only categories are P, B and R). **Figure S7** shows the estimates of the lexicon excluding the category 'N' (proper nouns).

* A *typo* is a one-time typing error by someone who presumably knows the correct spelling (as in *improtant*); a *misspelling*, which generally has the same pronunciation as the correct spelling, arises when a person is ignorant of the correct spelling (as in *abberation*).

HOUSE_OVERSIGHT_017024

III.4C. Dictionary Coverage

To determine the coverage of the OED and Merriam-Webster's Unabridge Dictionary (MW), we performed the above analysis on randomly generated subsets of the lexicon in eight frequency deciles (ranging from 10^{-9} – 10^{-8} to 10^{-3} – 10^{-2}). The samples contained 500 candidate words each for all but the top 3 deciles; the samples corresponding to the top 3 deciles (10^{-5} – 10^{-4}, 10^{-4} – 10^{-3}, 10^{-3} – 10^{-2}) contained 100 candidate words each.

A native speaker with no knowledge of the experiment being performed determined which words from our random samples fell into the P, B, or R categories (to enable a fair comparison, we excluded the N category from our analysis as both OED an MW exclude them). The annotator then attempted to find a definition for the words in both the online edition of the Merriam-Webster Unabridged Dictionary or in the online version of the Oxford English Dictionary's 2nd edition. Notably, the performance of the latter was boosted appreciably by its inclusion of Merriam-Webster's Medical Dictionary. Results of this analysis are shown in **Appendix**.

To estimate the fraction of dark matter in the English language, we applied the formula:
sum over all deciles of $P_{word}*P_{OED/MW}*N_{1gram}$, with:

- N_{1gram} the number of 1grams in the decile
- P_{word} the proportion of words (R,B or P) in this decile
- $P_{OED/MW}$ the proportion of words of that decile that are covered in OED or MW.

We obtain 52% of dark matter, words not listed in either MW or the OED. With the procedure above, we estimate the number of words excluding proper nouns at 572,000; this results in 297,000 words unlisted in even the most comprehensive commercial and historical dictionaries.

III.4D. Analysis New and Obsolete words in the American Heritage Dictionary

We obtained a list of the 4804 vocabulary items that were added to the AHD4 in 2000 from the dictionary's editorial staff. These 4804 words were not in AHD3 (1992) – although, on rare occasions a word could have featured in earlier editions of the dictionary (this is the case for "gypseous", which was included in AHD1 and AHD2).

Similar to our study of the dictionary's lexicon, we restrict ourselves to 1grams. We find 2077 1-grams newly added to the AHD4. Median frequency (**Fig 2D**) is computed by obtaining all frequencies of this set of words and computing its median.

Next, we ask which 1grams appear in AHD4 but are not part of the year 2000 lexicon any more (frequency lower than one part per billion between 1990 and 2000). We compute the lexical frequency of the 1-gram headwords in AHD, and find a small number (2,220) that are not part of the lexicon today. We show the mean frequency of these 2,220 words (**Fig 2F**).

III.5. The Evolution of Grammar

III.5A. Ensemble of verbs studied

Our list of irregular verbs was derived from the supplemental materials of **Ref 18** (main text). The full list of 281 verbs is given in **Appendix.**

Our objective is to study the way word frequency affects the trajectories of the irregular compared with regular past tense. To do so, we must be confident that

- the 1grams used refer to the verbs themselves: "to dive/dove" cannot be used, as "dove" is a common noun for a bird. Or, in the verb "to bet/bet", the irregular preterit cannot be distinguished from the

HOUSE_OVERSIGHT_017025

present (or, for that matter, from the common noun "a bet").

- the verb is not a compound, like "overpay" or "unbind", as the effect of the underlying verb ("pay", "bind") is presumably stronger than that of usage frequency.

We therefore obtain a list of 106 verbs that we use in the study (marked by the denomination 'True' in the column "Use in the study?")

III.5B. Verb frequencies

Next, for each verb, we computed the frequency of the regular past tense (built by suffixation of '-ed' at the end of the verb), and the frequency of the irregular past tense (summing preterit and past participle). These trajectories are represented in **Fig 3A** and **Fig S8**.

We define the regularity of a verb: at any given point in time, the regularity of a verb is the percentage of past tense usage made using the regular version. Therefore, in a given year, the regularity of a verb is r=R/(R+I) where R is the number of times the regular past tense was used, and I the number of times the irregular past tense was used. The regularity is a continuous variable that ranges between 0 and 1 (100%).

We plot in **Figure 3B** the mean regularity between 1800-1825 in x-axis, and the mean regularity between 1975-2000 in y-axis.

If we assume that a speaker of the English language uses only one of the two variants (regular or irregular); and that all speakers of English are equally likely to use the verb; then the regularity translates directly into percentage of the population of speakers using the regular form. While these assumptions may not hold generally, they provide a convenient way of estimating the prevalence of a certain word in the population of English speakers (or writers).

III.5C. Rates of regularization

We can compute, for any verb, the slope of regularity as a function of time: this can be interpreted as the variation in percentage of the population of English speakers using the regular form.

By holding population size constant over the time window used to obtain the slope, we derive the variation of population using the regular form in absolute terms.

For instance, the regularity of "sneak/snuck" has decreased from 100% to 50% over the past 50 years, which is 1% per year. We consider the population of US English speakers to be roughly 300 million. As a result, snuck is sneaking in at a speed of 3 million speakers per year, or about one speaker per minute in the US.

III.5D. Classification of Verbs

The verbs were classified into different types based on the phonetic pattern they represented using the classification of **Ref 18** (main text). **Fig 3C** shows the median regularity for the verbs 'burn', 'spoil', 'dwell', 'learn', 'smell', 'spill' in each year. We compute the UK rate as above, using 60 million for UK population.

III.6. Collective Memory

One hundred timelines were generated, for every year between 1875 and 1975. Amplitude for each plot was measured by either computing 'peak height' – i.e., the maximum of all the plotted values, or 'area-under-the curve' – i.e., the sum of all the plotted values. The peak for year X always occurred within a

HOUSE_OVERSIGHT_017026

handful of years after the year X itself. The lag between a year and its peak is partly due to the length of the authorship and publication process. For instance, a book about the events of 1950 may be written over the period from 1950-1952 and only published in 1953.

For each year, we estimated the slope of the exponential decay shortly past its peak. The exponent was estimated using the slope of the curve on a logarithmic plot of frequency between the year Y+5 and the year Y+25. This estimate is robust to the specific values of the interval, as long as the first value (here, Y+5) is past the peak of Y, and the second value is in the fifty years that follow Y. The Inset in **Figure 4A** was generated using 5 and 25. The half-life could thus be derived.

Half-life can also be estimated directly by asking how many years past the peak elapse before frequency drops below half its peak value. These values are noisier, but exhibit the same trend as in **Figure 4A, Inset** (not shown).

Trends similar to those described here may capture more general events, such as those shown in **Figure S9.**

III.7. The Pursuit of Fame

We study the fame of individuals appearing in the biographical sections of Encyclopedia Britannica and Wikipedia. Given the encyclopedic objective of these sources, we argue these represent comprehensive lists of notable individuals. Thus, from Encyclopedia Britannica and Wikipedia, we produce databases of all individuals born between 1800-1980, recording their full name and year of birth. We develop a method to identify the most common, relevant names used to refer to all individuals in our databases. This method enables us to deal with potentially complicated full names, sometimes including multiple titles and middle names. On the basis of the amount of biographical information regarding each individual, we resolve the ambiguity arising when multiple individuals share some part, or all, their name. Finally, using the time series of the word frequency of people's name, we compare the fame of individuals born in the same year or having the same occupation.

III.7A) Complete procedure

7.A.1 - Extraction of individuals appearing in Wikipedia.

Wikipedia is a large encyclopedic information source, with an important number of articles referring to people. We identify biographical Wikipedia articles through the DBPedia engine (**Ref S9**), a relational database created by extensively parsing Wikipedia. For our purposes, the most relevant component of DBPedia is the "Categories" relational database.

Wikipedia categories are structural entities which unite articles related to a specific topic. The DBPedia "Categories" database includes, for all articles within Wikipedia, a complete listing of the categories of which this article is a member. As an example, the article for Albert Einstein (http://en.wikipedia.org/wiki/Albert_Einstein) is a member of 73 categories, including "German physicists", "American physicists", "Violonists", "People from Ulm" and "1879_births". Likewise, the article for Joseph Heller (http://en.wikipedia.org/wiki/Joseph_Heller) is a member of 23 categories, including "Russian-American Jews", "American novelists", "Catch-22" and "1923_births".

We recognize articles referring to non-fictional people by their membership in a "year_births" category. The category "1879_births" includes Albert Einstein, Wallace Stevens and Leon Trotsky ,likewise "1923_births" includes Henry Kissinger, Maria Callas and Joseph Heller while "1931_births" includes Michael Gorbachev, Raul Castro and Rupert Murdoch. If only the approximate birth year of a person is

HOUSE_OVERSIGHT_017027

known, their article will be a member of a "decade_births" category such as "1890s_births" and "1930s_births". We treat these individuals as if born at the beginning of the decade.

For every parsed article, we append metadata relating to the importance of the article within Wikipedia, namely the size in words of the article and the number of page views which it obtains. The article word count is created by directly accessing the article using its URL. The traffic statistics for Wikipedia articles are obtained from http://stats.grok.se/.

Figure S10a displays the number of records parsed from Wikipedia and retained for the final cohort analysis. **Table S7** displays specific examples from the extraction's output, including name, year of birth, year of death, approximate word count of main article and traffic statistics for March 2010.

1) **Create a database of records referring to people born 1800-1980 in Wikipedia.**
    a. Using the DBPedia framework, find all articles which are members of the categories '1700_births' through '1980_births'. Only people both in 1800-1980 are used for the purposes of fame analysis. People born in 1700-1799 are used to identify naming ambiguities as described in section III.7.A.7 of this Supplementary Material.
    b. For all these articles, create a record identified by the article URL, and append the birth year.
    c. For every record, use the URL to navigate to the online Wikipedia page. Within the main article body text, remove all HTML markup tags and perform a word count. Append this word count to the record.
    d. For every record, use the URL to determine the page's traffic statistics for the month of March 2010. Append the number of views to the record.

III.7.A.2 – Identification of occupation for individuals appearing in Wikipedia.

Two types of structural elements within Wikipedia enable us to identify, for certain individuals, their occupation. The first, Wikipedia Categories, was previously described and used to recognize articles about people. Wikipedia Categories also contain information pertaining to occupation. The categories "Physicists", "Physicists by Nationality", "Physicists stubs", along with their subcategories, pinpoint articles of relating to the occupation of physicist. The second are Wikipedia Lists, special pages dedicated to listing Wikipedia articles which fit a precise subject. For physicists, relevant examples are "List of physicists", "List of plasma physicists" and "List of theoretical physicists". Given their redundancy, these two structural elements, when used in combination provide a strong means of identifying the occupation of an individual.

Next, we selected the top 50 individuals in each category, and annotated each one manually as a function of the individual's main occupation, as determined by reading the associated Wikipedia article. For instance, "Che Guevara" was listed in Biologists; so even though he was a medical doctor by training, this is not his primary historical contribution. The most famous individuals of each category born between 1800 and 1920 are given in **Appendix.**

In our database of individuals, we append, when available, information about the occupations of people. This enables the comparison, on the basis of fame, of groups of individuals distinguished by their occupational decisions.

2) **Associate Wikipedia records of individuals with occupations** using relevant Wikipedia "Categories" and "Lists" pages. For every occupation to be investigated :
    a. Manually create a list of Wikipedia categories and lists associated with this defined occupation.
    b. Using the DBPedia framework, find all the Wikipedia articles which are members of the chosen Wikipedia categories.

HOUSE_OVERSIGHT_017028

c. Using the online Wikipedia website, find all Wikipedia articles which are listed in the body of the chosen Wikipedia lists.
d. Intersect the set of all articles belonging to the relevant Lists and Categories with the set of people both 1800-1980. For people in both sets, append the occupation information.
e. Associate the records of these articles with the occupation.

III.7.A.3 - Extraction of individuals appearing in Encyclopedia Britannica.

Encyclopedia Britannica is a hand-curated, high quality encyclopedic dataset with many detailed biographical entries. We obtained, in a private communication, structured datasets from Encyclopedia Britannica Inc. These datasets contain a complete record of all entries relating to individuals in the Encyclopedia Britannica. Each record contains the birth and death of the person at hand, as well as set of information snippets summarizing the most critical biographical information available within the encyclopedia.

For the analysis of fame, we extract, from the dataset provided by Encyclopedia Britannica Inc., records of individuals born in between 1800 and 1980. For every person, we retain, as a measure of their notability, a count of the number of biographical snippets present in the dataset. **Figure S10b** outlines the number of records parsed from the Encyclopedia Britannica dataset, as well as the number of these records ultimately retained for final analysis. **Table S8** displays examples of records parsed in this step of the analysis procedure.

3) **Create a database of records referring to people born 1800-1980 in Encyclopedia Britannica.**
   a. Using the internal database records provided by Encyclopedia Britannica Inc., find all entries referring to individuals born 1700-1980. Only people both in 1800-1980 are used for the purposes of fame analysis. People born in 1700-1799 are used to identify naming ambiguities as described in section III.7.A.7 of this Supplementary Material.
   b. For these entries, create a record identified by a unique integer containing the individual's full name, as listed in the encyclopedia, and the individual's birth year.
   c. For every record, find the number of encyclopedic informational snippets present in the Encyclopedia Britannica dataset. Append this count to the record.

III.7.A.4 – Produce spelling variants of the full names of individuals.

We ultimately wish to identify the most relevant name used to commonly refer to an individual. Given the limits of OCR and the specificities of the method used to create the word frequency database, certain typographic elements such as accents, hyphens or quotation marks can complicate this process. As such, for every full name present in our database of people, we append variants of the full names where these typographic elements have been removed or, when possible, replaced. **Table S9** presents examples of spelling variants for multiple names.

4) **In both databases, for every record, create a set of raw names variants.** To create the set:
   a. Include the original raw name.
   b. If the name includes apostrophes or quotation marks, include a variant where these elements are removed.
   c. If the first word in the name contains a hyphen, include a name where this hyphen is replaced with a whitespace.
   d. If the last word of the name is a numeral, include a name where this numeral has been removed.
   e. For every element in the set which contains non-Latin characters, include a variant where this characters have been replaced using the closest Latin equivalent.

HOUSE_OVERSIGHT_017029

III.7.A.5 – Find possible names used to refer to individuals.

The common name of an individual sometimes significantly differs from the complete, formal name present in Encyclopedia Britannica and Wikipedia. This encyclopedia full name can contain details such as titles, initials and military or nobility standings, which are not commonly used when referring to individual in most publications. Even in simpler cases, when the full name contains only first, middle and last names, there exists no systematic convention on which names to use when talking about an individual. Henry David Thoreau is most commonly referred to by his full name, not "Henry Thoreau" nor "David Thoreau", whereas Oliver Joseph Lodge is mentioned by his first and last name "Oliver Lodge", not his full name "Oliver Joseph Lodge".

Given a full name with complex structure potentially containing details such as titles, initials, nobility rights and ranks, in addition to multiple first and last names, we must extract a list of simple names, using three words at most, which can potentially be used to refer to this individual. This set of names is created by generating combinations of names found in the raw name. Furthermore, whenever they appear we systematically exclude common words such as titles or ranks from these names. The query name sets of several individuals are displayed in **Table S10.**

5) **For every record, using the set of raw names, create a set of query names.** Query names are (2,3) grams which will be used in order to measure the fame of the individual. The following procedure is iterated on every raw name variant associated with the record. Steps for which the record type is not specified are carried out for both.
    a. For Encyclopedia Britannica records, truncate the raw name at the second comma, reorder so that the part of name preceding the first comma follows that succeeding the comma.
    b. For Wikipedia records, replace the underscores with whitespaces.
    c. Truncate the name string at the first (if any) parenthesis or comma.
    d. Truncate the name string at the beginning of the words 'in', 'In', 'the', 'The', 'of' and 'Of', if these are present.
    e. Create the last name set. Iterating from last to first in the words of the name, add the first name with the following properties:
        i. Begin with a capitalized letter.
        ii. Longer than 1 character.
        iii. Not ending in a period.
        iv. If the words preceding this last name are identified as a prefix ('von', 'de', 'van', 'der', 'de' , 'd'', 'al-', 'la', 'da', 'the', 'le', 'du', 'bin', 'y', 'ibn' and their capitalized versions), the last name is a 2gram containing both the prefix.
    f. If the last name contains a capitalized character besides the first one, add a variant of this word where the only capital letter is the first to the set of last names.
    g. Create the set of first names. Iterating on the raw name elements which are not part of the last name set, candidate first names are words with the following properties :
        i. Begin with a capital letter.
        ii. Longer than 1 character.
        iii. Not ending in a period.
        iv. Not a title. ('Archduke', 'Saint', 'Emperor', 'Empress', 'Mademoiselle', 'Mother', 'Brother', 'Sister', 'Father', 'Mr', 'Mrs', 'Marshall', 'Justice', 'Cardinal', 'Archbishop', 'Senator', 'President', 'Colonel', 'General', 'Admiral', 'Sir', 'Lady', 'Prince', 'Princess', 'King', 'Queen', 'de', 'Baron', 'Baroness', 'Grand', 'Duchess', 'Duke', 'Lord', 'Count', 'Countess', 'Dr')

HOUSE_OVERSIGHT_017030

h. Add to the set of query names all pairs of "first names + last names" produced by combining the sets of first and last names.
i. This procedure is carried for every raw name variant.

III.7.A.6 – Find the word match frequencies of all names.

Given the set of names which may refer to an individual, we wish to find the time resolved words frequencies of these names. The frequency of the name, which corresponds to a measure of how often an individual is mentioned, provides a metric for the fame of that person. We append the word frequencies of all the names which can potentially refer to an individual. This enables us, in a later step, to identify which name is the relevant.

6) **Append the fame signal for each query name of each record.** The fame signal is the timeseries of normalized word matches in the complete English database.

III.7.A.7 – Find ambiguous names which can refer to multiple individuals.

Certain names are particularly popular and are shared by multiple people. This results in ambiguity, as the same query name may refer to a plurality of individuals. Homonimity conflicts occur between a group of individuals when they share some part of, or all, their name. When these homonimity conflicts arise, the word frequency of a specific name may not reflect the number of references to a unique person, but to that of an entire group. As such, the word frequency does not constitute a clear means of tracking the fame of the concerned individuals. We identify homonimity conflicts by finding instances of individuals whose names contain complete or partial matches. These conflicts are, when possible, resolved on the basis of the importance of the conflicted individuals in the following step. Typical homonimity conflicts are shown in **Table S11.**

7) **Identify homonimity conflicts.** Homonimity conflicts arise when the query names of two or more individuals contain a substring match. These conflicts are distinguished as such :
   a. For every query name of every record, find the set of substrings of query names.
   b. For every query name of every record, search for matches in the set of query name substrings of all other records.
   c. Bidirectional homonimity conflicts occur when a query name fully matches another query name. The name conflicted name could be used to refer to both individuals. Unidirectional conflicts occur when a query name has a substring match within another query name. Thus, the conflicted name can refer to one of the individuals, but also be part of a name referring to another.

III.7.A.8 – Resolve, when possible, the most likely origin of ambiguous names.

The problem of homonymous individuals is limiting because the word frequencies data do not allow us to resolve the true identity behind a homonymous name. Nonetheless, in some cases, it is possible to distinguish conflicted individuals on the basis of their importance. For the database of people extracted from Encyclopedia Britannica, we argue that the quantity of information available about an individual provides a proxy for their relevance. Likewise, for people obtained from Wikipedia, we can judge their importance by the size of the article written about the person and the quantity of traffic the article generates. As such, we approach the problem of ambiguous names by comparing the notability of individuals, as evaluated by the amount of information available about them in the respective encyclopedic source. Examples of conflict resolution are shown in **Table S12** and **S13**.

8) **Resolve homonimity conflicts.**

HOUSE_OVERSIGHT_017031

a. Conflict resolution involves the decision of whether a query name, associated with multiple records, can unambiguously refer to a single one of them.
b. *Wikipedia*. Conflict resolution for Wikipedia records is carried out on the basis the main article word count and traffic statistics. A conflict is resolved as such :
    i. Find the cumulative word count of words written in the articles in conflict.
    ii. Find the cumulative number of views resulting from the traffic to the articles in conflict.
    iii. For every record in the conflict, find the fraction of words and views resulting from this record by dividing by the cumulative counts.
    iv. Does a record have the largest fraction of both words written and page views?
    v. Does this record have above 66% of either words written and page views?
    vi. If so, the conflicted query name can be considered as being sufficiently specific to the record with these properties.
c. *Encyclopedia Britannica*. Conflict resolution for Encyclopedia Britannica records is carried on the basis of the quantity of information snippets present in the dataset.
    i. Find the cumulative number of information snippets related to the records in conflicts.
    ii. For every record in the conflict, find the fraction of informational snippets by dividing with the cumulative count
    iii. If a record has greater than 66% of the cumulative total, the query name in conflict is considered to refer to this record.

III.7.A.9 Identify the most relevant name used to refer to an individual.

So far, we have obtained, for all individuals in both our databases, a set of names by which they can plausibly be mentioned. From this set, we wish to identify the best such candidate and use its word frequency to observe the fame of the person at hand. This optimal name is identified on the basis of the amplitude of the word frequency, the potential ambiguities which arise from name homonimity and the quality of the word frequency time series. Examples are shown in **Fig S11** and **S12.**

9) Determine the best query name for every record.

a. Order all the query names associated with a record on the basis of the integral of the fame signal from the year of birth until the year 2000.
b. Iterating from the strongest fame signal to the lowest, the selected query name is the first result with the following properties :
    i. Unambiguously refers to the record (as determined by conflict resolution, if needed).
    ii. The average fame signal in the window [year of birth ± 10 years] is less than 10^{-9} or an order of magnitude less than the average fame signal from the year of birth to the year 2000.
    iii. (*Wikipedia Only*). The query name, when converted to a Wikipedia URL by replacing whitespaces with underscores, refers to the record or an inexistent article. If the name refers to another article or a disambiguation page, the query name is rejected.
c. If the best query name is a 2-gram name corresponding the last two names in 3-gram query name, and if the fame integral of the 3-gram name is 80% of the fame integral of the 2-gram, the best query name is replaced by the 3-gram.

HOUSE_OVERSIGHT_017032

III.7.A.10 – Compare the fame of multiple individuals.

Having identified the best name candidate for every individual, we use the word frequency time series of this name as a metric for the fame of the each individual. We now compare the fame of multiple individuals on the basis of the properties of their fame signal. For this analysis, we group people according to specific characteristics, which in the context of this work are the years of birth and the respective occupations.

10) Assemble cohorts on the basis of a shared record property.

a. Fetch all records which match a specific record property, such as year of birth or occupation.
b. Create fame cohorts comparing the fame of individuals born in the same year.
    i. Use average lifetime fame ranking, done on the basis of the average fame as computed from the birth of the individual to the year 2000.
c. Create fame cohorts for individuals with the same occupation.
    i. Use most famous 20th year, ranking on the basis of the 20th best year in the terms of fame for the individual.

III.7B. Cohorts of fame

For each year, we defined a cohort of the top 50 most famous individuals born that year. Individual fame was measured in this case by the average frequency over all years after one's birth. We can compute cohorts on the basis of names from Wikipedia, or Encyclopedia Britannica. In **Figure 5**, we used cohorts computed with names from Wikipedia.

At each time point, we defined the frequency of the cohort as the median value of the frequencies of all individuals in the cohort.

For each cohort, we define:

(1) Age of initial celebrity. This is the first age when the cohort's frequency is greater than 10-9. This corresponds to the point at which the median individual in the cohort enter the "English lexicon" as defined in the first section of the paper.

(2) Age of peak celebrity. This is the first age when the cohort's frequency is greater than 95% of its peak value. This definition is meant to diminish the noise that exists on the exact position of the peak value of the cohort's frequency.

(3) Doubling time of fame. We compute the exponential rate at which fame increases between the 'age of fame' and the 'age of peak fame'. To do so, we fit an exponential to the timeseries with the methods of least squares. The doubling time is derived from the estimated exponent.

(4) Half-life of fame. We compute the exponential rate at which fame decreases past the year at which it reaches its peak (which is later than the "age of peak celebrity" as defined above). To do so, we fit an exponential to the timeseries with the methods of least squares. The half-life is derived from the estimated exponent.

We show the way these parameters change with the cohort's year of birth in **Figure S13**.

The dynamics of these quantities is sensibly the same when using cohorts from Wikipedia or from Encyclopedia Britannica. However, Britannica features fewer individuals in their cohorts, and therefore the cohorts from the early 19th century are much noisier. We show in **Figure S14** the fame analysis conducted with cohorts from Britannica, restricting our analysis to the years 1840-1950.

In **Figure 5E**, we analyze the trade-offs between early celebrity and overall fame as a function of occupation. For each occupation, we select the top 25 most famous individuals born between 1800 and 1920. For each occupation, we define the contour within which all points are close to at least 2 member of the cohort (it is the contour of the density map created by the cohort).

HOUSE_OVERSIGHT_017033

People leave more behind them than a name. Like her fictional protagonist Victor Frankenstein, Mary Shelley is survived by her creation: Frankenstein took on a life of his own within our collective imagination (**Figure S15**). Such legacies, and all the many other ways in which people achieve cultural immortality, fall beyond the scope of this initial examination.

III.8. History of Technology

A list of inventions from 1800-1960 was taken from Wikipedia (**Ref S10**).

The year listed is used in our analysis. Where multiple listings of a particular invention appear, the year retained in the list is the one reported in the main Wikipedia article for the invention. (e.g. "Microwave Oven" is listed in 1945 and 1946; the main article lists 1945 as the year of invention, and this is the year we use in our analyses).

Each entry's main Wikipedia page was checked for alternate terms for the invention. Where alternate names were listed in the main article (e.g. **thiamine** or **thiamin** or **vitamin B_1**), all the terms were compared for their presence in the database. Where there was no single dominant term (e.g.MSG or monosodium glutamate) the invention was eliminated from the list. If a name other than the originally listed one appears to be dominant, the dominant name was used in the analysis (e.g. electroencephalograph and EEG - EEG is used).

Inventions were grouped into 40-year intervals (1800-1840, 1840-1880, 1880-1920, and 1920-1960), and the median percentages of peak frequency was calculated for each bin for each year following invention: these were plotted in **Fig 4B**, together with examples of individual inventions in inset.

Our study of the history of technology suffers from a possible sampling bias: it is possible that some older inventions, which peaked shortly after their invention, are by now forgotten and not listed in the Wikipedia article at all. This sampling bias would be more extreme for the earlier cohorts, and would therefore tend to exaggerate the lag between invention date and cultural impact in the older invention cohorts. We have verified that our inventions are past their peaks, in all three cohorts (**Fig S16**). Future analyses would benefit from the use of historical invention lists to control for this effect.

Another possible bias is that observing inventions later after they were invented leaves more room for the fame of these inventions to rise. To ensure that the effect we observe is not biased in this way, we reproduce the analysis done in the paper using constant time intervals: a hundred years from time of invention. Because we have a narrower timespan, we consider only technologies invented in the 19th century; and we group them in only two cohorts. The effect is consistent with that observed in the main text (**Fig S16**).

III.9. Censorship

III.9A. Comparing the influence of censorship and propaganda on various groups

To create panel E of **Fig 6,** we analyzed a series of cohorts; for each cohort, we display the mean of the normalized probability mass functions of the cohort, as described in section 1B. We multiplied the result by 100 in order to represent the probability mass functions more intuitively, as a percentage of lifetime

HOUSE_OVERSIGHT_017034

fame. People whose names did not appear in the cohorts for the time periods in question (1925-1933, 1933-1945, and 1955-1965) were eliminated from the analysis.

The cohorts we generated were based on four major sources, and their content is given in **Appendix.**

1) The Hermann lists

The lists of the infamous librarian Wolfgang Hermann were originally published in a librarianship journal and later in Boersenblatt, a publishing industry magazine in Germany. They are reproduced in **Ref S11**. A digital version is available on the German-language version of Wikipedia (**Ref S12**). We considered digitizing **Ref S10** by hand to ensure accuracy, but felt that both OCR and manual entry would be time-consuming and error prone. Consequently, we began with the list available on Wikipedia and hired a manual annotator to compare this list with the version appearing in **Ref S11** to ensure the accuracy of the resulting list. The annotator did not have access to our data and made these decisions purely on the basis of the text of **Ref S11**. The following changes were made:

Literature
1) "Fjodor Panfjorow" was changed to "Fjodor Panferov".
2) "Nelly Sachs" was deleted.

History
1) "Hegemann W. Ellwald, Fr. v." was changed to "W. Hegemann" and "Fr. Von Hellwald"

Art
4) "Paul Stefan" was deleted.

Philosophy/Religion
1) "Max Nitsche" was deleted.

The results of this manual correction process were used as our lists for Politics, Literature, Literary History, History, Art-related Writers, and Philosophy/Religion.

2) The Berlin list

The lists of Hermann continued to be expanded by the Nazi regime. We also analyzed a version from 1938 (**Ref S13**). This version was digitized by the City of Berlin to mark the 75th year after the book burnings in 2008 (**Ref S14**). The list of authors appearing on the website occasionally included multiple authors on a single line, or errors in which the author field did not actually contain the name of a person who wrote the text. These were corrected by hand to create an initial list.

We noted that many authors were listed only using a last name and a first initial. Our manual annotator attempted to determine the full name of any such author. The results were far from comprehensive, but did lead us to expand the dataset somewhat; names with only first initials were replaced by the full name wherever possible.

Some authors were listed using a pseudonym, and on several occasions our manual annotator was able to determine the real name of the author who used a given pseudonym. In this case, the real name was added to the list.

In addition, we occasionally included multiple spelling variants for a single author. Because of this, and because an author's real name and pseudonym may both be included on the list, the number of author names on the list very slightly exceeds the number of individuals being examined. The numbers reported in the figure are the number of names on the list.

It is worth pointing out that Adolf Hitler appears as an author of one of the banned books from 1938. This is due to a French version of *Mein Kampf*, together with commentary, which was banned by the Nazi authorities. Although it is extremely peculiar to find Hitler on a list of banned authors, we did not remove Hitler's name, as we had no basis for doing so from the standpoint of the technical authorship and name criteria described above: Adolf Hitler is indeed listed as the author of a book that was banned by the Nazi regime. This is consistent with our stance throughout the paper, which is that we avoided making judgments ourselves that could bias the outcome of our results. Instead, we relied strictly upon our

HOUSE_OVERSIGHT_017035

secondary sources. Because Adolf Hitler is only one of many names, the list as a whole nevertheless exhibits strong evidence of suppression, especially because the measure we retained (median usage) is robust to such outliers.

3) *Degenerate artists*

The list of degenerate artists was taken directly from the catalog of a recent exhibition at the Los Angeles County Museum of Art which endeavored to reconstruct the original 'Degenerate Art' exhibition (**Ref S15**).

4) *People with recorded ties to Nazis*

The list of Nazi party members was generated in a manner consistent with the occupation categories in section 7. We included the following Wikipedia categories: *Nazis_from_outside_Germany, Nazi_leaders, SS_officers, Holocaust_perpetrators, Officials_of_Nazi_Germany, Nazis_convicted_of_war_crimes*, together with all of their subcategories, with the exception of *Nazis_from_outside_Germany*. In addition, the three categories *German_Nazi_politicians, Nazi_physicians, Nazis* were included without their respective subcategories.

III.9B. *De Novo* Identification of Censored and Suppressed Individuals

We began with the list of 56,500 people, comprising the 500 most famous individuals born in each year from 1800 – 1913. This list was derived from the analysis of all biographies in Wikipedia described in section 7. We removed all individuals whose mean frequency in the German language corpus was less than 5×10^{-9} during the period from 1925 – 1933; because their frequency is low, a statistical assessment of the effect of censorship and suppression on these individuals is more susceptible to noise.

The suppression index is computed for the remaining individuals using an observed/expected measure. The expected fame for a given year is computed by taking the mean frequency of the individual in the German language from 1925-1933, and the mean frequency of the individual from 1955-1965. These two values are assigned to 1929 and 1960, respectively; linear interpolation is then performed in order to compute an expected fame value in 1939. This expected value is compared to the observed mean frequency in the German language during the period from 1933-1945. The ratio of these two numbers is the suppression index *s*. The complete list of names and suppression indices is included as supplemental data. The distribution of *s* was plotted for using a logarithmic binning strategy, with 100 bins between 10^{-2} and 10^{2}. Three specific individuals who received scores indicating suppression in German are indicated on the plot by arrows (Walter Gropius, Pablo Picasso, and Hermann Maas).

As a point of comparison, the entire analysis was repeated for English; these results are shown on the plot.

III.9C. Validation by an expert annotator

We wanted to see whether the findings of this high-throughput, quantitative approach were consistent with the conclusions of an expert annotator using traditional, qualitative methods. We created a list of 100 individuals at the extremes of our distribution, including the names of the fifty people with the largest s value and of the fifty people with the smallest s value. We hired a guide at *Yad Vashem* with advanced degrees in German and Jewish literature to manually annotate these 100 names based on her assessment of which people were suppressed by the Nazis (S), which people would have benefited from the Nazi regime (B), and lastly, which people would not obviously be affected in either direction (N). All 100 names were presented to the annotator in a single, alphabetized list; the annotator did not have access to any of our methods, data, or conclusions. Thus the annotator's assessment is wholly independent of our own.

HOUSE_OVERSIGHT_017036

The annotator assigned 36 names to the S category and 27 names to the B category; the remaining 37 were given the ambiguous N classification. Of the names assigned to the S category by the human annotator, 29 had been annotated as suppressed by our algorithm, and 7 as elevated, so the correspondence between the annotator and our algorithm was 81%. Of the names assigned to the B category, 25 were annotated as elevated by our algorithm, and only 2 as suppressed, so the correspondence was 93%.

Taken together, the conclusions of a scholarly annotator researching one name at a time closely matched those of our automated approach. These findings confirm that our computational method provides an effective strategy for rapidly identifying likely victims of censorship given a large pool of possibilities.

III.10. Epidemics

Disease epidemics have a significant impact on the surrounding culture (**Fig. S18 A-C**). It was recently shown that during seasonal influenza epidemics, users of Google are more likely to engage in influenza-related searches, and that this signature of influenza epidemics corresponds well with the results of CDC surveillance (**Ref S16**). We therefore reasoned that culturomic approaches might be used to track historical epidemics. These could help complement historical medical records, which are often woefully incomplete.

We examined timelines for 4 diseases: influenza (main text), cholera, HIV, and poliomyelitis. In the case of influenza, peaks in cultural interest showed excellent correspondence with known historical epidemics (the Russian Flu of 1890, leading to 1M deaths, the Spanish Flu of 1918, leading to 20-100M deaths; and the Asian Flu of 1957, leading to 1.5M deaths). Similar results were observed for cholera and HIV. However, results for polio were mixed. The US epidemic of 1916 is clearly observed, but the 1951-55 epidemic is harder to pinpoint: the observed peak is much broader, starting in the 30s and ending in the 60s. This is likely due to increased interest in polio following the election of Franklin Delano Roosevelt in 1932, as well as the development and deployment of Salk's polio vaccine in 1952 and Sabin's oral version in 1962. These confounding factors highlight the challenge of interpreting timelines of cultural interest: interest may increase in response to an epidemic, but it may also respond to a stricken celebrity or a famous cure.

The dates of important historical epidemics were derived from the Cambridge World History of Human Diseases (1993) 3rd Edition.

For cholera, we retained the time periods which most affected the Western world, according to this resource:
- 1830-35 (Second Cholera Epidemic)
- 1848-52, and 1854 (Third Cholera Epidemic)
- 1866-74 (Fourth Cholera Epidemic)
- 1883-1887 (Fifth Cholera Epidemic)

The first, sixth and seventh cholera epidemics appear not to have caused significant casualties in the Western world.

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Supplementary References

"Quantitative analysis of culture using millions of digitized books", Michel et al.

S1. L. Taycher, "Books of the world stand up and be counted", 2010. http://booksearch.blogspot.com/2010/08/books-of-world-stand-up-and-be-counted.html

S2. Ray Smith, Daria Antonova, and Dar-Shyang Lee, **Adapting the Tesseract open source OCR engine for multilingual OCR**, *Proceedings of the International Conference on Multilingual OCR*, Barcelona Spain, 2009, http://doi.acm.org/10.1145/1577802.1577804

S3. Popat, Ashok. "A panlingual anomalous text detector." DocEng '09: Proceedings of the 9th ACM symposium on Document Engineering, 2009, pp. 201-204.

S4. Brants, Thorsten and Franz, Alex. "Web 1T 5-gram Version 1." LDC2006T13 http://www.ldc.upenn.edu/Catalog/CatalogEntry.jsp?catalogId=LDC2006T13

S5. Dean, Jeffrey and Ghemawat, Sanjay. "MapReduce: Simplified Data Processing on Large Clusters." OSDI '04 p137--150

S6. Lyman, Peter and Hal R. Varian, *"How Much Information",* 2003. http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/print.htm#books

S7. http://en.wikipedia.org/wiki/List_of_treaties.

S8. http://en.wikipedia.org/wiki/Geographical_renaming]

S9. Christian Bizer, Jens Lehmann, Georgi Kobilarov, Sören Auer, Christian Becker, Richard Cyganiak, Sebastian Hellmann." DBpedia – A Crystallization Point for the Web of Data." Journal of Web Semantics: Science, Services and Agents on the World Wide Web, 2009, pp. 154–165.

S10. http://en.wikipedia.org/wiki/Timeline_of_historic_inventions

S11. Gerhard Sauder: *Die Bücherverbrennung.10. Mai 1933.* Ullstein Verlag, Berlin, Wien 1985.

S12. http://de.wikipedia.org/wiki/Liste_der_verbrannten_Bücher_1933.

S13. Liste Des Schädlichen Und Unerwünschten Schrifttums: Stand Vom 31. Dez. 1938. Leipzig: Hedrich, 1938. Print.

S14. http://www.berlin.de/rubrik/hauptstadt/verbannte_buecher/az-autor.php

S15. Barron, Stephanie, and Peter W. Guenther. *Degenerate Art: the Fate of the Avant-garde in Nazi Germany.* Los Angeles, CA: Los Angeles County Museum of Art, 1991. Print.

S16. Ginsberg, Jeremy, Matthew H. Mohebbi, Rajan S. Patel, Lynnette Brammer, Mark S. Smolinski, and Larry Brilliant. "Detecting Influenza Epidemics Using Search Engine Query Data." *Nature* 457 (2008): 1012-014.

Supplementary Figures

"Quantitative analysis of culture using millions of digitized books", Michel et al.

Figure S1

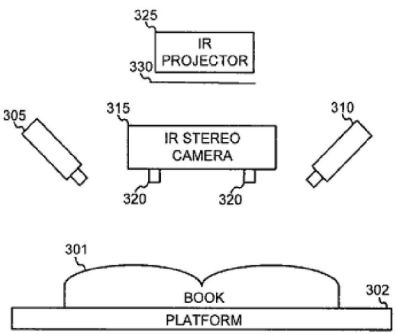
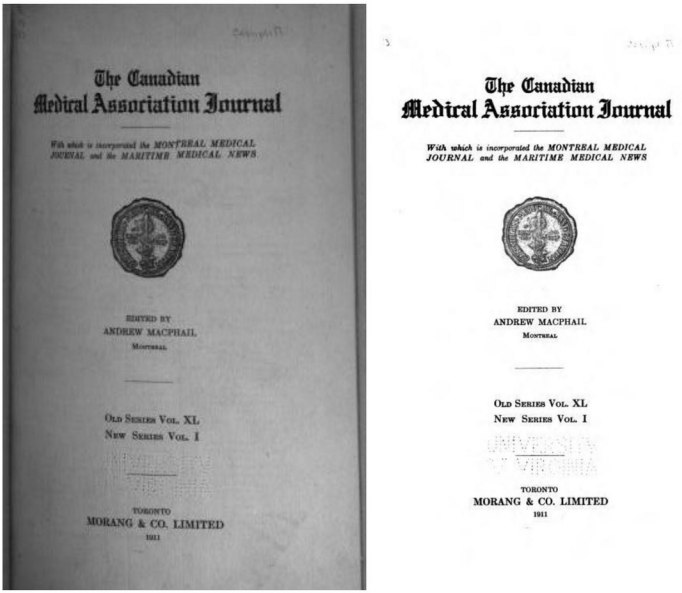


Fig. S1. Schematic of stereo scanning for Google Books.

Figure S2



The Canadian
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With which is incorporated the MONTREAL MEDICAL JOURNAL and the MARITIME MEDICAL NEWS

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Fig. S2. Example of a page scanned before (left) and after processing (right).

Figure S3

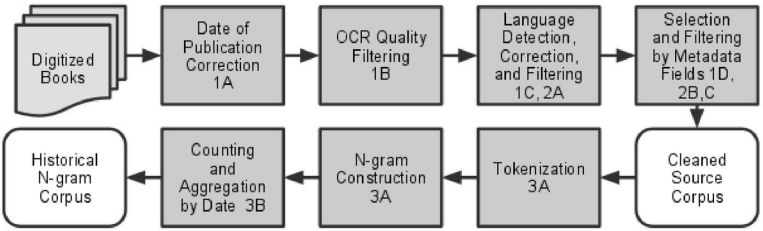

Fig. S3. Outline of n-gram corpus construction. The numbering corresponds to sections of the text.

Figure S4

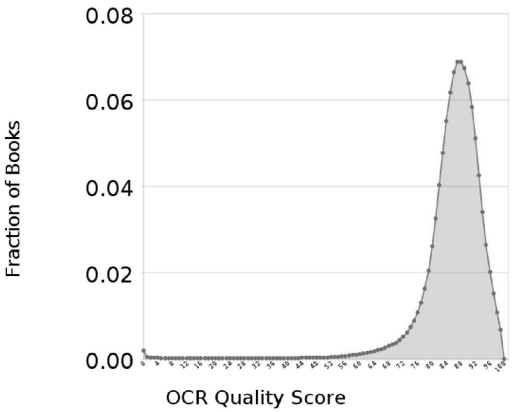

Fig. S4. Fraction of English Books with a given OCR quality.

Figure S5

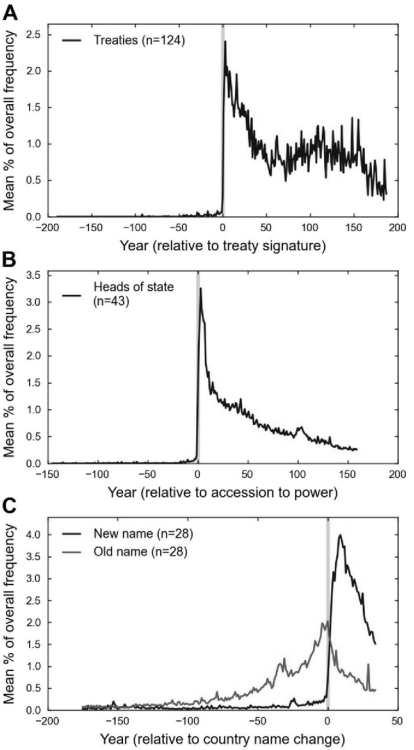

Fig. S5. Known events exhibit sharp peaks at date of occurrence. We select groups of events that occur at known dates, and produce the corresponding timeseries. We normalize each timeserie relative to its total frequency, center the timeseries around the relevant event, and plot the mean. (A) A list of 124 treaties. (B) A list of 43 head of state (US presidents, UK monarchs), centered around the year when they were elected president or became king/queen. (C) A list of 28 country name changes, centered around the year of name change. Together, these form positive controls about timeseries in the corpus.

Figure S6

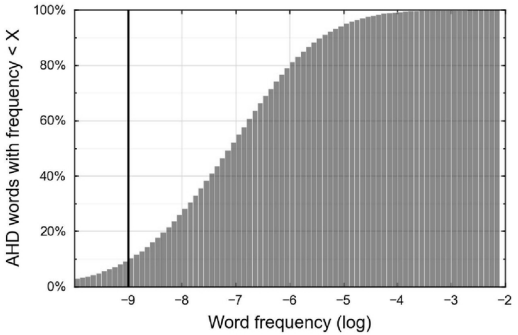

Fig. S6. Frequency distribution of words in the dictionary. We compute the frequency in our year 2000 lexicon for all 116,156 words (1-grams) in the AHD (year 2000). We represent the percentage of these words whose frequency is smaller than the value on the x-axis (logarithmic scale, base 10). 90% of all words in AHD are more frequent than 1 part per billion (10^{-9}), but only 75% are more frequent than 1 part per 100 million (10^{-8}).

Figure S7

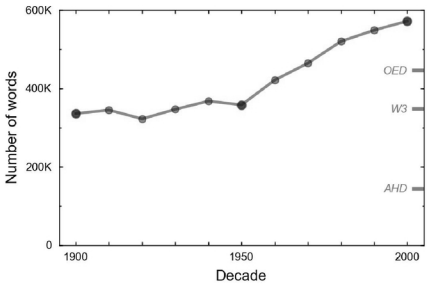

Fig. S7. Lexical trends excluding proper nouns. We compute the number of words that are 1-grams in the categories "P", "B" and "R". The same upward trend starting in 1950 is observed. The size of the lexicon in the year 2000 is still larger than the OED or W3.

Figure S8

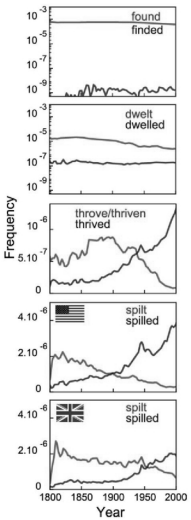

Fig. S8. Example of grammatical change. Irregular verbs are used as a model of grammatical evolution. For each verb, we plot the usage frequency of its irregular form in red (for instance, 'found'), and the usage frequency of its regular past-tense form in blue (for instance, 'finded'). Virtually all irregular verbs are found from time to time used in a regular form, but those used more often tend to be used in a regular way more rarely. This is illustrated in the top two rows with the frequently-used verb "find" and the less often encountered "dwell". In the third row, the trajectory of "thrive" is one of many ways by which regularization occurs. The bottom two panels shows that the regularization of "spill" happened earlier in the US than in the UK.

Figure S9

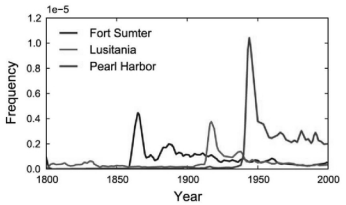

Fig. S9. We forget. Events of importance provoke a peak of discussion shortly after they happened, but interest in them quickly decreases.

Figure S10

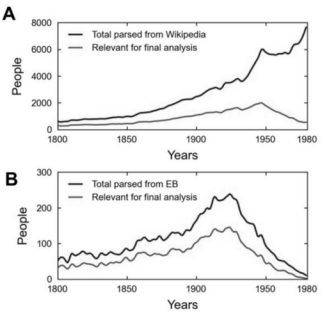

Fig. S10. Biographical Records. The number of records parsed from the two encyclopedic sources (blue curve), and used in our analyses (green curve). See steps 7.A.1 to 7.A.10 above.

Figure S11

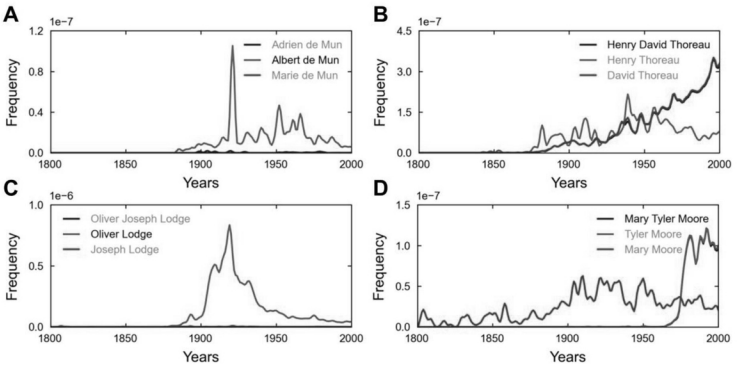

Fig. S11. Selection of query name. The chosen query name is in black. (A) Adrien Albert Marie de Mun. Strongest and optimal query name is Albert de Mun, (B) Oliver Joseph Lodge, strongest and optimal query name is Oliver Lodge, (C) Henry David Thoreau. Strongest query name is David Thoreau, but is a substring match of Henry David Thoreau, with fame >80% of David Thoreau. Optimal query name is Henry David Thoreau. (D) Mary Tyler Moore. Strongest name is Mary Moore, but is rejected because of noise. Next strongest is Tyler Moor, but this is a substring match of Mary Tyler Moore, with fame >80% of Tyler Moore. Optimal query name is thus Mary Tyler Moore.

Figure S12

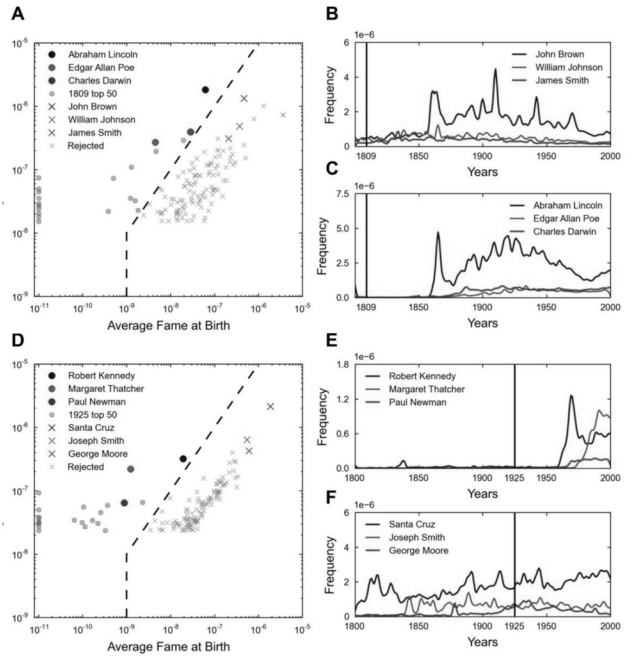

Fig. S12. Filtering out names with trajectories that cannot be resolved. Illustrates the requirement for query name filtration on the basis of premature fame. Fame a birth is the average fame in a 10 year window around birth, lifetime fame is the average fame from year of birth to 2000. The dashed line in (A), (D) indicates the separatrix used to excluded query names with premature fame signals. Points to the right were rejected from further analysis. In (B), (C), (E), (F) the black line indicates the year of birth of the individuals whose fame trajectories are plotted.

Figure S13

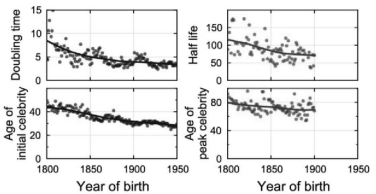

Fig. S13. Values of the four parameters of fame as a function of time. 'Age of peak celebrity' (75 years old) has been fairly consistent. Celebrities are noticed earlier, and become more famous than ever before: 'Age of initial celebrity' has dropped from 43 to 29 years, and 'Doubling time' has dropped from 8.1 to 3.3 years. But they are forgotten sooner as well: the half-life has declined from 120 years to 71.

Figure S14

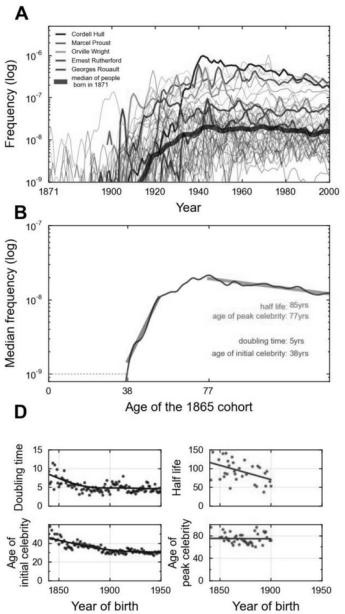

Fig. S14. Fundamental parameters of fame do not depend on the underlying source of people studied. We represent the analysis of fame using individuals from Encyclopedia Britannica.

Figure S15

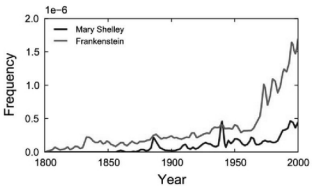

Fig. S15. Many routes to Immortality. People leave more behind them than their name: 'Mary Shelley' (blue) created the monstrously famous 'Frankenstein' (green).

Figure S16

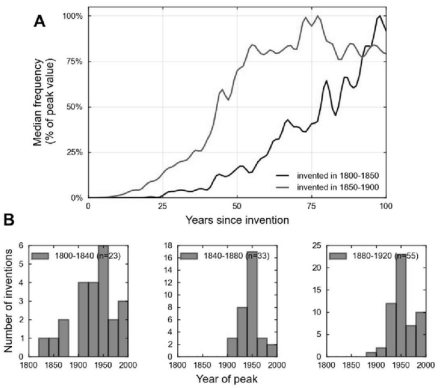

Fig. S16. Controls. (A) We observe over the same timespan (100 years) two cohorts invented at different times. Again, the more recent cohort reaches 25% of its peak faster. (B) We verify that inventions have already reached their peak. We calculate the peak of each invention, and plot the distribution of these peaks as a function of year, grouping them along the same cohorts as used in the text. In each case, the distribution falls within the bounds of the period observed (1800-2000).

Figure S17

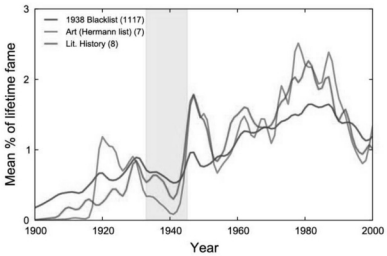

Fig. S17. Suppression of authors on the Art and Literary History blacklists in German. We plot the median trajectory (as in the main text) of authors in the Herman lists for Art (green) and Literary History (red), and for authors found in the 1938 blacklist (blue). The Nazi regime (1933-1945) is highlighted, and corresponds to strong drops in the trajectories of these authors.

Figure S18

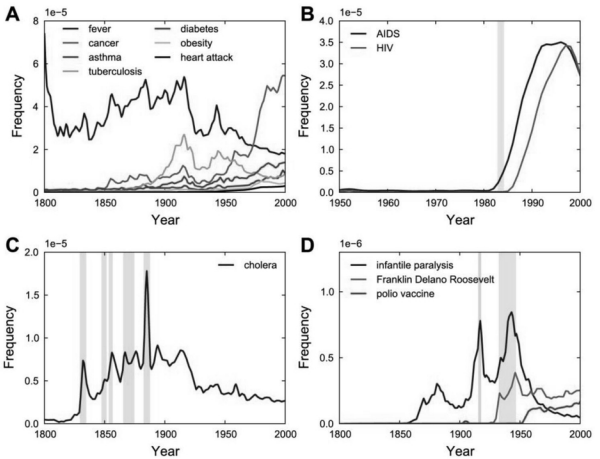

Fig. S18. Tracking historical epidemics using their influence on the surrounding culture. (**A**) Usage frequency of various diseases: 'fever' (blue), 'cancer' (green), 'asthma' (red), 'tuberculosis' (cyan), 'diabetes' (purple), 'obesity' (yellow) and 'heart attack' (black). (**B**) Cultural prevalence of AIDS and HIV. We highlight the year 1983 when the viral agent was discovered. (**C**) Usage of the term 'cholera' peaks during the cholera epidemics that affected Europe and the US (blue shading). (**D**) Usage of the term 'infantile paralysis' (blue) exhibits one peak during the 1916 polio epidemic (blue shading), and a second around the time of a series of polio epidemics that took place during the early 1950s. But the second peak is anomalously broad. Discussion of polio during that time may have been fueled by the election of 'Franklin Delano Roosevelt' (green), who had been paralyzed by polio in 1936 (green shading), as well as by the development of the 'polio vaccine' (red) in 1952. The vaccine ultimately eradicated 'infantile paralysis' in the United States.

Figure S19

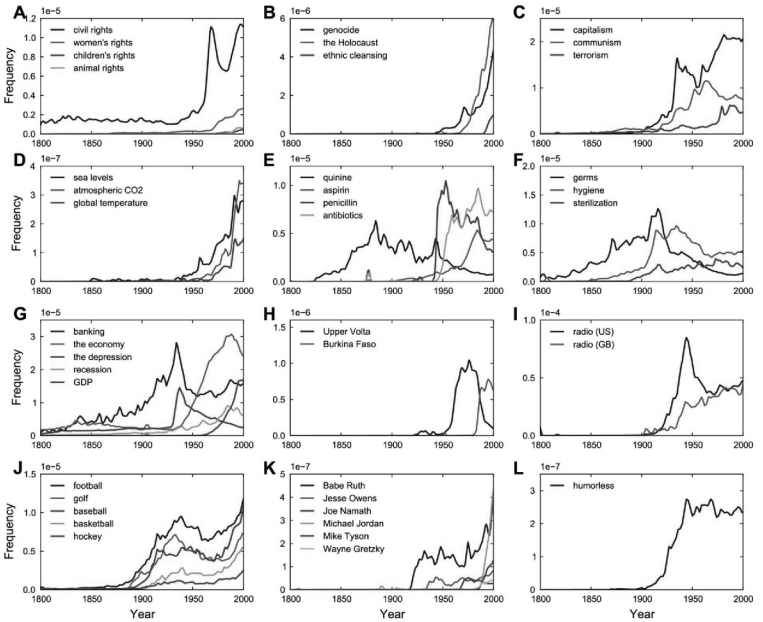

Fig. S19. Culturomic 'timelines' reveal how often a word or phrase appears in books over time. (A) 'civil rights', 'women's rights', 'children's rights' and 'animals rights' are shown. (**B**) 'genocide' (blue), 'the Holocaust' (green), and 'ethnic cleansing' (red) (**C**) Ideology: ideas about 'capitalism' (blue) and 'communism' (green) became extremely important during the 20th century. The latter peaked during the 1950s and 1960s, but is now decreasing. Sadly, 'terrorism' (red) has been on the rise. (**D**) Climate change: Awareness of 'global temperature', 'atmospheric CO2', and 'sea levels' is increasing. (**E**) 'aspirin' (blue), 'penicillin' (green), 'antibiotics' (red), and 'quinine' (cyan). (**F**) 'germs' (blue), 'hygiene' (green) and 'sterilization' (red). (**G**) The history of economics: 'banking' (blue) is an old concept which was of central concern during 'the depression' (red). Afterwards, a new economic vocabulary arose to supplement the older ideas. New concepts such as 'recession' (cyan), 'GDP' (purple), and 'the economy' (green) entered everyday discourse. (**H**) We illustrate geographical name changes: 'Upper Volta' (blue)

and 'Burkina Faso' (green). (**I**) 'radio' in the US (blue) and in the UK (red) have distinct trajectories. (**J**) 'football' (blue), 'golf' (green), 'baseball' (red), 'basketball' (cyan) and 'hockey' (purple) (**K**) Sportsmen: In the 1980s, the fame of 'Michael Jordan' (cyan) leaped over other that of other great athletes, including 'Jesse Owens' (green), 'Joe Namath' (red), 'Mike Tyson' (purple), and 'Wayne Gretsky' (yellow). Presently, only 'Babe Ruth' (blue) can compete. One can only speculate as to whether Jordan's hang time will match that of the Bambino. (**L**) 'humorless' is a word that rose to popularity during the first half of the century. This indicates how these data can serve to identify words that are a marker of a specific period in time.

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Raymond J. Baer	Chairman of the Board	Bank Julius Baer & Co. Ltd	Switzerland
Sebastián Bagó	President	Laboratorios Bagó SA	Argentina
Shaikha Al Bahar	Chief Executive Officer	National Bank of Kuwait	Kuwait
Alejandro Baillères	Chief Executive Officer	Grupo Nacional Provincial SAB	Mexico

HOUSE_OVERSIGHT_017062

Madhur Bajaj	Vice-Chairman	Bajaj Auto Ltd	India
Niraj Bajaj	Chairman and Managing Director	Mukand Limited	India
Rahul Bajaj	Chairman	Bajaj Auto Ltd	India
Douglas M. Baker Jr	Chairman, President and Chief Executive Officer	Ecolab Inc.	USA
Gerard Baker	Deputy Editor-in-Chief	The Wall Street Journal	USA
Peter Bakker	Chief Executive Officer	TNT	Netherlands
Jon Fredrik Baksaas	President and Chief Executive Officer	Telenor ASA	Norway
Jorge E. Ballesteros Zavala	Chief Executive Officer	Grupo Mexicano de Desarrollo SAB	Mexico
Jim Balsillie	Chairman and Co-Chief Executive Officer	Research in Motion Limited	Canada
Rolando Balsinde	Director	McKinsey & Company	Spain
Beat Balzli	Editor-in-Chief	HandelsZeitung und Finanzrundschau AG	Switzerland
Ban Ki-moon	Secretary-General, United Nations, New York		
Stéphane Bancel	Chief Executive Officer	bioMérieux SA	USA
Oriana Bandiera	Professor of Economics	London School of Economics and Political Science	United Kingdom
Chandrajit Banerjee	Director-General	Confederation of Indian Industry (CII)	India
Shumeet Banerji	Chief Executive Officer	Booz & Company	United Kingdom
Manvinder S. Banga	Operating Partner	Clayton, Dubilier & Rice LLP	United Kingdom
Britt D. Banks	Adjunct Professor, School of Law	University of Colorado	USA
Almir Guilherme Barbassa	Chief Financial Officer	Petroleo Brasileiro SA Petrobras	Brazil
Lionel Barber	Editor	The Financial Times	United Kingdom
Roger Barnett	Chairman and Chief Executive Officer	Shaklee Corporation	USA
Nicholas Barr	Professor of Public Economics	London School of Economics and Political Science	United Kingdom
Nicolas Barré	Deputy Managing Editor	Les Echos	France
Maria Bartiromo	Anchor, CNBC's Closing Bell; Host and Managing Editor, Wall Street Journal Report	CNBC	USA
Dominic Barton	Worldwide Managing Director	McKinsey & Company	United Kingdom
Pius Baschera	Chairman of the Board of Directors	Hilti Aktiengesellschaft	Liechtenstein
Lluis Bassets	Op-Ed Editor	El País	Spain
Sonja Bata	Chairman	Bata Shoe Foundation	Canada
Olivier Baube	Editor-in-Chief, Economy	Agence France Presse (AFP)	France
Raymond J. Baxter	Senior Vice-President, Community Benefit, Research and Health Policy	Kaiser Foundation Health Plan Inc.	USA
Eben Bayer	Founder and Chief Executive Officer	Ecovative Design LLC	USA
Alexander Bazarov	Vice-President	Sberbank	Russian Federation
Abdullah Bazid	Executive Vice-President, Strategy Planning	Saudi Basic Industries Corporation (SABIC)	Saudi Arabia
Timothy Beardson	Chairman	Crosby Holdings Ltd	Hong Kong SAR
Robert E. Beauchamp	Chairman, President and Chief Executive Officer	BMC Software Inc.	USA
Laurent Beaudoin	Chairman of the Board	Bombardier Inc.	Canada
Pierre Beaudoin	President and Chief Executive Officer	Bombardier Inc.	Canada
Bernhard Beck	Chief Personnel Officer	EnBW Energie Baden-Württemberg AG	Germany
Christophe Beck	Executive Vice-President, Institutional	Ecolab Inc.	USA
John M. Beck	Chairman and Chief Executive Officer	Aecon Group Inc.	Canada
Carol Becker	Dean, School of the Arts	Columbia University	USA
Charlie Beckett	Director, POLIS	London School of Economics and Political Science	United Kingdom
Tanya Beckett	Presenter	BBC World News	United Kingdom
Bernd Beetz	Chief Executive Officer	Coty Inc.	USA
Brian Behlendorf	Chief Technology Officer, World Economic Forum		
Nariman Behravesh	Chief Economist	IHS	USA
Martha Bejar	President, Global Sales and Operations	Wipro Technologies	USA
Koos Bekker	Chief Executive Officer	Naspers Ltd	South Africa
Erik Belfrage	Senior Advisor to the Chairman	Investor AB	Sweden
Marc R. Benioff	Chairman and Chief Executive Officer	Salesforce.com	USA
Suzan G. Benmayor	Columnist	Hürriyet Gazetesi	Turkey
Katrin Bennhold	Paris Correspondent	International Herald Tribune	France
Stéphane Benoit-Godet	Editor-in-Chief	Bilan	Switzerland

HOUSE_OVERSIGHT_017063

Bruno Bensasson	Vice-President, Economics, Prices and Markets	GDF SUEZ	France
Robert Berendes	Head of Business Development	Syngenta International AG	Switzerland
Axel Berg	Ambassador of Germany to Switzerland		
Roland Berger	Honorary Chairman	Roland Berger Strategy Consultants Holding GmbH	Germany
Douglas G. Bergeron	Chairman and Chief Executive Officer	VeriFone Systems Inc.	USA
Nicolas Berggruen	President and Chairman	Nicolas Berggruen Institute	USA
Stanley M. Bergman	Chairman of the Board and Chief Executive Officer	Henry Schein Inc.	USA
C. Fred Bergsten	Director	The Peterson Institute for International Economics	USA
Alfred R. Berkeley	Chairman	Pipeline Financial Group Inc.	USA
William H. Berkman	Managing Partner	Liberty Associated Partners LP	USA
Thomas L. Bernardin	Chairman and Chief Executive Officer	Leo Burnett Worldwide	USA
Thomas Bernt Henriksen	Economics Editor	Dagbladet Børsen A/S	Denmark
Giuliano Berretta	Chairman of the Board	Eutelsat SA	France
Mike Berry	President	Hillwood Development Corporation	USA
Ernesto Bertarelli	Chairman	Kedge Capital Partners Limited	Switzerland
Mark T. Bertolini	Chief Executive Officer and President	Aetna Inc.	USA
Baron Luc Bertrand	Chairman of the Executive Committee and Chief Executive Officer	Ackermans & Van Haaren NV	Belgium
Akil Beshir	Chairman	Telecom Egypt	Egypt
Erik Bettermann	Director-General	Deutsche Welle TV	Germany
Ulrich L. Bettermann	President and Chairman of the Board	OBO Bettermann Group	Germany
Jeffrey L. Bewkes	Chairman and Chief Executive Officer	Time Warner Inc.	USA
Donald S. Beyer Jr	US Ambassador	US Embassy	Switzerland
Homi K. Bhabha	Anne F. Rothenberg Professor of the Humanities, Department of English and American Literature	Harvard University	USA
Neeraj Bharadwaj	Managing Director	Accel India Growth Management Company Pvt. Ltd	India
Hari S. Bhartia	Co-Chairman and Managing Director; President, Confederation of Indian Industry (CII)	Jubilant Bhartia Group	India
Shobhana Bhartia	Member of Parliament; Chairperson and Editorial Director	HT Media Limited	India
Shyam Sunder Bhartia	Chairman and Managing Director	Jubilant Bhartia Group	India
Pramod Bhasin	President and Chief Executive Officer	Genpact Ltd	India
Karan Bhatia	Vice-President and Senior Counsel, International Law and Policy	General Electric Company	USA
Om Prakash Bhatt	Chairman	State Bank of India	India
Carl Bildt	Minister of Foreign Affairs of Sweden		
Jeroo Billimoria	Executive Director	Aflatoun, Child Social and Financial Education	Netherlands
Nicholas E. Billotti	President and Chief Executive Officer	Turner International LLC	USA
Nabeel Bin Salamah	Chief Executive Officer	Zain	Kuwait
Sally Grover Bingham	Reverend	Interfaith Power & Light	USA
Kumar M. Birla	Group Chairman	The Aditya Birla Group	India
Leonhard Birnbaum	Chief Strategy Officer and Member of the Executive Board	RWE AG	Germany
Fatih Birol	Chief Economist	International Energy Agency	France
Silas Birtwistle	Artist, A Table from the Sea's Edge Project, United Kingdom		
Matthew Bishop	New York Bureau Chief	The Economist	USA
Rune Bjerke	President and Chief Executive Officer	DnB NOR ASA	Norway
Kurt Bjorklund	Co-Managing Partner	Permira Advisers LLP	United Kingdom
Jerry Black	Vice-President, Chief Executive Officer ASEAN Business	Aeon Co. Ltd	Japan
Brent Blair	Associate Professor of Theatre Practice, School of Theatre	University of Southern California (USC)	USA
Tony Blair	UN Middle East Quartet Representative		
Franck Blais	Vice-President	Lynx Energy Partners	Switzerland
Mario I. Blejer	Adjunct Professor of Finance, School of Business	Universidad Torcuato di Tella	Argentina
Martin Blessing	Chairman of the Board of Managing Directors	Commerzbank AG	Germany
Richard Blewitt	Chief Executive	HelpAge International	United Kingdom
Henry Blodget	Chief Executive Officer and Editor-in-Chief	Business Insider, Inc.	USA

HOUSE_OVERSIGHT_017064

David E. Bloom	Clarence James Gamble Professor of Economics and Demography	Harvard School of Public Health	USA
Kathy Bloomgarden	Chief Executive Officer	Ruder Finn Inc.	USA
Sally Blount	Dean	Kellogg School of Management	USA
Rebecca Blumenstein	Deputy Managing Editor	The Wall Street Journal	USA
Adam Bly	Founder and Chief Executive Officer	Seed	USA
Kurt Bock	Member of the Board, Chief Financial Officer and Chairman-Elect, Board of Executive Directors	BASF SE	Germany
Michael C. Bodson	Executive Managing Director	The Depository Trust & Clearing Corporation (DTCC)	USA
Alan Boeckmann	Chairman and Chief Executive Officer	Fluor Corporation	USA
Deborah Boedicker	Principal	Strategic Investment Group	USA
Yurii Boiko	Minister of Energy and Coal Industry of Ukraine		
Irina Gueorguieva Bokova	Director-General, United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris		
Marc Bolland	Chief Executive	Marks & Spencer Plc	United Kingdom
Roberto Bolle	Etoile	La Scala Theatre	Italy
Lee C. Bollinger	President	Columbia University	USA
Nikolaus von Bomhard	Chairman of the Board of Management	Munich Re	Germany
Bono	Lead singer of U2 and Co-Founder, ONE campaign and (RED)	ONE	United Kingdom
Marwan M. Boodai	Chief Executive Officer	Boodai Corporation	Kuwait
Claire Boonstra	Co-Founder	Layar	Netherlands
Anders Borg	Minister of Finance of Sweden		
Andrei F. Borodin	Chief Executive Officer	Bank of Moscow	Russian Federation
Clemens Börsig	Chairman of the Supervisory Board	Deutsche Bank AG	Germany
Sir Leszek Borysiewicz	Vice-Chancellor	University of Cambridge	United Kingdom
Micheline Bossaert	Director of International Department	GDF SUEZ	France
Ana P. Botín	Member of the Board	Banco Santander SA	Spain
John C. Botts	Chairman	United Business Media Plc	United Kingdom
Martha Boudreau	President and Senior Partner	Fleishman-Hillard	USA
Charles-Edouard Bouée	Member of the Global Executive Committee and President of Roland Berger Asia	Roland Berger Strategy Consultants	People's Republic of China
Youssef Boutros-Ghali	Minister of Finance of Egypt; Chair of the International Monetary and Financial Committee, International Monetary Fund (IMF), Washington DC		
Roberta B. Bowman	Senior Vice-President and Chief Sustainability Officer	Duke Energy Corporation	USA
Jean-François van Boxmeer	Chairman of the Executive Board and Chief Executive Officer	Heineken International	Netherlands
Peter Brabeck-Letmathe	Chairman of the Board	Nestlé SA	Switzerland
Anu Bradford	Member of the Board	SITRA (Finnish National Fund for Research and Development)	USA
Svein Richard Brandtzaeg	President and Chief Executive Officer	Hydro	Norway
Susan Brate	Executive Manager, Manufacturing	SABIC Innovative Plastics LLC	USA
Marcus W. Brauchli	Executive Editor	The Washington Post Company	USA
Sigve Brekke	Executive Vice-President, Telenor Group and Head of Asia Region	Telenor Asia (ROH) Ltd	Thailand
Ian Bremmer	President	Eurasia Group	USA
Børge Brende	Secretary-General	Norwegian Red Cross	Norway
Marcus Brennecke	Senior Partner	EQT Partners Beteiligungsberatung GmbH	Germany
Erik A. Brenninkmeijer	Chairman of the Supervisory Board	COFRA Holding AG	Switzerland
Maurice Brenninkmeijer	Director	C&A	Netherlands
Jim Breyer	Partner	Accel Partners	USA
Samir Brikho	Chief Executive Officer	AMEC Plc	United Kingdom
Sergey Brilev	Anchor and Deputy Director	Russia TV	Russian Federation
Sergey Brin	Co-Founder and President, Technology	Google Inc.	USA
William A. Brindley	Chief Executive Offcer	Nethope Inc.	USA
Scott Brison	Member of Parliament and Member of the Liberal Official Opposition Shadow Cabinet, House of Commons, Canada		

HOUSE_OVERSIGHT_017065

Hannes Britschgi	Publisher	Ringier AG	Switzerland
Romero Britto	Artist and President	Britto Central	USA
Jeffrey D. Brody	Founding Partner	Redpoint Ventures	USA
Beth A. Brooke	Global Vice-Chair, Public Policy, Sustainability and Stakeholder Engagement	Ernst & Young	USA
David Brooks	Op-Ed Columnist	The New York Times	USA
Rebekah Brooks	Chief Executive Officer	News International Plc	United Kingdom
Stuart Brooks	Special Adviser	Chevron Corporation	United Kingdom
Richard D. Broome	Senior Vice-President, Corporate Affairs and Communications	Hertz Global Holding Inc.	USA
Frank Brosens	Co-Founder	Taconic Capital Advisors LP	USA
William F. Browder	Chief Executive Officer	Hermitage Capital Management Ltd	United Kingdom
J. Frank Brown	Dean	INSEAD	France
Mike Brown	Chief Executive Officer	Nedbank Group	South Africa
Tim Brown	Chief Executive Officer	IDEO LLC	USA
Tina Brown	Founder and Editor-in-Chief	The Daily Beast	USA
Neil Alexander Bruce	Chief Operating Officer	Amec Plc - Natural Resources	United Kingdom
Rainer Brüderle	Federal Minister of Economics and Technology of Germany		
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Frank Bruno	President	Cerberus Global Investment Advisors LLC	USA
John G. Bruno	Executive Vice-President	NCR Corporation	USA
Daniel J. Brutto	President, UPS International	UPS	Belgium
Eddy Bruyninckx	Chief Executive Officer	Port Authority Antwerp	Belgium
Charles Brymer	President and Chief Executive Officer	DDB Worldwide	USA
Thomas Buberl	Chief Executive Officer, Zurich Switzerland	Zurich Financial Services	Switzerland
Rolf Buch	Chief Executive Officer	arvato AG	Germany
Mick Buckley	President and Chief Executive Officer EMEA	CNBC	United Kingdom
Jerry Buhlmann	Chief Executive Officer	Aegis Group Plc	United Kingdom
Paul Bulcke	Chief Executive Officer	Nestlé SA	Switzerland
Marcos Bulgheroni	Executive Vice-Chairman	Energy Developments and Investments Corporation (EDIC)	Italy
Prasert Bunsumpun	President and Chief Executive Officer	PTT Public Company Ltd	Thailand
Hubert Burda	Chairman	Burda Media	Germany
Richard Burdett	Director, LSE Cities and Urban Age	London School of Economics Cities Programme	United Kingdom
Ted Burke	Managing Partner	Freshfields Bruckhaus Deringer	United Kingdom
Hans-Paul Bürkner	Global Chief Executive Officer and President	The Boston Consulting Group	Germany
M. Michele Burns	Chairman and Chief Executive Officer	Mercer Inc. (M&MC)	USA
Sharan Burrow	General Secretary	International Trade Union Confederation (ITUC)	Belgium
Michael Buscher	Chief Executive Officer	OC Oerlikon Management AG	Switzerland
Caspar Busse	Business Editor	Süddeutsche Zeitung GmbH	Germany
Jean-Luc Butel	Executive Vice-President and Group President, International	Medtronic Inc.	Japan
Luigi Buttiglione	Partner, Head of Global Strategy	Brevan Howard Investment Products Ltd	Switzerland
Baron Paul Buysse	Chairman of the Board of Directors	Bekaert NV/SA	Belgium
Felipe Calderón	President of Mexico		
Micheline Calmy-Rey	President of the Swiss Confederation and Federal Councillor of Foreign Affairs of the Swiss Confederation		
Jorge Calvet	Chairman and Chief Executive Officer	Gamesa Corporación Tecnológica SA	Spain
David Cameron	Prime Minister of the United Kingdom		
James Cameron	Founder and Vice-Chairman	Climate Change Capital	United Kingdom
Philip Campbell	Editor-in-Chief	Nature	United Kingdom
Rachel Campbell	Global Head, People, Performance and Culture	KPMG	United Kingdom
Lázaro Campos	Chief Executive Officer	SWIFT SCRL	Belgium

HOUSE_OVERSIGHT_017066

Eric I. Cantor	Majority Leader and Congressman from Virginia (Republican), 7th District, USA		
Cao Duc Phat	Minister of Agriculture and Rural Development of Vietnam		
Susan Capps Morris	Senior Vice-President and Chief of Staff to Office of Chief Executive Officer	Merck & Co. Inc.	USA
Steve Cardell	Chief Executive Officer	HCL Axon	United Kingdom
Gunilla Carlsson	Minister of International Development Cooperation of Sweden		
Mark J. Carney	Governor of the Bank of Canada		
Roger M. Carr	Chairman	Centrica Plc	United Kingdom
José Carreras	Opera Singer	José Carreras International Leukaemia Foundation	Spain
Cynthia Carroll	Chief Executive	Anglo American Plc	United Kingdom
Stephen A. Carter	Chief Marketing, Strategy and Communication Officer and Executive Vice-President	Alcatel-Lucent	France
Jaime Caruana	General Manager, Bank for International Settlements (BIS), Basel		
John Casey	Vice-President International News and Programming	CNBC	United Kingdom
Pete Cashmore	Chief Executive Officer and Founder	Mashable	USA
Alessandro Castellano	Chief Executive Officer	Sace SpA	Italy
Giovanni Castellucci	Chief Executive Officer	Atlantia SpA	Italy
Juan Luis Cebrian Echarri	Chief Executive Officer and Chairman of the Executive Committee	Grupo Prisa	Spain
Dominique Cerutti	President and Deputy Chief Executive Officer	NYSE Euronext	France
Laura Cha	Deputy Chairman, The Hong Kong and Shanghai Banking Corporation (Asia Pacific)	HSBC Asia Pacific	Hong Kong SAR
Sanjeev Chadha	President, Middle East and Africa Region	PepsiCo India Holdings Pvt. Ltd	India
John T. Chambers	Chairman and Chief Executive Officer	Cisco	USA
Walid Chammah	Chairman and Chief Executive Officer	Morgan Stanley International Limited	United Kingdom
François-Philippe Champagne	Strategic Development Director; Member of Management Committee	AMEC Plc	United Kingdom
Margaret Chan	Director-General, World Health Organization (WHO), Geneva		
Sanjay Chandra	Managing Director	Unitech Limited	India
Vikram Chandra	Presenter and Editor	New Delhi Television (NDTV)	India
Natarajan Chandrasekaran	Chief Executive Officer and Managing Director	Tata Consultancy Services Ltd	India
Anjali Chandrashekar	Global Changemaker	British Council	India
Rajesh Chandy	Professor of Marketing	London Business School	United Kingdom
Chang Dae-Whan	Chairman and Publisher	Maeil Business Newspaper and TV	Republic of Korea
Jean-Paul Chapel	Editor	France 2	France
Nigel Chapman	Chief Executive Officer	Plan International	United Kingdom
Erik Charas	Founder and Managing Director	Charas LDA	Mozambique
Jean Charest	Premier of Quebec, Canada		
Bernard Charlès	President and Chief Executive Officer	Dassault Systèmes SA	France
Richard Chartres	Bishop	The Diocese of London	United Kingdom
Chen Deming	Minister of Commerce of the People's Republic of China		
Chen Feng	Chairman	HNA Group Co. Ltd	People's Republic of China
Chen Wenchi	President and Chief Executive Officer	VIA Technologies Inc.	Taiwan, China
Ian Cheshire	Group Chief Executive	Kingfisher Plc	United Kingdom
Chey Chang-won	Vice-Chairman and Chief Executive Officer	SK Engineering and Construction	Republic of Korea
Chey Jae-won	Vice-Chairman and Chief Executive Officer	SK Holdings	Republic of Korea
Chey Tae-won	Chairman and Chief Executive Officer	SK Holdings	Republic of Korea
Hamed El Chiaty	Chairman and Chief Executive Officer	Travco Group International Holding S.A.E	Egypt
Wellington Chibebe	Secretary-General	Zimbabwe Congress of Trade Unions (ZCTU)	Zimbabwe
Palaniappan Chidambaram	Minister of Home Affairs of India		
David Childs	Managing Partner	Clifford Chance LLP	United Kingdom

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Calvin Chin	Chief Executive Officer	Qifang Inc.	People's Republic of China
John Chipman	Director-General and Chief Executive	International Institute for Strategic Studies (IISS)	United Kingdom
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H. S. Cho	Senior Vice-President	Hyosung Group	Republic of Korea
Ken Choi	Deputy Executive Editor	Chosun Ilbo	Republic of Korea
Ashwin C. Choksi	Chairman	Asian Paints Limited	India
Eric Chol	Editor-in-Chief Economics, Politics, International	La Tribune	France
Tejpreet Singh Chopra	President and Chief Executive Officer	Bharat Light and Power	India
Niels B. Christiansen	President and Chief Executive Officer	Danfoss A/S	Denmark
Victor L. L. Chu	Chairman and Chief Executive Officer	First Eastern Investment Group	Hong Kong SAR
Amy Chua	John M. Duff Jr Professor of Law	Yale Law School	USA
Anatoly B. Chubais	Chief Executive Officer	Russian Corporation of Nanotechnologies (RUSNANO)	Russian Federation
Ganhuyag Chuluun Hutagt	Vice-Minister of Finance of Mongolia		
Euisun Chung	Vice-Chairman	Hyundai Motor Company	Republic of Korea
Sureyya Ciliv	Chief Executive Officer	Turkcell Iletisim Hizmetleri AS	Turkey
Jean-François Cirelli	Vice-Chairman and President	GDF SUEZ	France
Liz Claman	Anchor	Fox Business Network	USA
Alan Clark	Managing Director	SABMiller Europe	Switzerland
Helen E. Clark	Administrator, United Nations Development Programme (UNDP), New York		
Richard T. Clark	Chairman	Merck & Co. Inc.	USA
Susan M. Clark	Director, Corporate Affairs	SABMiller plc	United Kingdom
Wendy Clark	Senior Vice-President, Integrated Marketing Communications and Capabilities	The Coca-Cola Company	USA
Jeff Clarke	President and Chief Executive Officer	Travelport	USA
Michael Clarke	Executive Vice-President, Kraft Foods Inc. and President, Kraft Foods Europe	Kraft Foods Europe GmbH	Switzerland
Tracy Clarke	Group Head, Human Resources and Communications	Standard Chartered	United Kingdom
R. Marcelo Claure	Chairman of the Board, Chief Executive Officer and President	Brightstar Corp.	USA
Nick Clegg	Deputy Prime Minister of the United Kingdom		
Reinhard Clemens	Member of the Board of Management and Chief Executive Officer, T-Systems	Deutsche Telekom AG	Germany
Tony Clement	Minister of Industry of Canada		
Sanford Climan	President	Entertainment Media Ventures	USA
William J. Clinton	Founder	William J. Clinton Foundation	USA
John H. Clippinger	Co-Director, The Law Lab, The Berkman Center for Internet & Society	Harvard University	USA
Paulo Coelho	Author	Sant Jordi Asociados	Spain
Andrew L. Cohen	Managing Director	JPMorgan Private Bank	Hong Kong SAR
Michael Cohen	Chief Executive Officer	Och-Ziff Management Europe Limited	United Kingdom
Steven A. Cohen	Chairman and Chief Executive Officer	S.A.C. Capital Advisors LP	USA
Zehavit Cohen	Managing Partner, Head of Israel Office	Apax Partners Israel Ltd	Israel
Gary D. Cohn	President and Chief Operating Officer	The Goldman Sachs Group Inc.	USA
Jared Cohon	President	Carnegie Mellon University	USA
Vittorio Colao	Chief Executive Officer	Vodafone Group Plc	United Kingdom
Andrea Coleman	Chief Executive Officer and Founder	Riders for Health	United Kingdom
Xavier M. Colin	Presenter, Geopolitis News Programme	Swiss Television RTS	Switzerland
Boris Collardi	Chief Executive Officer	Bank Julius Baer & Co. Ltd	Switzerland
Stephen van Coller	Chief Executive	Absa Capital	South Africa
Paul Collier	Professor of Economics, Department of Economics	University of Oxford	United Kingdom
Francis S. Collins	Director	National Institutes of Health	USA
James Collins Jr	President, DuPont Crop Protection	DuPont	USA
Veronica Colondam	Chief Executive Officer	YCAB (Yayasan Cinta Anak Bangsa) Foundation	Indonesia

HOUSE_OVERSIGHT_017068

George F. Colony	Chairman of the Board and Chief Executive Officer	Forrester Research Inc.	USA
Michel Combes	Chief Executive, Europe	Vodafone Group Services Ltd	United Kingdom
Patrick Combes	Chairman	Compagnie Financière Tradition	Switzerland
Kevin E. Comolli	Partner	Accel Partners	United Kingdom
John C. Compton	Chief Executive Officer, PepsiCo Americas Foods	PepsiCo Inc.	USA
Beth Comstock	Senior Vice-President and Chief Marketing Officer	General Electric Company	USA
Cristóbal Conde	President and Chief Executive Officer	SunGard	USA
Arturo Condo	President	INCAE Business School	Costa Rica
Peggy Conlon	President and Chief Executive Officer	Advertising Council	USA
Iain Conn	Chief Executive, Refining and Marketing	BP Plc	United Kingdom
John P. Connolly	Chief Executive Officer, United Kingdom, and Chairman of the Global Board	Deloitte	United Kingdom
John Conroy Jr	Head, Global Strategic Initiatives	Baker & McKenzie	USA
Jérome Contamine	Executive Vice-President and Chief Financial Officer	Sanofi-Aventis	France
Scott D. Cook	Chairman of the Executive Committee	Intuit Inc.	USA
Christopher Cooper-Hohn	Founder	The Children's Investment Fund Management (UK) LLP	United Kingdom
Jean-François Copé	Secretary-General, Union for a Popular Movement (UMP), France		
Agustín Coppel Luken	Chief Executive Officer	Coppel SA de CV	Mexico
Ernesto Cordero Arroyo	Secretary of Finance of Mexico		
Eckhard Cordes	Chief Executive Officer	METRO GROUP	Germany
Tracy Corrigan	Editor-in-Chief	The Wall Street Journal Europe	United Kingdom
Peter L. Corsell	Chairman	GridPoint Inc.	USA
Luc Cortebeeck	President	Confederation of Christian Trade Unions of Belgium	Belgium
Delos M. (Toby) Cosgrove	Chairman and Chief Executive Officer	Cleveland Clinic	USA
Cyrille Costes	President and Chief Executive Officer	Lynx Energy Partners	Switzerland
Robert Court	Global Head of External Affairs	Rio Tinto Plc	United Kingdom
Jean-Philippe Courtois	President	Microsoft International	France
Luciano Coutinho	President	Banco Nacional do Desenvolvimento Econômico e Social (BNDES)	Brazil
Howard Cox	Advisory Partner	Greylock	USA
Pamela J. Craig	Chief Financial Officer	Accenture	USA
Aron Cramer	President and Chief Executive Officer	Business for Social Responsibility (BSR)	USA
Gerhard Cromme	Chairman of the Supervisory Board	ThyssenKrupp AG	Germany
Audrey Kurth Cronin	Professor of Strategy	U.S. National War College	USA
Patrick M. Cronin	Senior Adviser and Senior Director, Asia Programme	The Center for a New American Security (CNAS)	USA
Daniel Cruise	Vice-President, Public and Government Affairs	Alcoa Inc.	USA
Yolanda Cuba	Non-Executive Director	Reunert Ltd	South Africa
Daniel Joshua Cullum	Global Changemaker	British Council	New Zealand
H. Lawrence Culp Jr	President and Chief Executive Officer	Danaher Corporation	USA
Sir Jonathan Stephen Cunliffe	Head of International Economic Affairs, Europe and G8 Sherpa, Prime Minister's Office, United Kingdom		
Nelson W. Cunningham	Managing Partner	McLarty Associates	USA
Jean-Pierre Cuoni	Chairman	EFG International	Switzerland
Frederico Fleury Curado	President and Chief Executive Officer	EMBRAER S.A.	Brazil
Neill A. Currie	Chief Executive Officer	RenaissanceRe Holdings Ltd	Bermuda
Nicholas A. Curtis	Executive Chairman	Lynas Corporation Limited	Australia
Scott Cutler	Executive Vice-President	NYSE Euronext	USA
Geoff Cutmore	Anchor	CNBC	United Kingdom
Stephanie Czerny	Managing Director	Burda Media	Germany
Francisco D'Souza	Chief Executive Officer	Cognizant Technology Solutions	USA
Vittorio Da Rold	Senior Correspondent, Foreign Affairs	Il Sole 24 Ore	Italy
Amr A. Al Dabbagh	Governor, Saudi Arabian General Investment Authority (SAGIA), Saudi Arabia		
Ibrahim S. Dabdoub	Group Chief Executive Officer	National Bank of Kuwait	Kuwait

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Juan Jose Daboub	Founding Chief Executive Officer	Global Adaptation Institute	USA
Herman Daems	Chairman of the Board	Gimv NV	Belgium
Martin Dahinden	Director-General	Swiss Agency for Development and Cooperation (SDC)	Switzerland
Weili Dai	Co-Founder, Vice-President and General Manager, Communications and Computing Business	Marvell Technology Group Ltd	USA
Omotayo Dairo	Founder and Chief Executive Officer	Quintas Renewable Energy Solutions Ltd	Nigeria
Henk van Dalen	Chief Financial Officer	VimpelCom Ltd	Netherlands
Elizabeth Daley	Dean, School of Cinematic Arts	University of Southern California (USC)	USA
Charles H. Dallara	Managing Director	Institute of International Finance (IIF)	USA
James Dallas	Senior Vice-President, Quality and Operations	Medtronic Inc.	USA
John Dalli	Commissioner, Health and Consumer Policy, European Commission, Brussels		
Luke J. Daly	Founder and Chief Executive Officer	Ferrate Treatment Technologies	USA
Winston Damarillo	Chief Executive Officer	Morphlabs Inc.	USA
Kommer Damen	Chairman	Damen Shipyards Group	Netherlands
Brian A. Dames	Chief Executive Officer	Eskom Holdings Limited	South Africa
Dang Thanh Tam	Chairman	Saigon Investment Corporation	Vietnam
Aliko Dangote	President and Chief Executive Officer	Dangote Group	Nigeria
John Eric Daniels	Group Chief Executive	Lloyds Banking Group Plc	United Kingdom
Ronald J. Daniels	President	Johns Hopkins University	USA
John Daniszewski	Vice-President and Senior Managing Editor	The Associated Press (AP)	USA
Richard Danziger	Chief of Mission for Sri Lanka	International Organization for Migration (IOM)	Sri Lanka
Jacques Daoust	President and Chief Executive Officer	Investissement Québec	Canada
Mazen S. Darwazeh	Chairman, MENA	Hikma Pharmaceuticals Limited	Jordan
Lord Darzi	Professor of Surgery, Imperial College London and Chair, Institute of Global Health Innovation	St Mary's Hospital	United Kingdom
Howard Davies	Director	London School of Economics and Political Science	United Kingdom
John Davies	Vice-President, Sales and Marketing and General Manager, World Ahead	Intel Corporation	USA
Martyn Davies	Chief Executive Officer	Frontier Advisory Pty Ltd	South Africa
Pat Davies	Chief Executive	Sasol Limited	South Africa
Rob Davies	Minister of Trade and Industry of South Africa		
Simon Davies	Firmwide Managing Partner	Linklaters LLP	United Kingdom
Geoff Davis	Chief Executive Officer	White Hat Ventures	USA
George S. Davis	Executive Vice-President and Chief Financial Officer	Applied Materials Inc.	USA
Robert Matthews Davis	Vice-President, Public Affairs	The Dow Chemical Company	USA
Sally Davis	Chief Executive Officer, BT Wholesale	BT Group Plc	United Kingdom
Hussain Dawood	Chairman	The Dawood Group	Pakistan
Robert De Niro	Co-Founder	Tribeca Enterprises LLC	USA
Raymond Debbane	President and Chief Executive Officer	The Invus Group LLC	USA
Jean-Charles Decaux	Chairman and Co-Chief Executive Officer	JCDecaux SA	France
Chris Dedicoat	President, European Markets	Cisco	United Kingdom
James Gregory Dees	Professor, Practice of Social Entrepreneurship, Fuqua School of Business	Duke University	USA
John K. Defterios	Anchor, CNN Marketplace Middle East	CNN International	United Kingdom
John J. DeGioia	President	Georgetown University	USA
Wolfgang J. Dehen	Member of the Managing Board and Chief Executive Officer, Siemens Energy	Siemens AG	Germany
Marijn E. Dekkers	Chairman of the Board of Management	Bayer AG	Germany
Michael S. Dell	Chairman and Chief Executive Officer	Dell Inc.	USA
Christopher Delong	Partner	Taconic Capital Advisors LP	USA

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Michel Demaré	Chief Financial Officer and President of Global Markets	ABB Ltd	Switzerland
Jean-François Demole	Managing Partner	Pictet & Cie Private Bankers	Switzerland
David Denison	President and Chief Executive Officer	Canada Pension Plan Investment Board	Canada
Ozlem Denizmen	Executive Vice-President, Dogus Strategy	Dogus Group	Turkey
Charlie Denson	President, Nike Brand	Nike Inc.	USA
Raghida Dergham	Senior Diplomatic Correspondent and Columnist	Al Hayat	USA
Olga K. Dergunova	Member of the Board	JSC VTB Bank	Russian Federation
Oleg V. Deripaska	Chief Executive Officer	Basic Element	Russian Federation
Jean Desazars de Montgailhard	Group Executive Vice-President, Strategy, Development and Public Affairs	Lafarge	France
Pascale-Marie Deschamps	Deputy Editor-in-Chief	Enjeux Les Echos	France
Odile Desforges	Executive Vice-President, Engineering and Quality	Renault SAS	France
Yogesh C. Deveshwar	Chairman	ITC Limited	India
Subhash Dhar	Global Head, Communications, Media and Entertainment Business	Infosys Technologies Ltd	India
Arjun Dhawan	President, Infrastructure Business	Hindustan Construction Company Ltd	India
Dho Young-Shim	Chairperson of the Board of Directors, UNWTO ST-EP Foundation; Member of UN MDG Advocacy Group, Seoul		
Pradeep K. Dhoot	President and Vice-Chairman	Videocon Industries Ltd and other Group Companies	India
Robert E. Diamond Jr	Chief Executive	Barclays PLC	United Kingdom
Mario Diaz-Balart	Congressman from Florida (Republican), 21st District, USA		
Sergio Díaz-Granados	Minister of Trade, Industry and Tourism of Colombia		
Christoph Dichand	Editor-in-Chief	Kronen Zeitung	Austria
Kai Diekmann	Editor-in-Chief	Bild	Germany
Frits van Dijk	Executive Vice-President and Zone Director, Asia, Oceania, Africa and Middle East	Nestlé SA	Switzerland
Robert L. Dilenschneider	President and Chief Executive Officer	The Dilenschneider Group Inc.	USA
Theo Dilissen	Chairman of the Board	Belgacom NV	Belgium
Phillip Dilley	Chairman	Arup Group Ltd	United Kingdom
James Dimon	Chairman and Chief Executive Officer	JPMorgan Chase & Co.	USA
Detlef Dinsel	Managing Partner	IK Investment Partners GmbH	Germany
Jacques Diouf	Director-General, Food and Agriculture Organization of the United Nations (FAO), Rome		
Laurie L. Dippenaar	Chairman	FirstRand Ltd	South Africa
Elizabeth Dipuo Peters	Minister of Energy of South Africa		
Hugo Dixon	Editor	Thomson Reuters, Reuters Breakingviews	United Kingdom
Dian Triansyah Djani	Ambassador and Permanent Representative of Indonesia to the United Nations, Geneva		
Kirill Dmitriev	President	Icon Private Equity	Russian Federation
Vladimir A. Dmitriev	Chairman	State Corporation Bank for Development and Foreign Economic Affairs (Vnesheconombank)	Russian Federation
Steve Dobbs	Senior Group President	Fluor Corporation	USA
Evgeny Dod	Chief Executive Officer	JSC RusHydro	Russian Federation
Colin Dodge	Executive Vice-President and Chief Recovery Officer	Nissan Motor Co. Limited	Japan
Volkert Doeksen	Chief Executive Officer and Managing Partner	AlpInvest Partners NV	Netherlands
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Andrew Doman	President and Chief Executive Officer	Russell Investments	USA
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Christian Dorer	Editor-in-Chief	Aargauer Zeitung	Switzerland
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Abdulla Falah Abdulla Al Dosari	Ambassador and Permanent Representative of the State of Qatar to the United Nations, Geneva		
Bharat Doshi	Executive Director and Chief Financial Officer	Mahindra & Mahindra Ltd	India
Brady W. Dougan	Chief Executive Officer	Credit Suisse AG	Switzerland
Trevor Richard Dougherty	Global Changemaker	British Council	USA
Nigel Doughty	Executive Co-Chairman	Doughty Hanson & Co.	United Kingdom
Arif Dowla	Managing Director	Advanced Chemical Industries Ltd	Bangladesh
William Downe	President and Chief Executive Officer	BMO Financial Group	Canada
John Doyle	General Manager, Transformational Development and Chief Strategy Officer	Ascension Health	USA
Mario Draghi	Governor of the Bank of Italy and Chairman, Financial Stability Board, Italy		
Margo Drakos	Co-Founder and Chief Operating Officer	InstantEncore.com	USA
Jeffrey M. Drazen	Editor-in-Chief	The New England Journal of Medicine	USA
David C. Drummond	Senior Vice-President, Corporate Development and Chief Legal Officer	Google Inc.	USA
Jamie C. Drummond	Executive Director	ONE	United Kingdom
Nadine Drutman	Chief of Staff to the Chief Executive Officer	Absa Group Ltd	South Africa
John P. Drzik	President and Chief Executive Officer	Oliver Wyman Group ((M&MC)	USA
Jeffrey Dubin	Head of News and Events	European Broadcasting Union (EBU)	Switzerland
Pierre Duhaime	Chief Executive Officer	SNC-Lavalin Group Inc.	Canada
Willem van Duin	Chairman and Chief Executive Officer	Eureko BV	Netherlands
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H.R.H. Duke of York	UK Special Representative for International Trade and Investment		
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Brian Duperreault	President and Chief Executive Officer	Marsh & McLennan Companies Inc. (M&MC)	USA
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Nicandro Durante	Chief Executive, Designate	British American Tobacco Plc	United Kingdom
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Gary Dushnitsky	Associate Professor of Strategic and International Management and Entrepreneurship	London Business School	United Kingdom
Barkha Dutt	Group Editor, English News	New Delhi Television (NDTV)	India
Soumitra Dutta	The Roland Berger Chaired Professor in Business and Technology	INSEAD	France
Arkady Dvorkovich	Aide to the President, G8 Affairs, Office of the President, Russian Federation		
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Richard W. Edelman	President and Chief Executive Officer	Edelman	USA

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Espen Barth Eide	Deputy Minister of Foreign Affairs of Norway		
Jörg Eigendorf	Chief Reporter, Member of the Editorial Board	Die Welt	Germany
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Stuart E. Eizenstat	Partner and Head, International Trade and Finance	Covington & Burling LLP	USA
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Gerri Elliott	Executive Vice-President, Strategic Alliances	Juniper Networks Inc.	USA
Lawrence Elliott	Economics Editor	The Guardian	United Kingdom
Michael J. Elliott	Editor, Time International, and Deputy Managing Editor	Time Magazine	USA
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Sir Vernon J. Ellis	Chair	British Council	United Kingdom
David T. Ellwood	Dean	Harvard Kennedy School	USA
Eduardo S. Elsztain	Chairman	IRSA Inversiones y Representaciones SA	Argentina
Craig Emerson	Minister of Trade of Australia		
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Klaus Engel	Chief Executive Officer	Evonik Industries AG	Germany
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David Faber	Anchor	CNBC	USA
Joachim Faber	Chief Executive Officer	Allianz Global Investors AG	Germany
Carlos Jose Fadigas	Chief Executive Officer	Braskem SA	Brazil
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Khalid A. Al Falih	President and Chief Executive Officer	Saudi Aramco	Saudi Arabia
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Werner Faymann	Federal Chancellor of Austria		

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Franz Fehrenbach	Chief Executive Officer	Robert Bosch GmbH	Germany
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Leonel Fernández	President of the Dominican Republic		
Bruno Ferrari	Secretary of the Economy of Mexico		
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Carola Ferstl	Editor and Presenter	N-TV	Germany
Michael Fertik	Founder and Chief Executive Officer	ReputationDefender Inc.	USA
Stephen Fidler	Brussels Editor	The Wall Street Journal	Belgium
Christiana Figueres	Executive Secretary, United Nations Framework Convention on Climate Change (UNFCCC), Bonn		
Joshua Fink	Chief Executive Officer	Enso Capital Management LLC	USA
Daniel Finkelstein	Executive Editor	The Times	United Kingdom
Anne M. Finucane	Global Strategy and Marketing Officer	Bank of America	USA
Marco Fiorese	Co-Founder	The Monaco-Asia Society	Monaco
Peter A. Fischer	Economics Editor and Head, Economics Department	Neue Zürcher Zeitung	Switzerland
Stanley Fischer	Governor of the Central Bank of Israel		
Peter Fitch	Head of Communications	Lloyd's	United Kingdom
Niall FitzGerald	Deputy Chairman	Thomson Reuters	United Kingdom
James M. Flaherty	Minister of Finance of Canada		
Rob Flaherty	Senior Partner and President	Ketchum Inc.	USA
Michael Flammini	Head, Enterprise Strategic Planning	Aetna Inc.	USA
Ryan Flanagan	President, Protective Packaging	Sealed Air Corp.	USA
Stephanie Flanders	Economics Editor	BBC World News	United Kingdom
Bruce Flatt	Senior Managing Partner and Chief Executive Officer	Brookfield Asset Management Inc.	Canada
Sam Fleming	Economics Editor	The Times	United Kingdom
Paul Fletcher	Senior Partner	Actis LLP	United Kingdom
Richard Fletcher	City Editor	The Daily Telegraph	United Kingdom
Olivier Fleurot	Chief Executive Officer	MSL Group	France
Douglas Flint	Group Chairman	HSBC Holdings Plc	United Kingdom
Joerg Floeck	Managing Director and Global Head, Sales and Customer Service	Thomson Reuters	United Kingdom
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James A. Forese	Head of Global Markets, Institutional Clients Group	Citi	USA
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Eric Foss	Chief Executive Officer	Pepsi Beverages Company	USA
George Foster	Paul L. and Phyllis Wattis Professor in Business and Dhirubhai Ambani Fellow in Entrepreneurship	Stanford Graduate School of Business	USA
Mark Foster	Group Chief Executive, Global Markets and Management Consulting	Accenture	United Kingdom
Jane E. Fountain	Professor of Political Science and Public Policy and Director, National Center for Digital Government	University of Massachusetts	USA
Justin Fox	Editorial Director	Harvard Business Review Group	USA
Alain Frachon	Editorial Director	Le Monde	France
Reto Francioni	Chief Executive Officer	Deutsche Börse AG	Germany
Barney Frank	Congressman from Massachusetts (Democrat), 4th District, USA		
Christoph Franz	Chairman and Chief Executive Officer	Deutsche Lufthansa AG	Germany

HOUSE_OVERSIGHT_017074

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Aurelia Frick	Minister of Foreign Affairs of Liechtenstein		
Thomas Fricke	Chief Economist	The Financial Times Deutschland	Germany
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James Eugene Frieda	Global Strategist	Moore Capital Management LLC	United Kingdom
Peter Friedli	President	Friedli Corporate Finance	Switzerland
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Alan G. Friedman	Executive Editor and Anchor	FBC Group Ltd	United Kingdom
Robert Friedman	Editor-at-Large, Finance	Bloomberg News	USA
Thomas L. Friedman	Columnist, Foreign Affairs	The New York Times	USA
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Douglas Frye	Global President and Chief Executive Officer	Colliers International	USA
Akio Fujii	Columnist, Senior Correspondent	Nihon Keizai Shimbun (Nikkei)	United Kingdom
Hidetoshi Fujisawa	Executive Commentator	NHK (Japan Broadcasting Corporation)	Japan
Kumi Fujisawa Tsunoda	Co-Founder	Think Tank SophiaBank	Japan
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Chikara Funabashi	President	Will Seed Co. Ltd	Japan
Dame Clara Furse	Non-Excutive Director	Nomura International Plc	United Kingdom
Zev Furst	Chairman and Chief Executive Officer	First International Resources LLC	USA
Omar A. Al Futtaim	Vice-Chairman	Al Futtaim Trading Group	United Arab Emirates
J. Erik Fyrwald	Chairman and Chief Executive Officer	Nalco Company	USA
M. Shafik Gabr	Chairman and Managing Director	ARTOC Group for Investment and Development	Egypt
Peter B. Gabriel	Founder	Real World	United Kingdom
Jitesh Gadhia	Senior Managing Director	The Blackstone Group	United Kingdom
Orit Gadiesh	Chairman	Bain & Company Inc.	USA
Chantal Gaemperle	Group Executive Vice-President, Human Resources and Synergies	LVMH Moët Hennessy - Louis Vuitton	France
Brian A. Gallagher	President and Chief Executive Officer	United Way Worldwide	USA
Robert L. Gallucci	President	MacArthur Foundation	USA
Gila Gamliel	Deputy Minister for Advancement of Young People, Students and Women, Office of the Prime Minister, Israel		
Stephen Gandel	Senior Writer	Time Magazine	USA
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Gao Xiqing	President and Vice-Chairman, China Investment Corporation (CIC), People's Republic of China		
Javier Garcia-Martinez	Professor	University of Alicante	Spain
Katherine Garrett-Cox	Chief Executive Officer	Alliance Trust Plc	United Kingdom
Timothy Garton Ash	Professor of European Studies	University of Oxford	United Kingdom
Armando Garza Sada	Chairman and Chief Executive Officer	Alfa	Mexico
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William H. Gates III	Co-Chair	Bill & Melinda Gates Foundation	USA
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Katherine M. Gehl	Chairman	Gehl Foods	USA
Horst F. Geicke	Executive Chairman	VinaCapital Group	Hong Kong SAR
Jürgen M. Geissinger	President and Chief Executive Officer	Schaeffler Group	Germany
Timothy F. Geithner	US Secretary of the Treasury		
Paul Geitner	Business Editor	International Herald Tribune	United Kingdom

HOUSE_OVERSIGHT_017075

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Richard L. Gelfond	Chief Executive Officer	Imax Corporation	USA
Eli Gelman	Chief Executive Officer	Amdocs Management Ltd	USA
Pierre Gentin	Managing Director, Legal and Risk	Credit Suisse	USA
William W. George	Professor of Management Practice	Harvard Business School	USA
Julie Louise Gerberding	President, Merck Vaccines	Merck & Co. Inc.	USA
David R. Gergen	Director, Center for Public Leadership	Harvard Kennedy School	USA
Valery Gergiev	Artistic and General Director	Mariinsky Theatre	Russian Federation
Valerie Germain	Managing Partner, Strategy and Business Development	Heidrick & Struggles	USA
Nataliya Germanova	Managing Director, Marketing	Sberbank	Russian Federation
Tillman U. Gerngross	Co-Founder and Chief Executive Officer	Adimab Inc.	USA
Olaf Gersemann	Business Editor	Welt am Sonntag	Germany
Minelik Getahun	Ambassador and Permanent Representative of Ethiopia to the United Nations, Geneva		
Aart J. de Geus	Chairman and Chief Executive Officer	Synopsys Inc.	USA
Federico Ghizzoni	Chief Executive Officer	UniCredit	Italy
Carlos Ghosn	Chairman and Chief Executive Officer	Renault-Nissan Alliance	France
Abdul Aziz Al Ghurair	Chief Executive Officer	Mashreqbank PSC	United Arab Emirates
Majid S. Al Ghurair	Chief Executive Officer	Al-Ghurair Group of Companies	United Arab Emirates
Julie Gichuru	Group Digital Business Manager and TV Host	Royal Media Services	Kenya
Sir John Gieve	Senior Fellow	Belfer Center for Science and International Affairs, Harvard University	USA
Clément Gignac	President and General Manager	Société Générale de Financement du Québec (SGF)	Canada
Mark Gilbert	Senior Columnist, London Bureau Chief	Bloomberg BusinessWeek	United Kingdom
Chris Giles	Economics Editor	The Financial Times	United Kingdom
Mack Gill	President, Global Services	SunGard	USA
Ambassador Dan Gillerman	Chairman	Markstone Capital Group	Israel
Sarah Gillett	Ambassador of the United Kingdom to Switzerland		
Trond Giske	Minister of Trade and Industry of Norway		
Jane Gladstone	Senior Managing Director	Evercore Partners Inc.	USA
Ivan Glasenberg	Chief Executive Officer	Glencore International AG	Switzerland
Daniel Glaser	Chairman and Chief Executive Officer	Marsh Inc. (M&MC)	USA
Amy Glasmeier	Professor of Geography and Regional Planning and Head	MIT - Department of Urban Studies and Planning	USA
Robert Glasser	Secretary-General	Care International	Switzerland
Susan Beth Glasser	Editor-in-Chief	Foreign Policy Magazine	USA
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Richard J. Gnodde	Co-Chief Executive Officer	Goldman Sachs International	United Kingdom
Jules Goddard	Research Fellow, Management Innovation Lab	London Business School	United Kingdom
Pierre Godé	Senior Executive Vice-President	LVMH Moët Hennessy - Louis Vuitton	France
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Adi B. Godrej	Chairman, The Godrej Group	Godrej Industries Ltd	India
Jamshyd N. Godrej	Chairman and Managing Director	Godrej & Boyce Mfg Co. Ltd	India
Daniel Goffart	Editor, Economic and Political News	Handelsblatt	Germany
Donald J. Gogel	President and Chief Executive Officer	Clayton, Dubilier & Rice LLC	USA
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Yair Goldfinger	Co-Founder and Chief Technology Officer	Dotomi	Israel
Ian Goldin	Director, Oxford Martin School	University of Oxford	United Kingdom
Neal Goldman	Chairman	Connectivity Data Systems	USA
Daniel Goleman	Co-Director, Consortium for Research on Emotional Intelligence in Organizations	Rutgers University	USA
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Francisco González	Chairman and Chief Executive Officer	Banco Bilbao Vizcaya Argentaria SA	Spain
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Adrian Gore	Chief Executive Officer	Discovery Holdings Ltd	South Africa
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Barry M. Gosin	Chief Executive Officer	Newmark Knight Frank	USA
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Anne Graham Lotz	Founder	AnGeL Ministries	USA
Michael D. Granoff	Chief Executive Officer	Pomona Capital	USA
Hugh Grant	Chairman, President and Chief Executive Officer	Monsanto Company	USA
Peter T. Grauer	Chairman	Bloomberg LP	USA
Mario Greco	Member of the Group Executive Committee and Chief Executive Officer, General Insurance	Zurich Financial Services	Switzerland
Andy Green	Chief Executive Officer	Logica Plc	United Kingdom
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William D. Green	Chairman	Accenture	USA
Sanford D. Greenberg	Chairman and Chief Executive Officer	TEI Industries LLC	USA
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Michelle Greene	Vice-President, Head, Corporate Responsibility and Executive Director, NYSE Foundation	NYSE Euronext	USA
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Herman Gref	Chairman of the Board and Chief Executive Officer	Sberbank	Russian Federation
Robert Greifeld	Chief Executive Officer	The NASDAQ OMX Group	USA
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Aram Grigorian	Managing Director	Troika Dialog Group	Russian Federation
Olafur Ragnar Grimsson	President of Iceland		
Daniel Gros	Director	Centre for European Policy Studies (CEPS)	Belgium
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Daniel Gross	Business Columnist	Newsweek	USA
Jürgen R. Grossmann	President and Chief Executive Officer	RWE AG	Germany
Steve Grove	Head, News and Politics	YouTube Inc.	USA
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Nizan Guanaes	Chairman	Grupo ABC	Brazil
Karel Gucht	Commissioner for Trade, European Commission, Brussels		
Jean-Marie Guéhenno	Arnold Saltzman Professor of Professional Practice	Columbia University	USA
Francesco P. Guerrera	US Finance and Business Editor	The Financial Times	USA
Robert Guest	Business Editor	The Economist	United Kingdom
Momar Guèye	Deputy Permanent Representative and Chargé d'Affaires a.i.	Permanent Mission of Senegal	Switzerland
Ajit Gulabchand	Chairman and Managing Director	Hindustan Construction Company Ltd	India
Mina Guli	Executive Director and Chief Investment Officer	Peony Capital Limited	People's Republic of China
Stuart T. Gulliver	Group Chief Executive Officer	HSBC Holdings Plc	United Kingdom
Guo Ping	Board Director	Huawei Technologies Co. Ltd	People's Republic of China
Guo Zhenxi	Director, Business Channel	China Central Television CCTV-2	People's Republic of China
Anant Gupta	President	HCL Technologies Ltd	India

HOUSE_OVERSIGHT_017077

Rajat Kumar Gupta	Chairman	International Chamber of Commerce (ICC)	France
Sanjay Gupta	Chief Medical Correspondent	CNN International	USA
Shekhar Gupta	Editor-in-Chief	The Indian Express Newspapers Ltd	India
Chander Prakash Gurnani	Chief Executive Officer	Mahindra Satyam	India
Angel Gurría	Secretary-General, Organisation for Economic Co-operation and Development (OECD), Paris		
Francis Gurry	Director-General, World Intellectual Property Organization (WIPO), Geneva		
Klaus-Peter Gushurst	Senior Vice-President, Director of Global Board	Booz & Company	Germany
Antonio Guterres	UN High Commissioner for Refugees, Geneva		
Amy Gutmann	President	University of Pennsylvania	USA
Karl-Theodor Freiherr zu Guttenberg	Federal Minister of Defence of the Federal Republic of Germany		
Lino Guzzella	Professor	ETH Zurich	Switzerland
Bonnie W. Gwin	Managing Partner, Board Practice	Heidrick & Struggles	USA
H.R.H. Haakon of Norway	Crown Prince of Norway		
Felix Haas	Chief Executive Officer and Head of Product	amiando AG	Germany
Richard N. Haass	President	Council on Foreign Relations	USA
Edgard Habib	Chief Economist	Chevron Corporation	USA
Francesca von Habsburg	Chairman	Thyssen Bornemisza Art Contemporary	Austria
Michael E. Haefliger	Executive and Artistic Director	Lucerne Festival	Switzerland
Gerd Haeusler	Chief Executive Officer	BayernLB	Germany
Ahmed Hafez	Adviser	National Bank of Kuwait	Kuwait
Nada Abbas Haffadh	Member of the Shura Council of Bahrain		
Jamil El Hage	Head, Business News	Al Arabiya	United Arab Emirates
Stein Erik Hagen	Chairman	Canica AS	Norway
Mikael Hagström	President, EMEA and Asia Pacific	SAS Institute Inc.	USA
Priya Haji	Co-Founder and Former Chief Executive Officer	WorldofGood.com by eBay Inc.	USA
Jahangir Hajiyev	Chairman of the Board	International Bank of Azerbaijan	Azerbaijan
Victor Halberstadt	Professor of Public Economics	Leiden University	Netherlands
Ueli Haldimann	Owner and Founder	Unlimited Communications	Switzerland
Roshi Joan Halifax	Founder, Abbot, Upaya Zen Center, USA		
Eugene Hall	Chief Executive Officer	Gartner Inc.	USA
Wendy Hall	Dean, Faculty of Physical and Applied Sciences; Trustee and Programme Director, Web Science Trust	University of Southampton	United Kingdom
Heinz Haller	Executive Vice-President and Chief Commercial Officer	The Dow Chemical Company	USA
Tarja Halonen	President of Finland		
Martin C. Halusa	Chief Executive Officer	Apax Partners LLP	United Kingdom
O. Andreas Halvorsen	Founder and Chief Executive Officer	Viking Global Investors LP	USA
George C. Halvorson	Chairman and Chief Executive Officer	Kaiser Foundation Health Plan Inc.	USA
Junichi Hamada	President	The University of Tokyo	Japan
Ali Hamadé	Journalist and Editorialist	An-Nahar	Lebanon
Jürgen Hambrecht	Chairman of the Board of Executive Directors	BASF SE	Germany
Andrew Hamilton	Vice-Chancellor	University of Oxford	United Kingdom
Mohamed Bin Dhaen Al Hamli	Minister of Energy of the United Arab Emirates		
Han Seung-Soo	Chairman	Global Green Growth Institute (GGGI)	Republic of Korea
Harish Hande	Managing Director	SELCO Solar Light (P) Limited	India
Paul Hanratty	Chief Executive Officer, Long Term Savings and Chairman	Old Mutual Life Assurance Company Limited	South Africa
Tim Hanstad	President and Chief Executive Officer	Landesa	USA
Hao Jiming	Academician and Professor, Department of Environmental Science and Engineering	Tsinghua University	People's Republic of China
Donald R. Harkleroad	President	The Bristol Company	USA
Poppy Harlow	Anchor, CNNMoney.com	CNN	USA
Fredric W. Harman	Managing Partner	Oak Investment Partners	USA

HOUSE_OVERSIGHT_017078

Christine Harper	Chief Financial Correspondent	Bloomberg LP	USA
Matthew J. Harrington	President and Chief Executive Officer, USA	Edelman	USA
Phillip J. Harrington	Executive Vice-President, Risk and Chief Administrative Officer	CA Technologies	USA
Erich Harsch	Chief Executive Officer	dm drogerie markt GMBH + Co. KG	Germany
Stephanie Pullings Hart	Vice-President, Supply Chain and Corporate Services	Nestle - Jenny Craig Inc.	USA
Yasuchika Hasegawa	President and Chief Executive Officer	Takeda Pharmaceutical Company Ltd	Japan
Muhadditha Al Hashimi	Chief Executive Officer	Mohammed Bin Rashid Al Maktoum Academic Medical Center	United Arab Emirates
Joergen Ole Haslestad	President and Chief Executive Officer	Yara International ASA	Norway
Anne Hastings	Managing Director	Fonkoze	Haiti
Takashi Hatchoji	Representative Executive Officer and Executive Vice-President	Hitachi Ltd	Japan
Gary A. Haugen	President and Chief Executive Officer	International Justice Mission (IJM)	USA
Carl Hausmann	Managing Director, Global Government and Corporate Affairs	Bunge Limited	USA
Ricardo Hausmann	Director, Center for International Development	Harvard Kennedy School	USA
Julien Hawari	Co-Chief Executive Officer and Editor-in-Chief	Trends	United Arab Emirates
Michael Hay	Professor of Management Practice in Entrepreneurship	London Business School	United Kingdom
Yasuo Hayashi	Chairman and Chief Executive Officer	Japan External Trade Organization (JETRO)	Japan
Richard Haythornthwaite	Chairman of the Board of Directors	MasterCard Worldwide	United Kingdom
He Yafei	Ambassador and Permanent Representative of the People's Republic of China	Permanent Mission of the People's Republic of China	Switzerland
Jeffrey Hedberg	Acting Chief Executive Officer	Telkom Group Limited	South Africa
Connie Hedegaard	Commissioner, Climate Action, European Commission, Brussels		
Hassan Heikal	Chief Executive Officer	EFG Hermes Holding	Egypt
Stephan Heimbach	Corporate Vice-President; Head, Corporate Communications and Government Affairs	Siemens AG	Germany
Axel C. Heitmann	Chairman of the Board of Management	LANXESS AG	Germany
Jochem Heizmann	Member of the Board of Management	Volkswagen AG	Germany
Ulf Peter Hellstrøm	Senior Staff Correspondent	Aftenposten	Norway
Gideon Henderson	Co-Director, 21st Century Ocean Institute, Oxford Martin School	University of Oxford	United Kingdom
Ulf Henriksson	Chief Executive Officer	Invensys Plc	United Kingdom
Mary Kay Henry	International President	Service Employees International Union (SEIU)	USA
Simon Henry	Chief Financial Officer	Royal Dutch Shell Plc	Netherlands
Hugh S. Herman	Chairman	Investec Ltd	South Africa
Paul Hermelin	Vice-Chairman and Chief Executive Officer	Capgemini	France
Adolfo Hernandez	President, Europe, Middle East and Africa and Executive Vice-President	Alcatel-Lucent	France
Diego Hernandez	Chief Executive Officer	Corporación Nacional del Cobre de Chile (CODELCO)	Chile
Kenneth A. Hersh	Founder and Chief Executive Officer	NGP Energy Capital Management	USA
Shannon S. Herzfeld	Vice-President, Government Relations	Archer Daniels Midland Co. (ADM)	USA
Rolf-Dieter Heuer	Director-General	European Organization for Nuclear Research (CERN)	Switzerland
Uwe J. Heuser	Economic and Business Editor	Die Zeit	Germany
Rob Heyvaert	Corporate Executive Vice-President	Fidelity National Information Services, Inc.	USA
William V. Hickey	President and Chief Executive Officer	Sealed Air Corp.	USA
Hans Hickler	Chief Executive Officer, Asia Pacific Region	Agility	Hong Kong SAR
Heinrich Hiesinger	Chairman of the Executive Board	ThyssenKrupp AG	Germany
Martin Hilb	Managing Director	Institute for Leadership and Human Resource Management (IFPM)	Switzerland
Philipp M. Hildebrand	Chairman of the Governing Board, Swiss National Bank, Switzerland		

HOUSE_OVERSIGHT_017079

Jon Hilsenrath	Chief Economic Correspondent	The Wall Street Journal	USA
Gopichand P. Hinduja	Chairman	Hinduja Automotive Ltd	United Kingdom
Prakash P. Hinduja	Chairman, Europe	Hinduja Group of Companies	Switzerland
Leslie Hinton	Chief Executive Officer	Dow Jones & Company Inc.	USA
Eric Hippeau	Special Partner and Adviser	Softbank Capital	USA
Priya Hiranandani-Vandrevala	Founder and Co-Chairman	Hirco Group	India
Naomi Hirose	Managing Director; International Affairs, Real Estate, Acquisition & Management Dept.	Tokyo Electric Power Company (TEPCO)	Japan
Susan Hockfield	President	Massachusetts Institute of Technology (MIT)	USA
Mark Hoffman	President, CNBC	NBC Universal Inc.	USA
Reid Hoffman	Executive Chairman and Founder	LinkedIn Corporation	USA
André S. Hoffmann	Chairman	Massellaz SA	Switzerland
Karl Hofmann	President and Chief Executive Officer	Population Services International (PSI)	USA
Joseph M. Hogan	Chief Executive Officer	ABB Ltd	Switzerland
Paul R. Hogan	Chairman and Founder	Home Instead Inc	USA
Tom Hogan	Executive Vice-President, Enterprise Sales, Marketing and Strategy	Hewlett-Packard Company	USA
Alec Hogg	Editor-in-Chief	Moneyweb Holdings	South Africa
Harry Hohmeister	Chief Executive Officer	Swiss International Air Lines Ltd	Switzerland
Sir John Holmes	Director	The Ditchley Foundation	United Kingdom
Stefan von Holtzbrinck	President and Chief Executive Officer	Verlagsgruppe Georg von Holtzbrinck GmbH	Germany
Jan Hommen	Chief Executive Officer	ING Group	Netherlands
Hong Ki-Joon	President and Chief Executive Officer	Hanwha Chemical Corporation	Republic of Korea
Hong Shen	Bureau Chief, China	Dow Jones Newswires	People's Republic of China
René Hooft Graafland	Member of the Executive Board and Chief Financial Officer	Heineken International	Netherlands
John L. Hopkins	Group Executive	Fluor Corporation	USA
Yoshito Hori	Chairman and Chief Executive Officer, Globis Group; President and Dean, Globis University; Managing Partner, Globis Capital Partners	GLOBIS Corporation	Japan
Tsutomu Horiuchi	Chief Financial Officer and Senior Managing Director	Mori Building Company Limited	Japan
Robert D. Hormats	US Undersecretary of State for Economic, Energy and Agricultural Affairs		
Douglas H. Horswill	Senior Vice-President, Sustainability and External Affairs	Teck Resources Limited	Canada
John Hourican	Chief Executive Officer, Global Banking and Markets	Royal Bank of Scotland	United Kingdom
Lloyd Walter Howell Jr	Executive Vice-President	Booz Allen Hamilton Inc.	USA
W. Lee Howell	Managing Director, Head of Programming and Global Agenda Councils, World Economic Forum		
Rumen Hranov M. Sc.	Chairman	Finman AG	Switzerland
Hsu Ta-Lin	Chairman	H&Q Asia Pacific	USA
George Hu	Executive Vice-President, Marketing and Alliances	Salesforce.com	USA
Ken Hu	Board Member and Executive Vice-President	Huawei Technologies Co. Ltd	People's Republic of China
Hu Shuli	Editor-in-Chief	Caixin Media	People's Republic of China
Philippe Huber	Co-Chief Executive Officer	Kentaro Ltd	United Kingdom
Ian Hudson	President, Europe, Middle East and Africa	DuPont De Nemours International SA	Switzerland
Arianna Huffington	Co-Founder and Editor-in-Chief	Huffington Post	USA
Peter van Hüllen	Chief Executive Officer	Georgsmarienhütte Holding GmbH	Germany
Göran Hultin	Chairman and Chief Executive Officer	Caden Corporation	United Kingdom
Glenn H. Hutchins	Founder and Co-Chief Executive	Silver Lake	USA
William N. Hutton	Columnist	The Guardian	United Kingdom
David Iakobachvili	Chairman of the Board of Directors	Wimm-Bill-Dann Foods OJSC	Russian Federation
Herminia Ibarra	The Cora Chaired Professor of Leadership and Learning and Professor of Organizational Behaviour	INSEAD	France
Riswinandi Idris	Deputy President Director	PT Bank Mandiri (Persero)	Indonesia

HOUSE_OVERSIGHT_017080

Enrique V. Iglesias	Secretary-General, SEGIB Secretaría General Iberoamericana, Spain		
David Ignatius	Associate Editor and Columnist	The Washington Post Company	USA
Emmanuel Ikazoboh	Acting Director-General	The Nigerian Stock Exchange Ltd	Nigeria
Michael J. Inacker	Senior Vice-President, Corporate Communications and Public Affairs	METRO GROUP	Germany
Masa Inakage	Dean and Professor, Graduate School of Media Design	Keio University	Japan
Bjarke Ingels	Architect	Bjarke Ingels Group (BIG)	Denmark
José Miguel Insulza	Secretary-General, Organization of American States (OAS), Washington DC		
Yoko Ishikura	Professor, Graduate School of International Corporate Strategy (ICS)	Hitotsubashi University	Japan
Faisal Islam	Economics Editor	Channel 4 News	United Kingdom
Yoshinori Isozaki	Managing Director	Kirin Holdings Company Limited	Japan
Kiyohiko Ito	Managing Director	Keizai Doyukai (Japan Association of Corporate Executives)	Japan
Koji Iwama	Corporate Vice-President, Corporate Representative, EMEA	Toshiba of Europe Ltd	United Kingdom
Daisuke Iwase	Co-Founder and Representative Director	Lifenet Insurance Company	Japan
Alexander V. Izosimov	President and Chief Executive Officer	VimpelCom Ltd	Netherlands
Natalia Izosimova	Managing Director	Foundation for Effective Governance	Ukraine
Michael Izza	Chief Executive Officer	The Institute of Chartered Accountants in England and Wales (ICAEW)	United Kingdom
Sir Mohammad Jaafar	Chairman and Managing Director	The Kuwaiti Danish Dairy Company KCSC	Kuwait
Abdul Malik Al Jaber	Chief Executive Officer	Zain Jordan	Jordan
Vuyo Jack	Co-Founder and Chairman	Empowerdex	South Africa
Shirley Ann Jackson	President	Rensselaer Polytechnic Institute (RPI)	USA
Paul E. Jacobs	Chairman and Chief Executive Officer	Qualcomm Inc.	USA
Munizae Jahangir	Special Correspondent and Associate Executive Producer	Express TV	Pakistan
Christopher Jahns	President and Chief Executive Officer	EBS University	Germany
Anshu Jain	Member of the Management Board and Head of the Corporate and Investment Bank	Deutsche Bank AG	United Kingdom
Dipak C. Jain	Dean Designate	INSEAD	France
Hans-Jürgen Jakobs	Head of Economic and Financial Department	Süddeutsche Zeitung GmbH	Germany
Kate James	Chief Communications Officer	Bill & Melinda Gates Foundation	USA
Esam Janahi	Board Member	Vision 3	United Arab Emirates
Rashad Y. Janahi	Board Member	Vision 3	United Arab Emirates
Amjad Parvez Janjua	Executive Director	Pakistan State Oil Company Limited (PSO)	Pakistan
Garth C. Japhet	Founder and Chief Executive Officer	Heartlines	South Africa
Livia Járóka	Member of the European Parliament	European Parliament	Belgium
Jeff Jarvis	Blogger, Buzzmachine.com and Professor	Graduate School of Journalism (CUNY)	USA
Mohamed Husnee Jazeel	Chief Executive Officer	Dabbagh Group Holding Co. Ltd	Saudi Arabia
Alain Jeannet	Editor-in-Chief	L'Hebdo	Switzerland
Richard A. Jefferson	Chief Executive Officer	Cambia	Australia
Kevin J. Jenkins	President and Chief Executive Officer	World Vision International	United Kingdom
Philip J. Jennings	General Secretary	UNI Global Union	Switzerland
Jeong Kim	President, Bell Labs	Alcatel-Lucent Bell Laboratories	USA
Jean-Luc Jezouin	Senior Vice-President and General Manager, New Markets Region	Kudelski Group	Switzerland
Jiang Jianqing	Chairman of the Board	Industrial and Commercial Bank of China Limited	People's Republic of China
Emmanuel Jimenez	Director, Human Development, East Asia and Pacific Region and Editor, World Bank Research Observer	The World Bank	USA
Joseph Jimenez	Chief Executive Officer	Novartis AG	Switzerland
Naveen Jindal	Executive Vice-Chairman and Managing Director	Jindal Steel and Power Limited	India

HOUSE_OVERSIGHT_017081

Jeffrey Joerres	Chairman and Chief Executive Officer	Manpower Inc.	USA
Josef Joffe	Publisher-Editor	Die Zeit	Germany
Björn Johansson	Chairman	Dr Bjorn Johansson Associates Inc.	Switzerland
Boris Johnson	Mayor of London, United Kingdom		
Chris Johnson	Executive Vice-President	Nestlé SA	Switzerland
David Johnson	Executive Vice-President and President, Europe, Africa and Middle East	Nalco Europe	Netherlands
Erica L. Johnson	Chief Officer, Customer Network Business	Eskom Holdings Limited	South Africa
H. Fisk Johnson	Chairman of the Board and Chief Executive Officer	S. C. Johnson & Son Inc.	USA
Jace Johnson	Vice President, Government Affairs and Public Policy	Adobe Systems	USA
Kevin Johnson	Chief Executive Officer	Juniper Networks Inc.	USA
Mark Johnson	Founder	Playing for Change	USA
Ray Johnson	Senior Vice-President and Chief Technology Officer	Lockheed Martin Corporation	USA
Robert A. Johnson	Executive Director	The Institute for New Economic Thinking (INET)	USA
Simon Johnson	Ronald A. Kurtz, Professor of Entrepreneurship	MIT - Sloan School of Management	USA
Tom Johnstone	President and Chief Executive Officer	AB SKF	Sweden
Anthony Jones	Journalist	Australian Broadcasting Corporation - ABC Television	Australia
David Jones	Global Chief Executive Officer	Havas Worldwide	USA
Hannah Jones	Vice-President, Sustainable Business and Innovation, Government Public Affairs	Nike Inc.	USA
Agnes Jongerius	President	Confederation of Dutch Trade Unions	Netherlands
Conni Jonsson	Chief Executive Officer and Managing Partner	EQT Partners AB	Sweden
Vyomesh Joshi	Executive Vice-President, Imaging and Printing Group	Hewlett-Packard Company	USA
Tarun Jotwani	Global Head, Fixed Income and Chief Executive Officer, Europe, Middle East and Africa	Nomura International Plc	United Kingdom
Luciano E. Joublanc	Ambassador of Mexico	Embassy of Mexico	Switzerland
Lisa Jucca	Chief Financial Correspondent, Italy	Thomson Reuters	Italy
Bernhard Jucker	Member of the Executive Committee and Head of Power Products	ABB Ltd	Switzerland
Khaled A. Juffali	Member of the Executive Committee and Managing Partner	E. A. Juffali and Brothers	Saudi Arabia
Paul Kagame	President of Rwanda		
Banri Kaieda	Minister of Economic and Fiscal Policy of Japan		
Fritz Kaiser	Executive Chairman	Kaiser Ritter Partner	Liechtenstein
Chandra Shekar Kakal	Global Head, Enterprise Solutions, Infosys	Infosys Technologies Ltd	India
Scott E. Kalb	Chief Investment Officer, Korea Investment Corporation (KIC), Republic of Korea		
Anatole Kaletsky	Editor-at-Large	The Times	United Kingdom
Siim Kallas	Vice-President and Commissioner, Transport, European Commission, Brussels		
Paul-Bernhard Kallen	Chief Executive Officer	Burda Media	Germany
Ajay Kalsi	Managing Director	Phoenix Overseas Ltd	India
Baba N. Kalyani	Chairman and Managing Director	Bharat Forge Ltd	India
Abdullah Saleh Kamel	Executive President and Chief Executive Officer	Dallah Al Baraka Holding Co.	Saudi Arabia
Tihomir D. Kamenov	Founder and Chairman	Commercial League Healthcare Group	Bulgaria
Suzan Salman Kanoo	President	International Motor Trading Agency WLL	Bahrain
Onkar S. Kanwar	Chairman	Apollo Tyres Ltd	India
John Kao	Chairman and Founder	Institute for Large Scale Innovation (ILSI)	USA
Scott B. Kapnick	Managing Partner	Highbridge Capital Management LLC	USA
Anatoly Karachinsky	President and Chief Executive Officer	IBS Group	Russian Federation
Erdal Karamercan	President and Chief Executive Officer	Eczacibasi Holding	Turkey
Johan Karlström	President and Chief Executive Officer	Skanska AB	Sweden

HOUSE_OVERSIGHT_017082

Unni Karunakara	President	Médecins Sans Frontières International	Switzerland
Kasiviswanathan Shanmugam	Minister for Home Affairs and Minister for Law of Singapore		
Drue Kataoka	Artist, Japan		
Piia-Noora Kauppi	Managing Director	Federation of Finnish Financial Services	Finland
Yoriko Kawaguchi	Member of the House of Councillors, Japan; Minister for Foreign Affairs of Japan (2002-2004)		
Chris Kearney	Chairman, President and Chief Executive Officer	SPX Corporation	USA
William Keegan	Senior Economics Commentator	The Observer	United Kingdom
Carol Keehan	President and Chief Executive Officer, Catholic Health Association, USA		
Tom Keene	Host	Bloomberg Radio & Television	USA
Tal Keinan	Chairman and Chief Executive Officer	KCPS & Company	Israel
Manish Kejriwal	Senior Managing Director	Temasek Holdings (Pte) Limited	India
Kairat Kelimbetov	Chief Executive Officer	Samruk-Kazyna JSC	Kazakhstan
Georg Kell	Executive Director, Global Compact Office, United Nations, New York		
Jakob Kellenberger	President, International Committee of the Red Cross (ICRC), Geneva		
Edmund F. Kelly	Chairman and Chief Executive Officer	Liberty Mutual Group	USA
Gail Kelly	Chief Executive Officer and Managing Director	Westpac Banking Corporation	Australia
Jeff Kelly	Chief Executive Officer, BT Global Services	BT Group Plc	United Kingdom
Kevin Kelly	Chief Executive Officer	Heidrick & Struggles	USA
Angelien Kemna	Chief Investment Officer	APG Asset Management	Netherlands
Frederick Kempe	President and Chief Executive Officer	The Atlantic Council of the United States	USA
Carsten Kengeter	Chief Executive Officer	UBS Investment Bank	United Kingdom
David Kennedy	Director, Institute for Global Law and Policy	Harvard Law School	USA
Kathleen Kennedy Townsend	Senior Vice-President	The Rock Creek Group	USA
David W. Kenny	President	Akamai Technologies Inc.	USA
Muhtar A. Kent	Chairman of the Board and Chief Executive Officer	The Coca-Cola Company	USA
Philip Kent	Chairman and Chief Executive Officer	Turner Broadcasting System Inc.	USA
Ronald Kent	Executive Vice-President, Head of International Listings	NYSE Euronext	United Kingdom
Neal Keny-Guyer	Chief Executive Officer	MercyCorps	USA
Scott Key	President and Chief Operating Officer	IHS	USA
Sanjeev Khagram	Professor of Public Affairs and International Studies; Lead Steward	University of Washington, iScale (Innovations for Scaling Impact)	USA
Mugheer Khamis Al Khaili	Director-General , Abu Dhabi Education Council, United Arab Emirates		
Amr Khaled	Chairman of the Board of Trustees	Right Start Foundation International	United Kingdom
Fazlun Khalid	Founder and Director	Islamic Foundation for Ecology and Environmental Sciences	United Kingdom
Mohamed bin Isa Al Khalifa	Vice-Chairman	Bahrain Telecommunications Co. (BATELCO)	Bahrain
Sheikh Mohammed Bin Essa Al Khalifa	Chief Executive	Bahrain Economic Development Board	Bahrain
H.H. Sheikh Al Khalifa	Adviser to the Prime Minister of Bahrain		
Imran Khan	Chairman, Pakistan Tehreek-e-Insaf, Pakistan		
Mehmood Khan	Chief Executive Officer, Global Nutrition Group; Senior Vice-President and Chief Scientific Officer	PepsiCo Inc.	USA
Riz Khan	Anchor	Al Jazeera	USA
Ajay Khanna	President	Jubilant Bhartia Group	India
Parag Khanna	Director, Global Governance Initiative	New America Foundation	USA
Tarun Khanna	Jorge Paulo Lemann Professor	Harvard Business School	USA

HOUSE_OVERSIGHT_017083

Jamal Khashoggi	General Manager and Editor-in-Chief	Al Waleed 24 News Channel	Saudi Arabia
Abdulaziz F. Al Khayyal	Senior Vice-President, Industrial Relations	Saudi Aramco	Saudi Arabia
Jamil El Khazen	Chief Executive Officer	Jamyco Holding Luxembourg SA	Switzerland
Jihad B. Khazen	Director	Al Hayat	United Kingdom
Nand Khemka	Chairman	SUN Group	India
Pankaj Kanaksi Khimji	Director	Khimji Ramdas LLC	Oman
Umesh Khimji	Chief Executive Officer	Ajit Khimji Group LLC	Oman
Habil F. Khorakiwala	Chairman	Wockhardt Limited	India
Sanjay Khosla	Executive Vice-President and President, Developing Markets	Kraft Foods Inc.	USA
Nagi F. Khouri	Director, Division of Breast Imaging, The Russell H. Morgan Department of Radiology and Radiological Science	The Johns Hopkins Avon Foundation Breast Center	USA
Samer S. Khoury	Executive Vice-President, Operations	Consolidated Contractors Company (CCC)	Greece
Eduard Khudainatov	President	Rosneft Oil Company	Russian Federation
Collins Khumalo	President	Multichoice (Pty) Ltd	South Africa
Naina Lal Kidwai	Country Head, India	HSBC Asia Pacific	India
Walter B. Kielholz	Chairman of the Board of Directors	Swiss Reinsurance Company Ltd	Switzerland
Jakaya M. Kikwete	President of Tanzania		
Nancy Killefer	Senior Director and Office Manager	McKinsey & Company	USA
Kim Dong Kwan	Managing Director	Hanwha Group	Republic of Korea
Kim Hyun-Chung	President and Chief Executive Officer	Hanwha Engineering & Construction Corporation	Republic of Korea
Kim Jong-Hoon	Minister for Trade of the Republic of Korea		
Kim Sam-Whan	Very Reverend	Myungsung Presbyterian Church	Republic of Korea
Kim Sang-Hyup	Secretary to the President of the Republic of Korea for Green Growth and Environment, Office of the President, Republic of Korea		
Kim Seung Youn	Chairman	Hanwha Group	Republic of Korea
David Kim Younghoon	Chairman and Chief Executive Officer	Daesung Group	Republic of Korea
Robert M. Kimmitt	Senior International Counsel	Wilmer Hale	USA
Takeshi Kimura	President	Mitsubishi Chemical Europe GMBH	Germany
Fred Kindle	Partner	Clayton, Dubilier & Rice LLP	United Kingdom
David King	Executive Director	Smith School of Enterprise and the Environment (SSEE)	United Kingdom
Raymond King	Chief Executive Officer	BUPA	United Kingdom
Steve King	Chief Executive Officer Worldwide	ZenithOptimedia	United Kingdom
Wallace King	Chief Executive Officer	Leighton Holdings Ltd	Australia
Lise Kingo	Executive Vice-President, Corporate Relations	Novo Nordisk A/S	Denmark
Ron Kirk	US Trade Representative		
David Kirkpatrick	Technology Columnist	The Daily Beast	USA
Victoria Kisyombe	Chief Executive Officer and Founder	Sero Lease and Finance (Selfina)	Tanzania
Shinichi Kitajima	Ambassador and Permanent Representative of Japan	Permanent Mission of Japan	Switzerland
Mari Kiviniemi	Prime Minister of Finland		
Akira Kiyota	Chairman	Daiwa Securities Group Inc.	Japan
Larry Klane	Chairman and Chief Executive Officer	Korea Exchange Bank	Republic of Korea
Bruce Klein	Senior Vice-President, US Public Sector	Cisco	USA
Klaus Kleinfeld	Chairman and Chief Executive Officer	Alcoa Inc.	USA
Mark Kleinman	City Editor	Sky News - BSkyB	United Kingdom
Andrzej Klesyk	Chief Executive Officer	PZU SA	Poland
Hans Klingenberg	Ambassador of Denmark	Embassy of Denmark	Switzerland
Jürgen Kluge	Chairman of the Managing Board	Franz Haniel & Cie GmbH	Germany
Steffen Klusmann	Editor-in-Chief	The Financial Times Deutschland	Germany
Hermann-Josef Knipper	Deputy Editor-in-Chief	Handelsblatt	Germany
Carsten Knop	Senior Business Editor	Frankfurter Allgemeine Zeitung	Germany
Sir Nigel Knowles	Managing Partner	DLA Piper UK LLP	United Kingdom
Eizo Kobayashi	Chairman and Representative Director	Itochu Corporation	Japan
Yoshimitsu Kobayashi	President and Chief Executive Officer	Mitsubishi Chemical Holdings Corporation	Japan
Aaron Koblin	Artist, USA		

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Silvana Koch-Mehrin	Vice-President, European Parliament, Brussels		
Caio Koch-Weser	Vice-Chairman, Deutsche Bank Group	Deutsche Bank AG	United Kingdom
Chanda Kochhar	Managing Director and Chief Executive Officer	ICICI Bank Ltd	India
Nancy Koehn	James E. Robison Professor of Business Administration	Harvard Business School	USA
Sergey A. Kogogin	Director-General	Kamaz Inc.	Russian Federation
Annie Koh	Associate Professor of Finance and Dean, Office of Executive and Professional Education	Singapore Management University	Singapore
Manuel Kohnstamm	Managing Director, Public Policy and Communications	Liberty Global Europe BV	Netherlands
Yorihiko Kojima	Chairman of the Board	Mitsubishi Corporation	Japan
Ali Kolaghassi	Vice-President	Saudi Oger Ltd	Saudi Arabia
Eivind Drachmann Kolding	Partner and Chief Executive Officer, Container Business	A.P. Møller-Maersk AS	Denmark
Kathy Koll Matsui	Co-Head, Asia Investment Research	Goldman Sachs Japan Co. Ltd	Japan
Steve Koltes	Managing Partner	CVC Capital Partners (Luxembourg) Sàrl	Luxembourg
Bronislaw Komorowski	President of Poland		
Madhu Koneru	Group Executive Director	Trimex International FZE	United Arab Emirates
Dmitry Konov	President	Sibur LLC	Russian Federation
Koo Jayoung	President and Chief Executive Officer	SK Energy	Republic of Korea
Nathalie Kosciusko-Morizet	Minister of Ecology, Sustainable Development, Transports and Housing of France		
Mikko Kosonen	President	SITRA (Finnish Innovation Fund)	Finland
Johann O. Koss	President and Chief Executive Officer	Right To Play International	Canada
Andrei L. Kostin	Chairman and Chief Executive Officer	JSC VTB Bank	Russian Federation
Wojciech J. Kostrzewa	President and Chief Executive Officer	ITI Corporation Sp.zo.o.	Poland
Uday S. Kotak	Vice-Chairman and Managing Director	Kotak Mahindra Bank Ltd	India
Brij Kothari	Director	PlanetRead	India
Margery Kraus	President and Chief Executive Officer	APCO Worldwide Inc.	USA
Lawrence M. Krauss	Professor, School of Earth and Space Exploration	Arizona State University	USA
Henry R. Kravis	Founding Partner	Kohlberg Kravis Roberts & Co.	USA
Dariusz Jacek Krawiec	President and Chief Executive Officer	PKN ORLEN SA	Poland
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HOUSE_OVERSIGHT_017085

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HOUSE_OVERSIGHT_017086

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4.2.12
WC: 191694

TOTAL WORD COUNT 191,694
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TABLE OF CONTENTS

Preface: Ideology as Biography—A life of continuous change
Wc 4391
Pages 9

Part I: From Brooklyn to Cambridge (with stops in New Haven and Washington)

Chapter 1: Born and religiously educated in Brooklyn
Wc 15,669
Pages 27

Chapter 2: My Secular Education—Brooklyn and Yale
Wc 3811
Pages 6

Chapter 3: My Clerkships: Judge Bazelon and Justice Goldberg
Wc 13969
Pages 24

Chapter 4: Beginning my life as an academic—and its changes over time
Wc 7530
Pages 12

Part II: The changing sound and look of freedom of speech: from the Pentagon Papers to Wikileaks and from Harry Reems' Deep Throat to Woodward and Bernstein's "Deep Throat."

Chapter 5: The Changing First Amendment—New Meanings For Old Words
Wc 5259
Pages 9

Chapter 6 Offensiveness- Pornography: I Am Curious Yellow and Deep Throat
Wc 12,338
Pages 24

Chapter 7 Disclosure of Secrets: From Pentagon Papers to Wikileaks
Wc 6905
Pages 13

Chapter 8: Expressions that incite violence and disrupt speakers
Wc 3545
Pages 6

HOUSE_OVERSIGHT_017088

4.2.12
WC: 191694

Chapter 9: The Right to Falsify History: Holocaust Denial and Academic Freedom
Wc 5031
Pages 10

Chapter 10: Speech that Conflicts with Reputational and Privacy Rights
Wc 4685
Pages 9

Part III: Criminal Justice: From Sherlock Holmes to Barry Scheck and CSI

Chapter 11: "Death is different"[1]: Challenging Capital Punishment
Wc 3157
Pages 6

Chapter 12: The death penalty for those who don't kill: Ricky and Raymond Tison
Wc 6392
Pages 20

Chapter 13: Using Science, Law, Logic and Experience to Disprove Murder
Wc 23825
Pages 51

Chapter 14: The changing politics of rape: From "no" means "maybe," to "maybe" means "no."
Wc 15644
Pages 29

Chapter 15: The changing impact of the media on the law
Wc 14877
Pages 29

PART IV: THE NEVERENDING QUEST FOR EQUALITY AND JUSTICE

Chapter 16: The Changing Face of Race: From Color Blindness to Race-Specific Remedies
Wc 14130
Pages 26

Chapter 17 The crumbling wall between church and state: from separation to christianization
Wc 8883
Pages 16

Chapter 18: From Human Right to Human Wrongs: How the hard left hijacked the Human Rights Agenda
Wc14667
Pages 27

[1] Justice John Paul Stevens

HOUSE_OVERSIGHT_017089

4.2.12
WC: 191694

Conclusion—Closing Argument:

Looking back at my 50 year career and forward to the laws next 50 years.
Wc 7047
Pages 13

APPENDIX—VIGNETTES
Wc 8817
Pages 42 (each on separate page)

HOUSE_OVERSIGHT_017090

Alan Dershowitz Takes The Stand: An Autobiography

Or

Taking the Stand—an Autobiography by Alan Dershowitz

Preface: Ideology as Biography—A life of continuous change

My legal practice has been described as "the most fascinating on the planet."[2] Though perhaps hyperbolic, the fact is that during my long career as a lawyer, I have:

- represented and counseled presidents, prime ministers, United Nations high officials, judges, senators, actors, musicians, athletes as well as ordinary people who have had the most extraordinary cases;

- played a role, sometimes large, sometimes small, in some of the most cataclysmic events of the last half century—from the assassination of JFK, to the forced resignation of Richard Nixon, to the Chappaquiddick investigation of Ted Kennedy, to the impeachment of President Clinton, to the war crimes trials of accused war criminals, to the defense of Israel in international fora.

- represented some of the most despised and despicable people on the face of the earth and sat across the table from defendants accused of mass murder, terrorism, war crimes, torture, rape and hate crimes;

- served as a lawyer in some of the most transforming legal cases of the age, including the Pentagon Papers Case, the WikiLeaks investigation, the anti-war prosecutions of Dr. Spock, the Chicago 7, the Weather Underground and Patricia Hearst;

- represented some of the most controversial defendants in recent history: OJ Simpson; Claus Von Bulow; Mike Tyson; Leona Helmsley and Michael Milken.

This autobiography delves beneath the surface of these cases and causes. It presents an inside account of legal events that have altered history and that continue to have a major impact on the lives of millions of people.

What Tocqueville observed two centuries ago—that in our country nearly every great issue finds its way into the courts—is even truer today than it was then. Accordingly, my autobiography will, in some sense, be a history of the last half century as seen through the eyes of a lawyer who

[2] [quote]

HOUSE_OVERSIGHT_017091

was privileged to have participated in many of the most intriguing and important cases and controversies of our era.
The law has changed considerably over the past half century. I have not only observed and written about these changes, I have helped to bring some of them about through my litigation, my writing and my teaching. This book presents an account of these changes and of my participation in the cases that precipitated them. It is also an account of one man's intellectual and ideological development during a dramatic century of world, American, and Jewish history, enriched with anecdotes and behind-the-scenes stories from my life and the lives of those I have encountered.

An autobiographer is like a defendant who takes the stand at his own trial. We all have the right to remain silent, both in life and in law. But if one elects to bear witness about his own life, then he or she must tell the truth, the whole truth and nothing but the truth. This commitment to complete candor is subject only to limited privileges such as those between a lawyer and a client, or a husband and a wife. A witness may be questioned not only about his actions, but also about his motivations, his feelings, his biases, and his regrets. In this autobiography, I intend to comply with these rules to the best of my ability.

Why then have I waived my privilege of silence and decided to write this autobiography: because I have lived the passion of my times and participated in some of the most transforming, legal and political events of the past half century. In this autobiography, I will describe and explain my role in litigating cases and advocating causes that have changed the political and legal landscape—for better or worse. I will also explain how I litigate difficult cases—the tactics and strategies I have successfully developed over the years. My oath of honesty makes it impossible to hide behind the false modesty that often denies the readers of autobiographies an accurate picture of the impact an author has had on events.

Since you're reading these words, you've probably encountered the public Alan Dershowitz—confrontational, unapologetic, brash, tough, argumentative, and uncompromising. Those who know me well—family, friends, and colleagues—hardly recognize the "character" I play on TV [alternative: my TV persona]. They tell me in my personal life, I shy away from confrontation and am something of a pushover. My son Elon says that when people bring me up in conversation, he can instantly tell whether they know me from TV or from personal interactions—whether they know what he calls "The Dersh Character" or "the real Alan."

This sharp dichotomy between my public and private personas was brought home to me quite dramatically, when a major motion picture, Reversal of Fortune, was made about my role in the Claus Von Bulow case, and a character, based on me, was played by Tony Award actor Ron Silver. The New York Times asked me to write an article for the arts and entertainment section on how it feels to watch someone play you on the big screen.

The opening scene of the film had my character playing an energetic basketball game with himself—true enough. But when he's interrupted by a phone call giving him the news that he had lost a case involving two brothers on death row (the Tison brothers, see Chapter 12), he smashes the phone on the pavement.

HOUSE_OVERSIGHT_017092

When I complained to my son, who had co-produced the film, that I don't throw phones when I lose cases—even capital cases—my son responded: "Dad, you've got to get it through your head that the person on the screen isn't you; it's your character—'the Dersh Character.'" He continued to assure me, in his best professional manner, that characters have to "establish themselves" early in the film, and that this "establishing scene" was intended to convey my energy and my passion for the rights of criminal defendants. "If we had several hours, we could have demonstrated your passion by recounting your involvement in many other cases, but we had about a minute; hence the smashed phone."

I wasn't satisfied. "That scene doesn't show passion," I said. "It shows a temper tantrum." My son tried to explain that a character in a film has to be shown with some faults early on in the film, so that he can "overcome" them. "I know you don't lose your temper," Elon assured me smilingly, "but the viewing audience has to see you grow."

Still, I didn't like being portrayed as a person whose passions—manifested by occasional curses in addition to the smashed phone—are reserved exclusively for his professional life. My "girlfriend" in the film—a mostly fictional character played by Annabella Sciorra—complains loudly that my character has nothing left for the people around him, and my character seems to agree: "My clients are the people I care about." Poor guy! I hope that's not me, although I do have to acknowledge that people who know me only professionally assume that I have nothing left for those I love. But the fact is that I reserve a lot of love, loyalty and friendship for family and people close to me.

I asked Ron Silver—who knows how important my family and friends are to me—how he felt playing me in way that he knew was something of a stereotype of the passionate lawyer for whom, Oliver Wendell Holmes' said, "the law is a jealous mistress." He responded: "I'm playing the public Alan Dershowitz—the one people see on TV and in the newspapers. I can't get to know the private Alan well enough to play him, and frankly the public isn't interested in that side of you."

In this book, I will try to interest my readers in both sides of my life, and how each impacts the other, and how both are very much the products of my early upbringing and my lifelong experiences. I think of myself as an integrated whole, though the very different roles I play—as lawyer, teacher, writer, father, husband, friend, colleague—require somewhat different balances among the various elements of my persona.

Although this autobiography is my first attempt to explore my life in full, I have written several earlier books that touch on aspects of my public life. The Best Defense dealt with my earliest cases during the first decade of my professional life. Chutzpah covered my Jewish causes and cases. Reversal of Fortune and Reasonable Doubts each dealt with one specific case (Von Bulow and O.J. Simpson). I will try not to repeat what I wrote in those books, though some overlap is inevitable. This more ambitious effort seeks to place my entire professional life into the broader context of how the law has changed over the past half century and how my private life prepared me to play a role in these changes.

HOUSE_OVERSIGHT_017093

I bring to this task a strong and dynamic world view that has been shaped by my life experiences and which has, in turn, shaped my life experiences. In looking back on my life, I am inevitably peering through the prism of the powerful ideology that has provided a compass for my actions.

Ideology is biography. Where we stand is the result of where we sat, who we sat next to, what we observed, what happened to us, and how we reacted to our experiences.

Ideology is complex. Its causes are multifaceted and rarely subject to quantification. The philosopher, Descartes, who famously said, "I think therefore I am" got it backwards. I am—I was, I will be—therefore I think what I think. The ability to think is inborn—a biological and genetic endowment. The content of one's thinking—the nature and quality of our ideas—is more nurture than nature. Without human experiences there could be no well-formed ideology, merely simple inborn reflexes based on instinct and genetics.[3] There is no gene, or combination of genes, that ordains the content of our views regarding politics, law, morality or religion.[4] Biology gives us the mechanisms with which to organize our experiences into coherent theories of life, but without these experiences—which begin in the womb and may actually alter the physical structures of our brain over time—all we would have are the mechanics of thought and the potential for formulating complex ideas and ideologies. It is our interactions—with other human beings, with nature, with nurture, with luck, with love, with hate, with pleasure, with pain, with our own limitations, with our mortality[5]—that shape our world views.

Among the most enduring and influential human encounters are those experienced at an early age. These include the accidents of birth: to which family, in which place, at which time we happen to come into the world. It is true that most people die with the religion and political affiliation into which they were born (or adopted). Identical twins, separated at birth, may share a common disposition, IQ and susceptibility to disease, but they are likely to share the religious and political affiliations of their adoptive parents. There is little genetic about the factors that directly influence religious, political or other ideological choices. They are largely a function of exposure to external factors.[6]

Many of these external factors are totally beyond the control of the person. They may involve decisions made by others, often before they were even born. Probably the most significant decisions affecting my own life were made by my great grandparents on my father's side and my grandparents on my mother's side: the decision to leave the shtetls of Poland and move to New York. Had they remained in Poland, as some of my relatives did, I would probably not have survived the Holocaust, since I was three years old when the systematic genocide began.[7] That

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[3] Quote Steve Pinker
[4] FN on Mark Hauser "Moral Minds." Drew Weston, George Lakoff.
[5] Kafka once quipped that "the meaning of life is that we die," and when God told Adam and Eve that if they eat from the tree of knowledge, they will die, he meant they will obtain the knowledge of mortality—which elevated humans above other species.
[6] This is not to deny the likely influence genetics and biology may have on a predisposition toward homosexuality or other orientations. Nor is it to deny that biological predisposition may influence ideology through the prism of experience. See [cite] [expand]
[7] Perhaps, of course, had my forbearers remained in Poland, my father might not have met my mother (although their families lived in neighboring shtetls). Accident, timing and luck determine virtually everything relating to birth.

HOUSE_OVERSIGHT_017094

may be why Jews of my generation are so influenced in their attitudes and ideology by the Holocaust. There but for the grace of God, and the forethought of our grandparents, go we. (In 1999, I wrote a novel *Just Revenge*, which reflected my dear feelings about the unavenged murders of so many of my relatives.)

Once a person is born in a certain place, at a certain time, attitudes and ideology are shaped (in part, because luck always intrudes[8]) directly by family, religion, culture, neighborhood, childhood friends, teachers and other mentors and role models. Sometimes they are a reaction to these influences. Often they are a combination of both.

If ideology is biography, then autobiography must honestly attempt to explore the sources of the author subject's ideology in his or her life experiences. This requires not only deep introspection, but a willingness to expose—to the reader but also to the writer—aspects of one's life that are generally kept private or submerged. Everyone has the right, within limits, to maintain a zone of privacy. I have devoted a considerable portion of my professional life seeking to preserve, indeed expand, that zone. But a decision to write an autobiography requires a commitment to candor and openness—a "waiver" (to use a legal term) of much of the right to privacy.

I keep fairly complete records of my cases and controversies. My archives are in the Brooklyn College Library where, subject to a few limited exceptions, they are available for all to read. I have published dozens of books, hundreds of articles and thousands of blogs. My professional life has been an open book and the accessibility of my archives—containing letters, drafts and other unpublished material— opens the book even further.

But beyond the written record lies a trove of memories, ideas, dreams, conversations, actions, inactions, passions, joys, and feelings not easily subject to characterization or categorization. Fortunately, I have a very good memory (more about that later) and I am prepared to open much of my memory bank in this autobiography, because I believe that the biography that informs my ideology and life choices cannot be limited to the externalities of my career. It must dig deeper into the thought processes that motivate actions, inactions and choices. In the process of self-exploration, I must also be willing to examine feelings and motivations that I have kept submerged, willfully or unconsciously, from my own conscious thought process. I don't know that I will be able to retrieve them all, but I will try. Nor can I be absolutely certain that all of my memories are photographically precise, since my children chide me that my stories get "better" with each retelling.

I believe that my actions, inactions, and choices have been significantly influenced by my upbringing. That might not seem obvious to those who know me and are familiar with my family background. Superficially, I am very different from my parents and grandparents, who lived insular lives in the Jewish shteles of Galicia, Poland, the Lower East side of Manhattan, and the Williamberg, Crown Heights and Boro Park Orthodox Jewish neighborhoods (also "shtetles") of Brooklyn. My parents and grandparents had little formal education. They rarely traveled beyond their routes to and from work (except for my grandparents' one-way journeys from Poland to Ellis Island). They almost never attended concerts, the Broadway Theater or dance recitals. They owned no art, few books, and no classical records. They rarely visited museums or

[8] An old Yiddish expression says: "Man plans, God laughs."

HOUSE_OVERSIGHT_017095

galleries. Their exposure to culture was limited to things Jewish—cantorial recitations, Yiddish theater, lectures by Orthodox rabbis, Jewish museums, Catskill Mountain and Miami Beach entertainment.

My adult life has been dramatically different. I travel the globe, meet with world leaders, own a nice art collection, am deeply involved in the world of music, theater and other forms of culture, and lead a largely secular life (though I too enjoy cantorial music "borsht belt" humor, and a good pastrami sandwich).

Yet I am their son and grandson. Although my life has taken a very different course—both personally and professionally—I could not begin to explain who I am, how I got to be who I am, and where I am heading, without exploring my family background and heritage. It is this history that helped to form me, that caused me to react against parts of it, and—most important—that gave me the tools necessary to choose which aspects of my traditions to accept and which to reject.[9]

I had a very powerful upbringing, having been born to a family with strong views on religion, morality, politics and community service. My neighborhood was tight knit. Everyone had a place and knew their place. Status was important, especially for our parents and grandparents, as was "yichus" (the Yiddish term for ancestry). But I grew up at a time of change, growth, excitement and opportunity.

Despite the reality of pervasive anti-Jewish discrimination—in college admission, employment, residency and social clubs—my generation believed there were no limits to what we could accomplish. If Jackie Robinson could play second base for the Brooklyn Dodgers, we could do anything. Maybe that was the reason so many successful people grew up in Brooklyn in the immediate post-war period. (In 1971, I was selected among 40 young scholars from around the country for a distinguished fellowship. When we met in Palo Alto, California, we discovered close to half the group had Brooklyn roots!) We were the breakout generation, standing on the broad shoulders and backbreaking work of our immigrant grandparents and our working class parents.

I cannot explain, indeed understand, my own world views, without describing those on whose shoulders I stand, that from which I have broken out, and the experiences that have shaped my life. So I will begin at the beginning, with my earliest memories and the stories I have been told about my upbringing.

But formative experiences do not end at childhood or adolescence. They continue throughout a lifetime. Learning never ends, at least for those with open minds and hearts, and, though ideologies may remain relatively fixed over time, they adapt to changing realities and perceptions. Winston Churchill famously quipped, "Show me a young conservative and I'll show you someone with no heart. Show me an old liberal and I'll show you someone with no brain." It is surely true that some people become less idealistic with age, with economic security and family responsibilities. But it is equally true that some young conservatives become more liberal as they

[9] My dear friend and teaching colleague Steven Pinker believes that parental influence may be overvalued [CITE]. I'm certain that it varies among individuals and families.

HOUSE_OVERSIGHT_017096

seek common ground with their children, while other people remain true to their earlier world views. It depends on the life one has lived.

I have been fortunate to live an ever changing life, both personally and professionally, and although my views on particular issues have been modified over time, my basic commitment to liberal values has remained relatively constant, in part because of my strong upbringing and in part because my career has been based on advocating these values.
An ancient Chinese curse goes this way: "May you live in interesting times." One of the worst things a doctor can say after examining you is: "Hmm… that's interesting." I have been blessed with living an interesting, if often controversial, life.

As an adolescent, I was involved in causes such as justice for the Rosenbergs, abolition of the death penalty, and the end of McCarthyism.

As a law clerk, during one of the most dramatic periods of our judicial history, I worked on important civil rights and liberties cases, heard the "I have a dream" speech of Martin Luther King, was close to the Cuban Missile Crisis, and partook of events following the assassination of John F. Kennedy.

As a young lawyer, I played a role in the Pentagon Papers case, the forced resignation of Richard Nixon, and the anti-war prosecutions of Dr. Spock, the Chicago Seven, the Weather Underground and Patricia Hearst. I consulted on the Chappaquiddick investigation of Ted Kennedy, on the attempted deportation of John Lennon and the draft case against Mohammad Ali. I was an observer at the trial of accused Nazi war criminal John Demjanjuk and subsequently consulted with the Israeli government about that case.

Later in my career, I was a lawyer in the Bill Clinton impeachment, the Bush v. Gore election case, the efforts to free Nelson Mandela, Natan Sharansky and other political prisoners. I participated in the Senate censure of California Senator Alan Cranston, the Frank Snepp CIA censorship case, prosecutions involving the former Yugoslavia in the Hague, the defense of Israel against international war crime prosecution, and the investigation of Wiki-Leaks and Julian Assange. I worked on the appeals of the Jewish Defense League murder case and the Jonathan Pollard spy prosecution. I consulted on the defense of director John Landis, the OJ Simpson double murder case and the Bakke "affirmative action" litigation. I challenged the Bruce Franklin tenure denial at Stanford and appealed the Claus Von Bulow attempted murder conviction, the Leona Helmsley tax case, the Mike Tyson rape prosecution, the conviction of Conrad Black, the Tison Brothers murder case, the "I Am Curious Yellow" censorship prosecution, the Deep Throat case, the nude beach case on Cape Cod and the HAIR censorship case. I participated in the Woody Allen-Mia Farrow litigation, the Michael Milken case, the litigation against the cigarette industry and the wrongful death suit on behalf of Steven J. Gould. I have won more than 100 cases and have been called—perhaps also with a bit of hyperbole—"the winningest appellate criminal defense lawyer in history." Of the more than three dozen murder and attempted murder cases in which I have participated, I lost fewer than a handful. None of my capital punishment clients has been executed.

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Among the people I have advised are President Bill Clinton, Prime Minister Benjamin Netanayu and President Moshe Katsav of Israel, Canadian Prime Minister Pierre Trudeau, Senator Alan Cranston, the Deputy Secretary General of the United Nations, Marlon Brando, Frank Sinatra, Woody Harrelson, Michael Jackson, John Lennon, Natalie Portman, Broadway producer David Merrick, New England Patriot Head Coach Bill Belichick, the actress Isabella Rossellini, the international arms dealer Adnan Khashoggi, singers Carly Simon and David Crosby, basketball player Hakeem Olajuwon, baseball star Kevin Youkilis, football quarterback Tom Brady, saxophonist Stan Goetz, artist Peter Max, cellist Yo Yo Ma, comedian Steven Wright, actor Robert Downey, Jr., several billionaires such as Sheldon Adelson and Mark Rich, authors such as Saul Bellow, David Mamet and Elie Wiesel, and judges, senators, congressmen, governors and other public officials.

In addition I have had some of the most interesting cases involving people who are not well known but the cases raised intriguing and fascinating issues. Among these issues are whether a man can be prosecuted for attempted murder for shooting a dead body that he thought was alive, whether a husband can be prosecuted on charges of slavery for not doing anything about his wife's alleged abuse of domestic employees, whether a husband can be forced to adopt a child and whether a law firm can discriminate in its partnership decision.

I have engaged in public debates and controversies with some of the most contentious and influential figures of the age including William F. Buckley, Noam Chomsky, Rabbi Meyer Kahana, Rabbi Adan Steinzaltz, Justice Antonin Scalia, Ken Starr, Elie Wiesel, Vaclav Havel, Golda Meir, Red Auerbach, William Kunstler, Roy Cohn, Norman Mailer, Patrick Buchanan, Norman Podhoretz, Bill O'Reilley, Skip Gates, Alan Keyes, Dennis Prager, Jeremy Ben Ami, Mike Hukabee, Shawn Mann, William Bulger, James Zogby, Jimmy Carter, Richard Goldstone, Norman Finkelstein and many others.

I was part of an American team of debaters selected to confront Soviet debaters on a nationally televised debate, during the height of Soviet oppression of Refusenicks, for which William Buckley suggested that the US team be given medals of freedom. I was a regular "advocate" on the nationally-televised Peabody award winning show "The Advocates" on PBS for several years. I have been interviewed by nearly every television and radio talk and news show and have written for most major newspapers, magazines and blogs. This is my 30th book.

In recent years, I have devoted considerable energy to the defense of Israel, while remaining critical of some of its policies. The Forward has called me, "America's most public Jewish defender," and "Israel's single most visible defender – the Jewish state's lead attorney in the court of public opinion." In 2010, The Prime Minister of Israel asked me to become Israel's Ambassador to the United Nations—an offer I respectfully declined because I am an American, not an Israeli citizen. I have agreed instead to be available to serve as an American lawyer for Israel before international tribunals.

I have also taught thousands of students, many of whom have become world and national leaders.

I have learned from each of these experiences, and they too have helped to shape my evolving world views. I have seen the law change, in some respects quite dramatically, in the half century I

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have been practicing it. If the past is the best predictor of the future, then I also have some ideas about what changes we might anticipate in the law over the next half century.

Oliver Wendell Holmes urged his young colleagues to "live the passion of your times." I have followed that advice and now wish to share this passion with my readers.

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Part I: From Brooklyn to Cambridge (with stops in New Haven and Washington)

Chapter 1: Born and religiously educated in Brooklyn

The doctor told my pregnant and anxious mother that she would give birth "first in September." So when I was born on September 1, 1938, my mother thought the doctor was a genius. I was the first person in the history of my family to be born in a hospital. My maternal grandfather, an immigrant from Poland, wanted me to be born at home, because in Poland, there were rumors that Jewish babies were switched with Polish babies. To prevent this from happening to his grandchild, he stood guard over me at the baby room. Nevertheless, when I started to misbehave early in my life, he was convinced that the switch had taken place, despite me being—in my paternal grandmother's words—"the spittin' image" of my father. (I was well into my adult life before I realized that I was much more like my mother in ways other than physical resemblance.)

I was born in the Williamsberg neighborhood of Brooklyn, where both of my parents had lived most of their lives, having moved as youngsters from the lower East Side of Manhattan where they were born to Orthodox Jewish parents who had emigrated from Poland at the end of the 19th and beginning of the 20th Century. When my mother was pregnant with my brother Nathan, who is three and a half years younger than me, we moved to the Boro Park neighborhood of Brooklyn where I grew up and where my parents remained until their deaths.

Boro Park is unique among American Jewish neighborhoods in that it has always been Jewish. Unlike the neighborhoods of Manhattan—such as the Lower East side and Harlem, which have had changing ethnic populations—Boro Park has always been, and remains, dominantly Jewish. The first occupants of the small tract houses built near the beginning of the twentieth century of the site of rural farms were Jewish immigrants seeking to escape from the crowded ghettos of Manhattan and later Williamsberg. The current occupants of the modern multi-dwelling units are Chasidic Jews who have moved from Crown Heights and Williamsberg seeking to recreate the shtetles of Eastern Europe.

When I lived in Boro Park during the 1940s and 1950s, it was a modern Orthodox community of second generation Jews whose grandparents had emigrated mostly from Poland and Russia during the late 19th and early 20th centuries. Following the end of World War II, some displaced persons who had survived the Holocaust moved into the neighborhood.

My parents reached adulthood in Williamsberg during the peek of the Great Depression. My mother Claire had been a very good student at Eastern District High School and at the age of 16 enrolled at City College in the fall of 1929—the first in the history of her family to attend college. She was forced to leave before the end of the first semester by her father's deteriorating economic situation. She went to work as a bookkeeper, earning $12 a week.

My father, who was not a good student, attended a Yeshiva high school in Williamsberg. It was called Torah V'Daas—translated as Bible and Knowledge. He began to work during high school and never attended college.

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My grandparents knew each other from the neighborhood even before my parents met. My grandfathers were both amateur "chazanim," cantors, who sang the Jewish liturgy in small synagogues, called "shteebles." They were slightly competitive, but were both involved in the founding of several Jewish institutions in Williamsberg, including a free loan society, a burial society, the Young Israel synagogue and the Torah V'Daas Yeshiva. Their day jobs were typical for their generation of Jewish immigrants. Louis Dershowitz, my paternal grandfather, sold corrugated boxes. Naphtali Ringel, my maternal grandfather, was a jeweler. My grandmothers, Ida and Blima, took care of their many children. Each had eight, but two of Blima's children died of diphtheria during an epidemic. My mother nearly died during the influenza outbreak of 1917, but according to family lore, she was saved by being "bleeded."

I was born toward the end of the depression and exactly a year to the day before the outbreak of the Second World War. I was the first grandchild on both sides of my family. Many were to follow.

Among my earliest memories were vignittes from the Second World War, which ended when I was nearly seven. I can see my father pasting on the Frigidaire door newspaper maps depicting the progress of allied troops toward Berlin. I can hear radio accounts, in deep Stentorian voices, from WOR (which I thought spelled "war") announcing military victories and defeats. I can still sing ditties I learned from friends (the first sung to the tune of the Disney song from Snow White).

> "Whistle while you work
> Hitler is a jerk
> Mussolini is a meanie
> And the Japs are worse"

And another (sung to the melody of "My Country Tis of Thee, Sweet Land of Liberty"):

> "My country tis of thee
> Sweet land of Germany
> My name is Fritz
> My father was a spy
> Caught by the FBI
> Tomorrow he must die
> My name is Fritz."

The comic books we read during the war always pitted the superheroes against the "Nazis" and "Japs" and I wanted to help in the effort. I decided that if Billy Batson could turn into Captain Marvel by simply shouting Shazam, so could I. And so, after making a cape out of a red towel and tying it around my neck, I jumped out of the window yelling Shazam. Fortunately, I lived on the first floor and only sustained a scraped knee and a bad case of disillusionment. (For my 70th birthday, my brother found a card that commemorated the superhero phase of my life; it showed an elderly Superman standing on a ledge, ready to fly, but wondering "now where is it I'm supposed to be flying?")

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If I could help our war effort by turning myself into a superhero, at least I could look out for German spies on our beaches. When I was four years old, German spies landed on Long Island in a submarine. Although they were quickly captured, there were rumors of other planned landings. And so over the next few summers, which my family spent in a rented room near Rockaway Beach, a local police officer paid us kids a penny a day to be on the lookout for "Kraud Subs." We took our job very seriously.

I recall my grandmother Ringel (my mother's mother), who was recovering from a heart attack, taking me to a rehabilitation home in Lakewood, New Jersey, where several wounded or shell-shocked soldiers were also being rehabilitated and listening to their scary combat stories.

Then I remember, quite vividly, both VE (Victory in Europe) and VJ (Victory over Japan) days. There was dancing in the streets, block parties and prayerful celebrations. Our soldiers, including several of my uncles, were coming home. (My father received a medical deferment because he had an ulcer, which my mother said was caused by my bad behavior.)

We weren't told of any Holocaust or Shoah—those words were not even in our vocabulary—just that we had lost many relatives in Europe to the brutal Nazis and Hitler ("Yemach Sh'mo—may his name be erased from memory). We cheered Hitler's death, which according to a Jewish joke of the time, we knew would occur on a Jewish holiday—because whatever day he died would be a Jewish holiday! A few weeks earlier, we cried over Roosevelt's passing, which I heard of while listening to the radio and broke the news to my grandmother Ringel, who was taking care of me. She refused to believe it, until she herself heard it on the radio. Then she cried. Roosevelt (which she pronounced like "Rosenfeld") was the hero of our neighborhood (and other Jewish neighborhoods). A magazine photo of him hung in our home.

The "greenies" (recent immigrants, "greenhorns") who moved to Boro Park from the displaced person camps never talked out what had happened "over there." The tattooed numbers on their arms remained unexplained, though we knew they were the dark reminders of terrible events.

Among my other early memories was Israel's struggle for independence and statehood, just a few years after the war. My family members were religious Zionists ("Misrachi Zionists"). We had a blue and white Jewish National Fund "pushka" (charity box) in our homes, and every time we made a phone call, we were supposed to deposit a penny. We sang the "Jewish National Anthem" (Hatikvah) in school assemblies. I still remember its original words, before Israel became a state: "Lashuv L'Eretz Avosainv" ("to return to the land of our ancestors").

One particular incident remains a powerful and painful memory. My mother had a friend from the neighborhood named Mrs. Perlestein, whose son Moshe went off to fight in Israel's War of Independence. There was a big party to celebrate his leaving. Several months later, I saw my mother crying hysterically. Moshe had been killed, along with 34 other Jewish soldiers and civilians, trying to bring supplies to a Jewish outpost near Jerusalem. My mother kept sobbing, "She was in the movies, when her son was killed. She was in the movies." Israel's war had come home to Boro Park. It had been brought into our own home. Everyone in the neighborhood knew Moshe and his parents. He had attended my elementary school, played stickball on my

HOUSE_OVERSIGHT_017102

block and was a local hero. It was a shared tragedy and Moshe's death—combined with my mother's reaction to it—had a profound and lasting effect on my 9 year old psyche.

My friends and I formed a "club"—really just a group of kids who played ball together. We named it "The Palmach"—after the Israeli strike force that was helping to win the war. We memorized the Palmach Anthem "Rishonin, Tamid Anachnu Tamid, Anu, Anu Hapalmach." ("We are always the first, we are the Palmach"). Recently, I spoke to a Jewish group in Los Angeles and among the guests were Vidal Sassoon (the style master) and David Steinberg (the comedian). Steinberg mentioned to me that when Sassoon was a young man, he had volunteered to fight for the Palmach (If you think that seems unlikely, consider that "Dr. Ruth" Westheimer served as a sniper in the same war). I challenged Sassoon to sing the Palmach Anthem and before you knew it, Sassoon and I were loudly belting out the Hebrew words to the amusement of the other surprised guests.

Israel declared statehood in May of 1948, when I was nine and a half years old. Following its bold declaration that after 2,000 years of exile, there arose a Jewish state in the Land of Israel, (supported by the United Nations, the United States, the Soviet Union and most western nations), the nascent state was attacked by the armies of the surrounding Arab countries. That summer I went to a Hebrew speaking Zionist summer camp called "Massad." During my summer at Camp Massad (where the counselor of an adjoining bunk was a young Noam Chomsky, then a fervent left-wing Zionist) we heard daily announcements over the loudspeaker regarding the War of Independence. We sang Israeli songs, danced the hora and played sports using Hebrew words (a "strike" was a "Shkeya," a "ball" a "kadur".) The announcement I remember most vividly was "Hatinok Rut met hayom"—the "babe" Ruth died today. But I also remember several announcements regarding the death or wounding of Israelis who were related to the people in the camp. One out of every hundred Israeli men, women and children were killed—some in cold blood, after surrendering—while defending their new state. Many of those killed had managed to survive the Holocaust.

We also learned of Stalin's campaign against Jewish writers, politicians and Zionists. After the end of the war, Stalin became the new Hitler as we read about show trials, pogroms and executions of Jews. We hated communism almost as much as we hated fascism.

These early memories—relating to the America's war against Nazism, Israel's War of Independence, and Stalin's war against the Jews—contributed significantly to my emerging ideology and world views.

I grew up in a home with few books, little music, no art, no secular culture and no intellectualism. My parents were smart but had no time or patience for these "luxuries." Our home was modest--the ground floor of a two and half family house. (The finished basement was rented to my cousin and her new husband). Our apartment had two small bedrooms, the smaller of which I shared with my brother. We ate in the kitchen. The living room, which had the mandatory couch covered with a plastic protector, was reserved for special guests (who were rare). The tiny bathroom was shared by the four of us. The foyer doubled as a dining area for Friday night and Shabbat meals. The total area was certainly under ___ square feet. But we had an outside—and what an outside it was! In the front there was a small garden and a stoop. In the

HOUSE_OVERSIGHT_017103

rear there was a tiny back porch, a yard and a garage. Since we had no car, we rented the garage to another cousin who used it to store the toys he sold wholesale.

We were not poor. We always had food. But we couldn't afford any luxuries, such as restaurants. We passed down clothing from generation to generation and ate a lot of "leftovers". (Remember the comedian who said "we always ate leftovers—nobody has ever found the "original" meal.) My mother has always said we were "comfortable." (The same comedian told about the Jewish man who was hit by a car, and was laying on the ground; when the ambulance attendant asked him "are you comfortable," he replied, "I make a living.")

The center of our home was the stoop in front of the house. We sat on it, played stoop ball on it, jumped from it and slid down the smooth slides on each side of it. It was like a personal playground. On nice days, everyone was outside, especially before the advent of television. We even listened to the radio--Brooklyn Dodger baseball games, the Lone Ranger, "Can You Top This?," "The Shadow," "Captain Midnight," and "The Arthur Godfrey Show"--while sitting on the stoop, with the radio connected to an inside socket by a long, frayed extension cord. We ate lunch on the stoop on days off from school, had our milk and cookies on the stoop when we got back from school, traded jokes, and even did our homework on the stoop. Mostly, we just sat on the stoop and talked among ourselves and to passing neighbors, who knew where to find us. In those days, nobody called ahead—phone calls were expensive. They just dropped by.

In front of the stoop was what we called "the gutter." (Today it is referred to as "the street.") The gutter was part of our playground since cars rarely drove down our street. We played punch ball in the gutter, stickball in the driveway and basketball in front of the garage--shooting at a rim screwed to an old ping pong table that was secured to the roof of the garage by a couple of two by fours.

We had no room to play indoors, so we had to use the areas around the house as our play area. Our house became the magnet for my friends because we had a stoop, a hoop and an area in front of our stoop with few trees to hinder the punched ball. (A ball that hit a tree was called a "hindoo"—probably a corruption of "hinder.")

The stereotype of the Brooklyn Jewish home during the immediate post WWII era was one filled with great books, classical music, beautiful art prints and intellectual parents forcing knowledge into their upwardly mobile male children aspiring to become doctors, teachers, lawyers and businessmen. (The daughters were also taught to be upwardly mobile by marrying the doctors, etc.)

My home could not have been more different--at least externally. The living room book shelves were filled with inexpensive knickknacks (chachkas). The only books were a faux leather yellow dictionary that my parents got for free by subscribing to "Coronet Magazine." When I was in college, they briefly subscribed to the Reader's Digest Condensed Books. There was, of course, a "Chumash" (Hebrew bible) and half dozen prayer books (siddurs and machsers). I do not recall

HOUSE_OVERSIGHT_017104

seeing my parents read anything but newspapers (The New York Post), until I went to college. They were just too busy making a living--both parents worked--and keeping house.

There were no book stores in Boro Park, expect for a small used book shop that smelled old and seemed to specialize in subversive books. The owner, who smelled like his mildewed books, looked like Trotsky, who he was said to admire. We were warned to stay away, lest we be put on some "list" of young subversives.

My parents, especially my mother, were terrified about "lists" and "records." This was, after all, the age of "blacklists," "redchanels," and other colored compilations that kept anyone on them from getting a job. "They will put you on a list," my mother would warn. Or "it will go on your permanent record." When I was 13 or 14, I actually did something that may have gotten me on a list.

It was during the height of the McCarthy period, shortly after Julius and Ethel Rosenberg had been sentenced to death. A Rosenberg relative was accosting people getting off the train, asking them to sign a petition to save the Rosenbergs' lives. I read the petition and it made sense to me, so I signed it. A nosy neighbor observed the transaction and duly reported it to my mother. She was convinced that my life was over, my career was ruined and that my willingness to sign a communist-inspired petition would become part of my permanent record. (Was there ever really a permanent record? It was certainly drummed into me for years that such a paper existed. I'd love to find mine and see what's in it.)[10] My mother decided that I had to be taught a lesson. She told my father the story. I could see that my father was proud of what I had done, but my mother told him to slap me. Ever obedient, he did, causing him more pain than me.

In addition to the "subversive" book store, we had a library that was also tiny and somewhat decrepit, but when I was nearing the end of high school, a new, spacious library opened about half a mile away. We went there every Friday afternoon--for two reasons. First, that's where the girls were on Friday afternoon. And second, we could take out up to four books and keep them for a month. The two reasons merged when Artie Edelman realized that we could impress the girls by taking out serious books. Up until that time my reading of serious literature had been limited to Classic Comics. Don't laugh!

Classic Comics were marvelous. Not only could we read about the adventures of Ivanhoe, we could see what he looked like! My first erotic desires were aroused by the illustration of the dark-haired "Jewess" Rebecca. (I can still picture her and have searched for a copy of the Classic Comic at flea markets from coast to coast to relive my unrequited adolescent lust).

I recently came across the Classic Comic of Crime and Punishment. Having read three translations of the great work of Dostoyevsky, I was amazed at how faithful the comic was to the tone, atmosphere and even words of the original. I tried to give it to my granddaughter who was reading the book for class, but she politely turned down the offer, with a slight air of condescension that one gratefully accepts only from a grandchild.

[10] Now there really are "permanent records." They're called Facebook, Twitter and the Internet.

HOUSE_OVERSIGHT_017105

The first real books I actually read were several to which I had been introduced by the Classic Comics: The Count of Monte Christo, The Red Badge of Courage; Moby Dick; and a Connecticut Yankee in King Arthur's Court.

During my senior year in high school, I became a voracious reader, to the disdain of some family members. My Uncle Hedgie (a nickname for Harry) would berate me for sitting around the house reading, when I could be working or playing sports. "Be a man," he would demand. "Get off your ass." But I would stay in my tiny room, with my Webcote tape recorder playing classical music I had recorded off WQXR, the New York Times classical music station, or off a record I borrowed from the library and recorded from my friend Artie's turntable. I also bought a used copy of the Encyclopedia Americana, whose twenty plus volumes filled the hitherto empty shelves in our living room. My friend Norman Sohn had found an old book store in Manhattan that sold used Encyclopedias, and the Americana cost only $75, as contrasted with the Britannica, which was $200.

During my early years, all we had was a small plastic radio that lived in the kitchen, unless it was moved near the stoop. When I was 10 years old, we bought a ten inch TV "console" that included a 78 phonograph player that opened at the top. But my mother had situated her "good" lamp on the top of the console, so I couldn't get access to the turntable. I saved up, and with my Bar Mitzvah money, I bought a humongous webcore reel to reel tape recorder, which must have been a foot cubed. I could barely lift it, and the tape often tangled or split, but it was better than the wire recorder technology that it replaced.

I loved classical music, especially opera and choral music. As an adolescent I had sung alto in the local synagogue choir and had a fairly good voice. I was "fairly" good--but not very good-- at lots of things in addition to singing: athletics, acting, joke telling and getting dates with girls. I was very good at only one thing: debating. And I was equally bad at one thing: school.

My passion for music took me to the Metropolitan Opera House, where for 50 cents, a student could get a seat with a table and a lamp if he came with a score of the opera. We would borrow the score from the library, take a train to Times Square and listen to Richard Tucker, Robert Merrill, Jan Pierce and Roberta Peters sing Carman, La Boheme and La Traviata. (We were forbidden to listen to Wagner, because he was an anti-Semite, who_____ admired).

I also became passionate about art. All kinds of art from Egyptian and Roman Sculpture to Picasso's Guernica and Rodan's Thinker. There were no art poster or reproductions in our home. The walls had mirrors (to make the apartment seem bigger) and some family photos. But there were free museums all around us, and the library had art books--with pictures of naked women! I loved Goya's nude, especially when contrasted with the clothed version of La Gioconda who I could imagine undressing just for me!

The girls loved to be asked on a museum date, and we loved to ask because it was free and it showed them that we had "culture" (pronounced "culchah").

HOUSE_OVERSIGHT_017106

To this day I have no idea how I fell in love with literature, music and art. They are my passions, as they have been since I was old enough to appreciate these "luxuries"--inexpensive as they were to us--that my parents couldn't afford. I was never exposed to classical music or art, even in school where the music teacher taught us "exotic" songs like "finicula, funicula," American songs by Stephen Foster, and an assortment of religious and Zionist Hebrew songs. (Zum Gali, Gali, Gali; Tsena, Tsena; Hayveynu Shalom Alechem.) Our art teachers tried to teach us to draw "useful" objects, like cars, trains and horses.

My friends' homes were as barren of culture as mine with the exception of Artie Edelman and Bernie Beck, whose parents were better educated and more cultured than mine. I must have picked up some appreciation of music and art from them. When I went to sleep away camp, especially as a junior counselor, I also came in contact with music and art through the "rich" Manhattan kids who had attended the expensive camp as paying campers and were now junior counselors. Several of them, who became my friends, had been exposed to culture through their more sophisticated Jewish parents.

None of these peripheral contacts with culture fully explains my transition from a home barren of books, records and posters, to my home as an adult that is filled with books, music, paintings, sculpture and historical objects.[11]

Nor does it explain why none of my three children, who were brought up in my home, have any real passion for the classical arts. They are by no means uncultured. They love popular music, films, current fiction, theater and gourmet food. But they don't have the same passion for classical music or fine art that I have. By mentioning this difference, I don't mean to be a snob, but for someone who strongly believes in the power of nurture, exposure and experience, this generational skip poses a dilemma. Reaction is, of course, one sort of experience, and my passion may well have been a reaction to my parents, as my childrens' lack of passion for what moves me so deeply may be a reaction to their parents. So be it.

The family values that shape my upbringing focused on modern Orthodox Judaism, religious Zionism, political liberalism of the sort represented by FDR, Anti-Nazism, Anti-Communism, opposition to all kinds of discrimination, support for freedom of speech, a hatred of McCarthyism, opposition to the death penalty, a commitment to self defense and defense of family and community, a strong sense of patriotism, and a desire to be as truly American as was consistent with not assimilating and losing our traditions and heritage.

My father, who was a physically strong but rather meek man, wanted me to be "a tough Jew" who always "fought back." He urged me to never let "them" get away with "it." By them he meant anti-Semites, and by it, he meant pushing Jews around. He taught me to box and wrestle and insisted that I never "tattle" on my friends, regardless of the consequences to me.

One of my father's brother's was a man named Yitzchak, who we called Itchie. It had nothing to do with any skin condition. One day my Uncle Itchie took me to a Brooklyn Dodger baseball

[11] Finding Jefferson

HOUSE_OVERSIGHT_017107

game that got rained out half way through. We ran to the train station only to find no one tending the token booth. My uncle had one token and so the two of us squeezed through the turnstile on his one token. As soon as we got home he took a dime, put it in an envelope and sent it to the transit authority, apologizing profusely for temporarily cheating them of their dime. A year later he did the same thing, but on a much larger scale. My Uncle Itchie stowed away on a ship headed for Palestine in order to participate in Israel's struggle for statehood. He did not have enough money for passage, so he hid in a closet during the nearly month long trip, getting food from a friend who was paying his own way over. My Uncle then swam from the ship to shore, evading British authorities. After working for several months he then sent the full fare for the lowest class of service to the shipping company. Those were the values with which I was brought up. You do what you have to do, but then you pay your debts.

Religion in my home was not a matter of faith or an accepted theology. To this day, I have no idea what my parents believed about the nature of God, the literal truth of the Bible, heaven and hell, or other issues so central to most religions. Ours was a religion of practice and rules—of required acts and omissions. A cartoon I once saw perfectly represented my parents approach to religion. It showed a father dragging his reluctant young son in the direction of the synagogue and saying:

> "Atheist, Shmathiest, I don't care—as long as you come to shul."

Our Judaism was entirely rule bound. Before every activity, there was a required "brucha"—a formulistic blessing appropriate to the activity. "Baruch ata Adonoy"—"blessed be you our God"—followed by a reference to His creation: "who brings forth bread from the earth" or "wine from the grapes" or "fruit from the trees" or "produce from the ground." Then there was a generic brucha that covered everything not included among the specific blessing: "Sheh-hakol Nihiye B'Dvaroh." My grandmother Ringel, who was the religious enforcer in the family, would ask demandingly, if she saw me drinking a glass of water, "Did you make a "shakel," referring to the previously mentioned generic blessing. My grandmother, who spoke no Hebrew, probably had no idea of the literal meaning of the blessing, but she knew—and insisted that I knew—you had to recite it (even just mumble it) before you drank the water.

There were rules for everything. If you accidentally used a "milichdika" (dairy) fork on a "flayshidika" (meat) item, the offending (or offended) item had to be buried in the earth for exactly seven days. That restored its kosher quality by "kashering" it. After eating meat, we had to wait precisely 6 hours before eating dairy—after eating dairy, however, you had to wait only half an hour to eat meat, but a full hour if the "dairy" meal contained fish. Not a minute less. When my parents told me the rules of swimming after eating—wait two hours after a heavy meal, one hour after a light meal, half an hour after a piece of fruit and 15 minutes after a Hershey bar—I thought these were religious rules, because they paralleled the rules about how long you had to wait between meat and dairy. (I later learned that the swimming rules were based neither on religion, nor upon science, but rather on questionable "folk wisdom.")

From my earlier days, I accepted the highly technical, rule-oriented religious obligations imposed on me by my parents and grandparents. It was a lot easier for me to obey rules—even if I didn't understand the reasons, if any, behind them—than to accept a theology that was always somewhat

HOUSE_OVERSIGHT_017108

alien to my rational mindset. (And I suspect, to my parents, if they even bothered to think about it.) Everyone in the almost entire Jewish neighborhood (at least everyone who was part of the modern Orthodox community) followed the rules. Few, I suspect, accepted the entire theological framework that included the literal truth of the bible, the resurrection of the dead, heaven and hell (which were not in the Jewish Bible) and the incorporeal nature of a single God. What we cared about was the precise ingredients in a candy bar (no lard or gelatin), the number of steps you could take if your yarmulkah fell off (more on this later), whether you could wear your house key as a tiepin to avoid the prohibition against carrying on the Sabbath, whether it was permissible to use an automatic timer—a "shabos clock"—to turn on the TV for a Saturday afternoon World Series game, or whether you could ride on an elevator on Shabos if it automatically stopped on every floor and required no pressing of buttons. The rabbis answered these questions for us, but they didn't always agree. My mother had little patience with most of the local rabbis because her late father, who was not a rabbi, "knew so much more than they did," and always resolved religious disputes by accepting the approach that was "easiest" and most adaptive to the modern lifestyle. Even my grandmother knew more than these "phony rabbis," my mother would insist contemptuously. My mother always said, "Respect people, not titles." Then she was appalled when I showed disrespect for my frequently incompetent teachers!

Most of the rules we were required to obey were negative ones: "Donts." Don't—eat unkosher, drive or work on Shabas, eat anything on fast days, marry a non-Jew, eat ice cream after a hot dog, wear leather on Yom Kippur, talk after washing your hands but before making a "motzie" and eating the challah.

My grandmother—the enforcer—had a favorite Yiddish word: "meturnished"—it is forbidden to do! She would shout it out in anticipation of any potential violation. If she saw you about to eat a Nabisco cookie, she would intone the M word. If she saw you putting a handkerchief in your pocket on Shabas, the word would ring in your ear. If you even thought about putting your yalmulkah in your pocket, you would hear the word. Once I began to whistle a tune. My musical effort was grated with a loud "meturnished." "Why?" I implored. There's nothing in the Torah about whistling. "It is unJewish," my grandmother insisted, "The Goyim whistle, we don't." It's now more than 30 years, since Grandma Ringel died, but the M word still rings in my ears every time I indulge in a prohibited food or contemplate an un-Jewish activity (such as enjoying a Wagnerian opera). Freud called it the "superego." He must have had a Jewish grandmother too.

Of course we tried to figure out ways around these prohibitions—half of Jewish law seems to be creating technical prohibitions, while the other half seems to be creating ways around them. Much like the Internal Revenue Code. No wonder so many Jews become lawyers and accountants. It's not in our DNA; it's in our religious training.

A story from my earliest childhood illustrates the extraordinary hold that religion—really observance of religious obligations—held over all of us.

A few months before my brother was born, my father was holding my hand on a busy street, while my mother was shopping. She had just bought me a new pair of high leather shoes—they went above my ankles. For some reason, I bolted away from my father and ran into the "gutter." My foot was run over by an 18 wheeler truck. It would have been much worse had my father not

HOUSE_OVERSIGHT_017109

pulled me out from under the humongous vehicle. Fortunately, the new shoes saved my foot from being crushed, but several bones were broken and I was rushed to the nearest hospital, which was Catholic.

My parents left me there overnight. At about 8:00PM one of the nurses called my mother and said that I was refusing to eat and demanding to go to Florida. My mother said, "He's never even heard of Florida." She was told to come to the hospital immediately. She saw me sitting in front of my tray of food refusing to eat and screaming, "Miami, Miami!" To the nurses, that referred to a city in southern Florida. My mother immediately understood that I was referring not to Miami, but to my "yami"—which was short for yamulka, the religious skullcap that every Jewish male must wear while eating. I refused to eat without my yami, even though I was only 3 years old. My response was automatic—programmed. As soon as my mother made a yamulka for me out of a handkerchief and placed it on my head, I ate all the food and asked for doubles (the Catholic hospital provided kosher food for Jewish patients.) I'm sure I mumbled the appropriate Bruchas for each item of food I imbibed.

We learned these rules first at home and then in the Yeshiva—Jewish day school—that nearly everyone in the neighborhood attended. As is typical in Orthodox Jewish neighborhoods, there were two competing Yeshivas: One taught Yiddish, the other Hebrew.

I started out in the Yiddish-speaking more traditional, school-named "Torahs Emes" (the Truthful Bible), where my grandma Ringel wanted me to go to learn the "Mamma Loshen"—the mother tongue. But after two years, my parents switched me to the Hebrew-speaking, more modern Yeshiva, named "Etz Chaim" (the Tree of Life), which I attended through 8th grade, when I shifted to a Yeshiva high school until I finished 12th grade.

My Yeshiva education was a decidedly mixed blessing (both in the literal and figurative senses of that overworked phrase.) The hours were long: elementary school went from 8:30AM to 4:30PM; high school from 9:00AM to 6:10PM. We had only one full day off, Saturday, but it really wasn't a day off, since we spent much of it in the synagogue--9:00AM to noon and then afternoon and evening services, which varied in time depending on when it got dark (two stars had to be visible to the naked eye, or in the event there were clouds, "would have been" visible.) Friday was an early day, with school ending at about 1PM to allow us to prepare for the Sabbath. And Sunday was also a half day, though this compromise with secularism engendered grumbling from some of the old fashioned rabbis, who wanted us to spend the entire Christian day of rest in class.

Mornings were generally devoted to religious subjects—Bible (Tanach) Talmud, (Gemarah), ritual rules (Shulchan Aruch,) and ethics (Pirkay Avos.) Afternoons were devoted to the usual secular subjects--math, science, history, English, French (for the smart kids who wanted to become doctors) or Spanish (for the rest of us), (no German or Latin), civics, gym, art, music appreciation--as well as "Jewish secular" subjects, such as Hebrew, Jewish history, Zionism and Jewish literature. Then there was debate, student government, basketball and other "extracurricular" activities. Lunch "hour", which was 35 minutes, separated the religious from the secular classes and was the only time we ever discussed the conflict between what we were taught

HOUSE_OVERSIGHT_017110

in the morning, such as the creation story, and what we were taught in the afternoon, such as evolution and genetics. No attempt was made to reconcile Torah (scripture) and Madah (secular knowledge). They were simply distinct and entirely separate world views (or as my late colleague Steven Jay Gould put it in his always elegant choice of words, "separate magisteria"). We lived by the rule of separation between church and state, and for most of the students it raised no issue of cognitive dissonance. In the morning, they thought like rabbis; in the afternoon like scientists; and there was no need to reconcile. It was like being immersed in a good science fiction novel or film: one simply accepted the premises and everything else followed quite logically.

For a few of us, that wasn't good enough. I recall vividly our efforts to find--or contrive--common ground. For some, this quest took them to wonder whether the God of Genesis could have created evolution. For them there was an abiding faith that both religion and science could both be right. For me, the common ground was an abiding conviction that both could be wrong--or at least incomplete as an explanation of how we came to be. I was skeptical of both religion and science. Genesis, though elegant and poetic, seemed too simple. But so did evolution--at least the way we were taught it.

The apparent conflict between religion and science did not move me to search for reconciliation. It moved me to search for doubts, for holes (not black ones, but grey ones), for inconsistencies not between religion and science--that was too easy--but rather within religious doctrine and within scientific "truth." I loved hard questions. I hated the easy answers often given, with a smirk of self-satisfaction by my religious and secular teachers.

The mission of our modern Orthodox Yeshiva was to integrate us into the mainstream of American life while preserving our commitment to modern Orthodox Judaism. “Torah” and “Madah” were the two themes. Torah, which literally means bible, represented the religious component. Madah, which literally means knowledge, represented the secular component. They were thought to be reconcilable, though little explicit effort was directed at reconciling the very different world views implicit in the relatively closed system of Orthodox Judaism and the openness that is required to obtain real secular knowledge. When it came to culture, however, there was actually very little conflict, because becoming good Americans—including immersing ourselves in mainstream American culture—was part of the mission of our schools. Of course I hated anything the teachers tried to imbue in us, because with a few exceptions, they taught by rote and memorization. Although I was good at memorization, I rebelled against the authoritarianism implicit in religious teaching.

As much as I hated my teachers, they hated me even more. I loved conflict, doubt, questions, debates and uncertainty. I expressed these attitudes openly, often without being called on. I was repeatedly disciplined for my “poor attitude.” My 6th grade report card, which I still have, graded me “unsatisfactory” in “deportment” and “getting along with others.” I received grades of D in “effort,” D in “conduct,” D in “achievement,” C in spelling, D in “respects the rights of others,” D in “comprehension,” C+ in geography and A in “speaks clearly.” One teacher even gave me an “unsatisfactory” in “personal hygiene.” My mother, who was meticulous about cleanliness and scrubbed me clean every day before school, complained. The teacher replied, “his body is clean, but his mind is dirty; he refuses to show respect to his rabbis.”

HOUSE_OVERSIGHT_017111

To be sure, I was a mediocre Yeshiva student--actually I exaggerate: I was slightly worse than mediocre, once having actually received a grade of "Bayn Ani Minus," which literally means "mediocre minus." I couldn't even quite make it to mediocrity. At least I had something to which to aspire!

When I was in sixth grade, the school decided to administer IQ tests to all the students. The school called my mother and said that I had gotten one of the highest scores. At first the rabbi thought I had cheated, but when he was persuaded that in fact I had a high IQ he decided to put me in the A class. We had a track system and the grades were divided into the A, B and C classes. I had always been in the C class. My mother was worried about me having to compete with all those smart kids, so she persuaded the principal to compromise and put me in the B class, where I remained, getting C's until I graduated. I spent my four high school years in what was called "the garbage class," which focused more on discipline than learning.

I had a well deserved reputation in both elementary and high school as a "bad kid". My grades were low (except on state-wide standardized tests called the "regents," which I always aced). My conduct, called "deportment," was terrible. I was always getting into trouble because of my pranks, because I "talked back" and was "fresh" to teachers, because I questioned everything, because I didn't show "respect," and because I was a "wise guy."

This was the greatest gift—ok, I will even say "blessing"—of my Yeshiva education: To question everything and everyone. It was merely an unintended consequence of the Yeshiva method, and I was certainly not its only beneficiary or (according to the rabbis) its only failure. The Jewish characteristic of questioning is not a complete coincidence. It is a product of experiences, and surely the Yeshiva education--which juxtaposes religion and science with little explicit effort to reconcile these distinct approaches to the search for truth--is an element of these experiences, for at least some young Jews. It certainly was for me, and for that I will be eternally grateful.

I also need to thank my local synagogue for helping me discover sex. To this day I am convinced that some higher authority built the benches at precisely the right height to introduce sexual feelings at precisely the right time. When Orthodox Jews pray, they shake back and forth while standing up. At a certain point in my life, the top of the bench in front of me, which had a curve on the top, was exactly parallel to my genitals while I stood in prayer. It was while shuckling back and forth in the synagogue that I experienced my first arousal.

What then was my "take away" from Yeshiva? For me it has been a lifelong "belief" in the "certainty" of "doubt." For most of my classmates, the take away has been a lifelong belief in the certainty of certainty. Why the difference? Surely minor genetic disparities do not explain such a profound difference in world views. Nor does mere intelligence, since many of my "certain" classmates were brilliant. I think it was the environment underneath the roof of our homes. I came to Yeshiva ready to doubt. Although my parents were both strictly observant, relatively modern Orthodox Jews, they too were skeptics, especially my mother. Despite her lack of formal education and high culture, she was a cynic, always doubting, always questioning, though this became less apparent as she grew older and observed--to her chagrin--what she had actually transmitted to her children. She doubted while continuing to observe all the rituals. That was the

HOUSE_OVERSIGHT_017112

traditional Jewish approach to learning and ritual—doubt all you want, but do! My brother and I started that way, but ultimately our doubts carried over into action--or more precisely inaction. We stopped observing in our mid 20s. My mother couldn't understand or accept that. "I don't care what you believe or don't believe," she would insist, "as long as you go to Shul, keep kosher and don't work (broadly defined to include driving, watching television or going to a ballgame) on Shabbas." That's all she asked of us. "Is that so much to ask!"

When we started to break the rules, my mother began to doubt her doubting. Doubting was good as long as it didn't lead to breaking with the rituals--as it didn't in her case. Or so she believed, until she saw, with her own eyes, the wages of doubt, in her own children. This led her to doubt doubt and to embrace certainty. She would never completely abandon her doubting nature, but she no longer believed that doubt was cost-free. It had cost her to lose her own children to "excessive doubt" and the real sin of acting on one's doubt. I certainly don't mean to suggest that our mother "lost" us in any sense other than the observance of ritual, but that was critically important to her. Although my brother and I maintained an extremely close relationship until her death at age 95--we spoke to her almost every day--it was never quite the same once we left the "club" and followed our own rules as it pertained to Jewish practices.

My mother even questioned her decision to “let me go to Brooklyn College.” She insisted that I would have “turned out better” if I had gone to Yeshiva University, but I didn’t have that option, because Yeshiva turned me down. (More on that later).

My mother may not have been happy with the way I used the doubt she instilled in me, but I have been ecstatic. It has become the most important quality in my life--and the most significant ingredient in whatever success I may have achieved. It certainly played an important role in my decision to become a lawyer defending freedom of speech, accused criminals, and other unpopular causes. (More on that later.) So thank you Mom! And even thank you Yeshiva Etz Chaim and Yeshiva University High School for provoking me to be a skeptic, a doubter and an agnostic about life. (And thank you Yeshiva University for turning me down!)

My mother influenced me in many ways with her skepticism, not the least of which was when she repeatedly had to defend me for my conduct at school. I remember one incident in particular. I was playing “Ring A Levio” in the schoolyard on any icy winter day and chasing a classmate named Victor Botnick. He slipped and his leg got stuck under the gate and he broke it while trying to stand up. I was accused of deliberately breaking his leg and called into the principal’s office. My mother immediately came to school and spoke to me privately. I told her the story and assured her that I would never break my friend Victor’s leg purposely. My mother went to the principal’s office with me and served as my defense attorney, making charts and diagrams that proved that I could not have possibly broken his leg deliberately and that he caused it to break while trying to stand up with his foot still stuck under the gate. I was acquitted, though the Principal still had his suspicions. This was my first experience with the adversarial process and with a defense attorney. My mother, of course, was not a lawyer, having attended college for only part of one semester. But she was my Perry Mason, and an important inspiration for why I decided to become a defense lawyer. For me the presumption of innocence was not a theory. I knew I was innocent, yet the principal presumed me guilty. Only my mother’s effective advocacy kept me from being suspended—at least this time.

HOUSE_OVERSIGHT_017113

My decision to become a criminal lawyer was certainly not influenced by any exposure to real crime. I lived in a neighborhood where we never locked our doors and where violent crime was unheard of. There were of course street fights, in which I frequently participated - - more often as victim than victor - - but the Borough Park section of Brooklyn was a safe neighborhood. [I guess that's why my family was so mystified when my brother failed to return home from a shopping errand immediately after the end of the Sabbath, on Saturday night. My mother had sent him to the store to buy a bottle of milk; it was usually a fifteen-minute errand. An hour passed and there was no sign of Nathan, who we called, and I still call, Tully. I thought he was kidnapped and started to empty my piggy bank to gather the ransom. It turned out that he was in fact kidnapped, but only temporarily and not for any ransom. On his way to the store a rabbi grabbed him and pulled him into the little synagogue in his home. It seems that they only had nine Jewish males and they could not end the Sabbath without a tenth to form a minyan for the closing prayer. My brother was therefore grabbed off the street and made to participate in the service so that they could complete the prayer and the others could go out and do their shopping. It was as close as my family ever came to experiencing a crime, at least while I was growing up.] [possible omission]

Several years after I moved out of the house, my parents' apartment was burglarized. All the burglars took were Jewish ritual items, such as the Hanukah Menorah, the Sabbath candles, etc. When my mother called to tell me about the burglary, I responded, "See, Jews can be burglars too." Without a moment's hesitation my mother rebuked me, "They weren't Jews, they were Israelis." For my mother, real Jews, who in her world were all orthodox, and Israelis, who tended to be secular, were completely different breeds.

My father, though rarely at home, influenced me as well. He had a small store on the lower east side, where he sold wholesale during the week and retail on Sunday (he was of course closed on Saturday). I would sometimes help him on Sunday after my school finished at 1:00 pm. One Sunday he got a ticket for violating the Sunday closing law. I went to court with him a few days later and the presiding judge was man named Hyman Barshay. It was my first experience in a real court. He asked my father why he was open on Sunday and my father responded that he had to stay closed on Saturday because he was an Orthodox Jew and he couldn't afford to be closed for two days. "Did you go to Schul on Saturday?" the judge asked. My father replied, "Of course." The judge challenged him, asking, "Then what was the Torah portion of the week?" When my father responded correctly, the judge tore up the ticket. If he had gotten the answer wrong, the judge would've doubled the fine. So much for separation between church and state.

This was not my only experience with the First Amendment. Shortly thereafter, my friends and I decided to form a social athletic club - - a euphemism for a Jewish gang, but without the rough stuff. We named our club The Shields and we designed our own jackets, which we got wholesale, since the father of one of our members owned an athletic store. His name was "Snot" Chaitman. I leave the source of that nickname to your imagination. Whitey, the leader of our club, decided that we should have something sexy and not at all Jewish looking (whatever that meant). Accordingly, the colors we selected were chartreuse and black. We really wanted to look like hoods, despite our generally wimpy nature. Our yeshiva immediately banned the jackets as too tough looking and not consistent with the Jewish values of the school. Fortunately one of our

HOUSE_OVERSIGHT_017114

club members lived across the street from the school, and so we would go to school wearing normal approved clothes, then immediately upon leaving school go to our friend's house and change into our costumes. We felt like super heroes, but I was no longer jumping out of windows.

Boro Park in the 1940s and 50s was not only a religious neighborhood; it was a funny neighborhood. Two houses away from me lived Jackie Mason. Around the corner was Eliot Gould (ne Goldstein). A few blocks away, in my uncle's building, lived Buddy Hackett. Woody Allen grew up in a nearby neighborhood, as did Larry David.

Joke telling among my friends was a competitive sport. (In those days there were new jokes because our parents and grandparents didn't tell jokes—at least not to us kids, but older brothers were a good source.) We didn't know anybody who actually made up a joke. Every rendition would begin with, "I heard a good joke," or "have you heard the one about—the rabbi and the farmer's daughter, or the rabbi, the priest and the minister?" (The rabbi always came out on top!)

The first joke I remember hearing (and telling) involved a put-down of communist Russia. It was about the time the Russians wanted to one-up the Americans by ordering a large number of condoms 14 inches long. The Americans sent them the 14 inch condoms—marked "medium." The jokes improved as we got older!

Our favorite radio show was "Can you top this," which involved professional comics who would try to top each other and listeners who submitted jokes. A "laugh meter" determined whose joke was funniest. There were cash prizes for listeners who topped the pros. The jokes told by panelists, such as Harry Hershfield and Joe Laurie, Jr., had to be spontaneous and related to the subject of the original joke. The panelists boasted that they knew 15,000 jokes among them.

We would sit around the radio and try to top the pros. We would also send in our own jokes, which were never chosen. But we often thought our jokes were as good or better than theirs.

Living in a funny neighborhood at a funny time and listening to funny shows served me well. (My wife thinks too well, since I often use humor to avoid discussing serious issues.) I use humor in the courtroom, in the classroom and in every other aspect of my life. A highlight of my current summers is sitting on the porch of the Chilmark store on Martha's Vineyard and playing a contemporary version of "Can you top this?" with my friend Harold Ramis, who knows more than 15,000 Jewish jokes! Sometimes Larry David, Ted Danson, Seth Myers or Tony Shalub drop by. I never "top" Harold, but I hold my own.

I learned many of my jokes in the Catskill Mountains where I worked as a busboy over the Jewish holidays. The only hotel that would hire me was the King David. It was a run-down place that conveniently burned to the ground right after the Jewish holidays. It was across the road from The Posh Brown's, made famous by Jerry Lewis, who frequently performed there. Nearby were Grossingers, Concord, Kutchers, President, Nevelle, Tamarak, Pine View and Pioneer. I played and watched basketball, played "Simon Says" with Lou Goldstein, who claimed to have invented the game, and snuck into the shows that featured Alan King, Freddie Roman, Sheky Green and Red Burrons. It was "Can you top this?" on steroids. Plus, there were girls.

HOUSE_OVERSIGHT_017115

Although we were orthodox Jews, none of us abided by the orthodox rules regulating sexuality. We were as anxious to make out as anyone; the problem was we had no one to make out with because the girls all had to be beyond reproach. The closest we ever came to a good squeeze was when we went to the Cyclone at Coney Island. We were all scared, but figured the girls would be more frightened and would cuddle up to us during the dangerous ride. Sometimes we tried to pick up non-Jewish girls at Coney Island, because we heard they had wild reputations (meaning we could get to "first base"). We wore our basketball jackets, which said "Talmudical" - - our school was Brooklyn Talmudical Academy. (The full name was Rabbi Isaac Elchanan Theological Seminary and Talmudical Academy, Yeshiva University High School, Brooklyn Branch, Boys Division. Imagine the locomotive cheer!) The colors for these jackets were selected by the school. Not surprisingly there were blue and white - -very Jewish. "Talmudical" was not a particularly good visual for pick-ups, so we turned our jackets inside out. The raincoat side was gray and read "B.T.A.", which we told the girls stood for "Brooklyn Technical Aviation." It still didn't work.

In our senior year we discovered that a train ride to Manhattan and a bus ride to Union City would get us to the burlesque house where at least we could see what we could not touch. One day a group of us went, and we took along one particularly orthodox classmate who insisted on wearing his yamulka during the show. The rest of us had tucked ours into our pockets. Of course we sat in the front row, to get the best view. When a drunken guy in the back started screaming "Take it off, Take it off," Irving was sure he was referring to his yarmulke. He stood and confronted the guy shouting: "I will not take it off. I am proud of my yarmulke." To this day, whenever I see Irving, I always yell, "Take it off! Take it off!" He'll never live it down.

The yeshiva I went to was strongly Zionist, supporting Israel's struggle for independence, but the rabbis hated David Ben Gurion, Israel's first leader. Ben Gurion was an atheist who believed that Israel should be a secular socialist democracy. My rabbis wanted it to be an orthodox Jewish theocracy. Thank God Ben Gurion won, though he ultimately reached an uncomfortable compromise with the rabbis. (Recently, I acquired a letter Ben Gurion wrote in 1963, stating that the religious and secular elements of Israeli society must be sensitive to each other's beliefs:

> "There is no doubt that the feelings of a religious man are to be respected, but religious people must respect the freedom of choice of a fellow man, and no coercion is to be exercised for or against religious conduct."

These words could have been spoken by Jefferson or Madison.)

One day, David Ben Gurion was giving a speech in Central Park to a vast audience of supporters. My friend Tsvi Groner, who subsequently made "Aliya" to Israel, and I decided to cut school to listen to Ben Gurion. When we were caught being out of school we had to make up a lie. We told the rabbis that we'd gone to a Brooklyn Dodgers baseball game. For *that* we received far less of a punishment than we would have had we admitted going to hear the atheist Ben Gurion.

HOUSE_OVERSIGHT_017116

My mother was summoned to my high school so often that some of the students thought she worked in the principal's office. One day, after I had done something especially egregious—I threw a "dummy" dressed like me off the roof of the building, after threatening to "jump off the roof" when my teacher threw me out of the class[12]—the principal demanded of my mother "what are we going to do with your son?" Without any hesitation my mother responded, "I don't know what you're going to do, but as for me, I'm going to keep him." The principal threatened to send me to another school called "R.J.J.," which we always said, stood for "Reformatory for Jewish Juveniles," because some of the tougher kids—the disciplinary "problems"—went there. (The initials really stood for "Rabbi Jacob Joseph"). Ultimately I was suspended for a few weeks on the ground of "lack of respect" and spent them at the local library and museum, where I learned considerably more than I was learning in my classes.

It was not my first suspension, nor would it be my last. Nor would it be my first encounter with my principal, Rabbi Zuroff, who in my senior year, when he was finally resigned to my remaining in the school until graduation, called me to his office for some career advice. This is what he told me: "You have a good mouth, but not much of a 'Yiddisher Kup,'" which means 'Jewish head' or brain, as distinguished from a Goyisher (non-Jewish) Kup"—a slightly bigoted concept suggesting that Jews are endowed with special mental qualities or capacities.[13] He continued: "You should do something where you use your mouth, not your brains." I asked him what he would suggest. He replied: "You should become either a lawyer, or a Conservative Rabbi." (He was an Orthodox Rabbi who held his Conservative colleagues in utter contempt.) To make sure the latter part of his advice was followed, he urged Yeshiva University, which trained Orthodox Rabbis, to reject me, which it did.

My classmates as well valued my verbal over my intellectual skills. The first draft of my high school yearbook description said that I have "a mouth of Webster, but a head of clay." (My mother made them change it!)

Rabbi Zuroff's career advice was actually better than the choices given to me by the New York City Department of Employment, to which my mother turned in desperation. After reviewing my high school record, and administering an aptitude test, the counselor told my mother that I could aspire to work in an advertising firm or a "funeral parlor." My mother asked whether I could be a lawyer, to which the counselor replied, "Mrs. Dershowitz, I'm afraid you have to go to college to be a lawyer, and your boy just isn't college material."

Many years later, following a talk I gave at a temple in Los Angeles, a man about my age came up to me and asked whether I was "related to a guy I went to high school with named Avi Dershowitz." "Avi" was the Hebrew nick-name by which I was known all through high school. I began to use my "real" name, Alan, when I started Brooklyn College, though my old friends and family still call me Avi.

I decided to put the questioner on, so I said, "yeah, yeah, we are related."

[12] For a fuller account of this episode, see *The Best Defense* at ff __

[13] The classic Jewish joke reflecting this xenophelia is about Moishe who says to his wife, "It's too hard to be a Jew. I'm converting to Christianity." He goes to church, converts and goes home to sleep. Next morning his wife wakes up and sees Moishe wearing his Talit (Jewish prayer shawl) while davening (praying in Hebrew). "What are you doing Moishe," she asks, "You're a Christian." Moishe replies, "I forgot! Goyisher Kup."

HOUSE_OVERSIGHT_017117

"What ever happened to Avi?" he asked.

I continued the put on: "We don't talk about him in our family. He came to no good."

Showing no surprise, my questioner replied: "I knew he would come to no good. He was such a bad kid in high school."

I'm sure some of my critics would agree that I came to "no good," but at least by objective standards I've exceeded the expectations my high school teachers and principal had for me. None of them thought I was "college material."

This assessment was recently confirmed by a classmate who I encountered in Florida. We had been friends during our first two years in high school and then, quite suddenly, his parents moved to a different city and I had no contact with him for nearly 60 years. When we first spoke on the phone, I asked him what he had done after leaving Talmudical Academy in Brooklyn. He told me had had moved away and then come back to New York City for college. When I told him that I had attended Brooklyn College and then law school, he seemed surprised. I suspect that he too, along with others of my classmates, didn't think I was "college material."

The only successful part of my high school career, other than my debating, was making the varsity basketball team. Though I was never a starter (except when one or two of the starters were sick), I did manage to accompany my team to Madison Square Garden for the inter-Yeshiva finals. I shared a locker with Dolph Schayes, (who, you know was born before 1933, since after that no Jewish boy was ever again named Adolph) whose team, the Syracuse Nationals, was playing against the N.Y. Knicks in the main event to which our game was a preliminary. One of the people on the opposing team was a kid even shorter than me named Ralph Lipschitz. He eventually decided that to make it in the fashion business he would have to change his name. So Lipschitz became Lauren.

All of the teams we played against in our league were Jewish high schools, but some were much more orthodox than we were. We did not wear yarmulkes when we played, but some of our opponents did. They believed that it was improper to walk more than four steps without wearing a yarmulke. In one game, one of my opponents stole a ball from me and had a open lane to the basket. He was very fast and so I had no hope of catching him. Instead I grabbed the yarmulke off the top of his head and threw it on the floor and yelled, "You can't go more than four steps." He stopped, shot the ball and missed. I got a technical foul, which was well deserved. If the Anti-Defamation League had heard about my actions it might well have qualified as an anti-Semitic incident, but all's fair in love and basketball.

Basketball was not our only passion. We all loved baseball, especially since Ebbets Field was located four blocks from our high school. The morning recess generally coincided with the time when several of the players walked past our school to the stadium. Remember that these players were working stiffs being paid low salaries and generally taking public transportation to and from the games. We would wait for them to pass school and walk with them to Ebbets Field. I got to know several of the players, including Carl Furillo, Pee Wee Reese, Gene Hermansky, Gil Hodges

HOUSE_OVERSIGHT_017118

and Ralph Branca (whose mother, it now turns out, was Jewish!). Jackie Robinson, who was our real hero, generally was driven to the stadium for safety reasons. I will never forget Jackie Robinson's first game with the Dodgers. We persuaded our European-born rabbi to make a special blessing for him, without his knowing whom he was blessing, since he never would have approved blessing a baseball player. We made up a Hebrew name for Jackie Robinson, calling him Yakov (Jacob) Gnov (Rob) buh (in) Ben (son). When he got his first hit, we were convinced the blessing had worked. I had a spiral notebook in which I had collected autographs of every single Brooklyn Dodger who played during my high school years. As soon as I moved out of the house my mother tossed it in the garbage pail, along with my signed baseball cards and comic book collection. I could've been a millionaire….
When the Dodgers were not at home, we would play softball in the parking lot adjacent to Ebbets Field. One day we made headlines when one of my classmates hit a homerun from the parking lot over the Ebbets Field wall. The Brooklyn Eagle reported that it was the first time anyone had hit a home run into rather than out of the ballpark.

It's not surprising that my high school memories are long on sports and short on academics, because my academic performance was abysmal. In my senior semester my first half grades were as follows (I still have the report card): English 80; Math 60 (F); Hebrew 65; History 65; Physics 60 (F). With two failing grades, I couldn't graduate, and so by the end of the last semester, I raised my physics grade to the minimum passing number of 65; my math grade to 75; and my history grade to 70 (the others remained the same). Yet despite my poor grades, I still remember much of what the teachers taught, often quite poorly. Other, more useful, information from Yeshiva has also stayed with me, especially from the Torah, the Talmud and Jewish history. Half a century after finishing my religious education, I wrote a book entitled "The Genesis of Justice," in which I analyzed the first book of the Bible from a secular lawyer's perspective. I never could have done this without my Jewish education. When I showed the galley proofs to my Uncle Zacky, an Orthodox rabbi, he said he admired its intellectual content but not its heretical views. He pleaded with me to "change just one word." I asked him, "which word?" He responded "the word 'Dershowitz' on the cover.

In my family, directness was more of a virtue than politeness, and interrupting someone was a sign of respect. It meant, "I get it, so you don't have to finish your thought. Now let me tell you why you're wrong." The interrupter fully expected to be interrupted in turn, and so on. Nobody ever got to finish what they were saying. Now that's a good conversation. I'm reminded of the joke about the pollster who approaches four random people in Times Square and says, "Excuse me, I'd like your opinion on the meat shortage." The first one, an Ethiopian replies, "There's a word I don't understand, what 'meat?' is?" The second, an American, also says there's a word he doesn't understand: "What's "shortage?'" The third, from China, also doesn't understand something: "What's opinion?" Finally, the Israeli too says there's something he doesn't understand: "What's 'excuse me?'" We never said "excuse me." Conventional politeness was not part of our language. Nor was rudeness. We simply didn't regard interrupting someone as rude, as long as everyone eventually got to say what they wanted.

My mother regarded people who were "too polite" with suspicion: "You never know what Muriel is really thinking," she would say about my extremely polite Aunt (by marriage, of course) Muriel, who lived upstairs from us and was married to my somewhat rude (in the best sense of

HOUSE_OVERSIGHT_017119

that word, at least to my family) Uncle Hedgie, who you always knew exactly what he was thinking.

When I began teaching at age 25, some of my more "proper" students objected to my constant interruptions, until I persuaded them that being interrupted was a compliment, signifying that their point had been made and understood. ("We get it.") Some televisions viewers have also written to me about my penchant for interrupting opposing "talking heads." It's simply a matter of style, not rudeness, though some mistake the former for the latter.

Another blessing of my early religious training relates to memory and my use of it in my professional life. My mother was blessed (cursed?) with a near perfect memory. (Probably more nature than nurture.) She could recall virtually everything from her youth. When she was in her 80s, she would spot someone on the train and go over to her and ask her "Aren't you Mildred Cohen and weren't you in my sixth grade class?" She was invariably right. She remembered, word for word, what she had been taught in the third or fourth grade. She remembered every melody she had ever learned, even though she never went to concerts and didn't listen to recordings as an adult. She could recite from memory long poems she learned in elementary school. Most surprising of all, she had committed to memory an entire Latin mass, which a Catholic elementary schoolteacher, in an effort to Americanize the children of immigrants, had made her learn by heart. She had no idea what it meant, but it was one of her favorite parlor tricks to repeat its Latin words, accompanied by the church melody she had learned. She never forgot anything she had heard, read or smelled. Growing up with a mother who never forgot was a curse for me, because I did a good many things I wish she could forget.

Although I always knew I had a good memory, I discovered that I had inherited my mother's extraordinary gift while participating in intercollegiate debates. The debate tournaments always took place on Saturday. I pleaded with my parents to let me go, promising that I would travel before the Sabbath and after the Sabbath, and that I would say my prayers wherever I happened to be. My parents agreed on the condition that I not write during the Sabbath. ("Meturnished") My mother told me it wasn't necessary to write because I could remember things that others had to write down. ("Our family has good memories.") I was doubtful but it proved to be true. I became a champion debater and my teammates marveled at the fact that I didn't bring a pencil or pad but could recite word for word what my opponent had said before responding to it. I then realized what a blessing this memory was. I went through the rest of college and law school without ever taking a note. This enabled me to listen very carefully to what was being taught and to have a far better understanding of it than the student "stenographers" who were busy taking down every word the teacher said, as if putting it in writing was a substitute for understanding it. To this day, I rarely take notes, even in court, though my memory for new information is not nearly as good as it used to be.

Recently, after watching the film "Invictus," my wife asked me if I had any idea who wrote the poem by that name. She thought it must be a well known poet, such as Byron or Shelly. Without thinking, I blurted out "Henley." She replied "who the hell is Henley?" I said, "I don't have the slightest idea, but I think Invictus was written by some English poet named "Henley." She checked Google and sure enough the poem was written by a relatively obscure Victorian poet named William Ernst Henley (1849-1903), who wrote little else of note. His name popped into

HOUSE_OVERSIGHT_017120

my head as a 55 year old memory association from a high school English class in which we had to memorize the author's various works that we read but probably didn't understand. (To show how little has changed in more than half a century of poor education, my daughter in her sophomore year at Yale had to memorize and spout back on the final exam, the name of British landscape portraits, the year they were painted and the museum in which they hang. It's as if God hadn't invented Google precisely to eliminate such absurd memorization tasks.)

A few years earlier, I impressed my children at Steve's ice cream shop in Cambridge, which offered free ice cream to anyone who could answer really obscure trivial pursuit questions. The question of the month that no one had answered was: "What was the Lone Ranger's family name? (Most people said "Ranger.") I immediately blurted out "Reed." I added that Reed was also the Green Hornet's family name because according to the "origin story" in a comic book that I had read half a century earlier, they were cousins.

During my junior year in high school, my memory for obscure facts and the "parlor tricks" I played with it got me an interview with the producers of a television game show called "The $64,000 question," but I failed the personality part of the test and was rejected. That was fortunate, since the show was rigged. (I still have the letter from "Production Services Company" at 667 Madison Avenue informing me that the results of my written examination "are gratifying" and inviting me for the personal interview I failed). But my "mother's memory" has served me well as a lawyer, teacher—and joke teller. (The downside of remembering every joke I ever heard is that I rarely get to hear a "new" joke, because I've heard—and told—a good many jokes over my lifetime).

I not only remember the jokes I've heard (and told and retold) over the years, but more importantly, I remember nearly every case I ever read, nearly every fact in the records of cases and nearly every principle of law I ever learned. I try to teach my students to develop and rely on their memories rather than on their stereotypical skills. During the first two weeks of law school, I forbid my first year students to take any notes ("meturnished"). I assure them that nothing discussed during this "listening" period will be on the exam and I urge them to learn how to listen and remember, because this will be very important in court and other professional settings. Many of the students react nervously because they have never been denied the ability to take notes, but after a few days they acclimate, and some even appreciate, the different regime.

My good memory went mostly to waste in my early years, because there was so little worth remembering. We would be given a quarter to memorize passages from holy texts and a dollar if we could recite "by heart" (what does that mean?) an entire chapter from the Bible. Only once did my memory serve me well during my adolescence, and that was at my Bar Mitzvah. Prior to "becoming a man," I had never really excelled at anything. I was good, but not great, at athletics; good, but not great, with my social life, and God-awful in academics and behavior. But my Bar Mitzvah performance was perfect. I had read the Torah portion—"Judges and Magistrates"—flawlessly, because I was able to memorize the entire reading, melody and all. My performance was the talk of the neighborhood. But a month later, my friend Jerry (now a prominent rabbi) read his Torah portion in the same synagogue. He was awful, making mistake after mistake, and singing off tune. It was embarrassing. The rabbi then got up to give the sermon. He recognized that Jerry had not done well and in order to console him, he referred to

HOUSE_OVERSIGHT_017121

"another Bar Mitzvah boy" who had done a better job reading from the Torah, but who wasn't nearly as good a student or person as Jerry. "We judge boys not by the quality of their voices or their ability to memorize, but by their understanding of what they were reciting and by the lives they lead based on their understanding." It was a direct put down of me, and so understood by the congregation. It stung me and led me to conclude that I could do nothing right in the eyes of the religious authority figures. Even when I did something perfectly, they would find some way to turn my success against me. It discouraged me from trying.

A few years later, I had a similar experience in high school. The one subject that interested me was history, and the teacher was young and dynamic. I studied hard—a rarity—for a state-wide exam and got an 88. When the teacher, who knew my reputation as a mediocre student, told me my score, he said: "Don't let it go to your head. You're a 75 student. You've always been a 75 student and you'll always be a 75 student." (He gave me a 70 despite my 88 grade on the Regents exam.) It became a self-fulfilling prophecy for two reasons. First, all my teachers believed it. Second, I believed it and stopped studying because I could get 70's or 75's without much work, and if that's who I am, why take time away from activities I enjoyed, such as sports, jokes, girls and messing around.

It was in the summer of my junior year in high school, when an authority figure—the camp dramatics counselor, Yitz Greenberg (also now a prominent rabbi)—finally told me that I wasn't a "75 student." He had cast me in the difficult rule of Cyrano d'Berjurac in the camp play. I memorized the lines and did a good job (my long nose helped). After the performance, Yitz put his arm around me and said, "You know you're very smart." I replied, "No, I just have a good memory." He insisted that my smarts went beyond memorization. He told me I could be a good lawyer. I respected and believed him. It was an important moment in my life, for which I will be forever grateful. My parents loved me but never told me I was smart, because they believed my teachers and saw my report cards. I needed to hear it from an authority figure outside of my home, and Yitz was that figure.

Despite my inglorious high school career, Yitz's faith in me led to consider college. My father thought I should go to work and take some classes at night, but my mother wanted me to graduate from college—as she couldn't do. My mother filled out my application to Brooklyn College. I wanted to go to City College in Manhattan, because my best friend Norman Sohn was going there, but my parents wouldn't let me go to an "out-of-town college." Brooklyn College was part of the New York City College system, which had an excellent academic program, but little by way of any social or athletic life. It was free to any New York City resident, and anyone who had a sufficiently high grade average in high school was automatically admitted. Remarkably, the required grade score was different for boys and girls. Boys needed an 82 or 83 average (depending on the year) while girls needed an 86 or 87. Imagine the lawsuit today! The reason for this differential was that the school wanted "gender balance," and if the same score were required, the college would be dominantly female. (Similar differentials are still at work today, but they operate beneath the radar screen under the rubric of "diversity" and "discretion." An admissions officer at an elite college told me that he turns down many students with perfect SAT scores. When I asked him who these rejected students were, he acknowledged that they were almost exclusively of Asian and Jewish background: "if we took everybody with perfect

HOUSE_OVERSIGHT_017122

SAT scores, there would be little diversity," he explained. He too apparently believed in the "Yiddisher (and Asian) Kup" theory.)

I did not come close to having an 82 average, but fortunately there was also a test that an applicant with non-qualifying grades could take. Unfortunately, a high score alone on the test did not get you in: you needed a combined score—test plus grade average—to make the cut. With my low average, I needed a near perfect score to make it. Otherwise I would have to go to night school and work during the day. I did very well on the test and was admitted.

I also won a New York State Regents Scholarship which paid me $1,400 to go to college. (I put the money in an interest bearing account that paid for my first year at law school.) The state scholarship was based entirely on a single, highly competitive exam. High schools took great pride in how many state scholarships their students won. The relevant statistic that helped rank the schools was the percentage of those who won, based on the number of students who took the exam. My high school was obsessed with doing well in the state scholarship competition, so it limited those who could take the exam to students with grade points over 80, in order to inflate the percentage of winners. I did not qualify, but I knew I could do well on a state-wide competitive exam that was graded by outsiders, not by my teachers who were predisposed against me. So I pleaded with Rabbi Zuroff to take the exam. He refused, telling me I would never win and my taking it would just bring down the percentage. Not satisfied with his answer, I filed a petition with the New York Regents—my first of many petitions. To everyone's surprise, the Regents ruled in my favor and the school was ordered to let me, and everyone else, take the exam. Two of us, who had averages below 80, along with 4 or 5 others, won the scholarship. My principal's first reaction was that I must have cheated, but a check of the seating chart showed that I was not sitting near anyone else who won. So off I went to Brooklyn College, with money in my bank account. It was a turning point for me academically, professionally, religiously and existentially.

Before I turn to my college and law school years, which were quite successful, I want to speculate for a moment as to why, despite the unsuccessful nature of my early teen years, I am so focused on them as so formative to my later life. Several years ago, *The New York Times Magazine* asked me to reflect back on my teen years for a column entitled *About Men*. The assignment got me to wonder why I am so obsessed with nostalgia from that particular period in my life. This is part of what I wrote:

> I'M ENTERING THAT AGE WHEN songs from the hit parades of my adolescence bring tears of nostalgia. I'm a sucker for memorabilia of the 1950's.
>
> My house is cluttered with toys I've recently bought - chintzy replicas of vintage Chevys and Thunderbirds, overpriced miniature jukeboxes that play "Rock Around the Clock," anything reminiscent of the 1955 world champion Brooklyn Dodgers (a redundancy to any aficionado, because there are no other world champion Brooklyn Dodgers).
>
> I rush to see any Woody Allen film that has even a remote connection to the time and place we both grew up in (another redundancy - everything Woody Allen does has a strong connection to Brooklyn in the 50's). I drag my family to Neil Simon plays through

HOUSE_OVERSIGHT_017123

> which I laugh and cry while they observe me in puzzlement. I crave reruns of television sit-coms and revivals of shows I hated in their original incarnations.
>
> Those must have been wonderful times to evoke such strong - and expensive - reactions.

I then described a nostalgia weekend that I and six guys I grew up spent at the Concord Hotel in the Catskill Mountains, where we once had gone to summer camp or worked as waiters. The guys played one-on-one basketball and horse (even those who hated hoop as kids). We told jokes so old you could give them numbers (itself one of the oldest jokes). And we wondered about why our lost adolescence exerted such magnetic attraction.

> "Those were the worst days of my life," one of the guys - who used to talk with a high voice - confided. Suddenly, we were all contemplative. Our adolescence was miserable, we acknowledged. As the Musak played "Love Is a Many-Splendored Thing," another related how he dreaded the slow dances because he would always become palpably tumescent (certainly not a phrase from our youth) while doing the fox trot. Another shocked us all by soberly confessing that he had become tumescent only once during his adolescence, but then he reassured us by bragging that "it started when I was 12 and it didn't stop until I was 21."

I then recalled one of the most humiliating moments from my adolescence:

> It was prom time, and the girls had established a committee of three to which the boys had to apply for dates. I had my eye on a pretty blonde from an adjoining neighborhood (her distance, I hoped, might have kept her from learning of my questionable reputation among the local parents). As I approached the committee and shyly uttered "Karen," all three arbiters laughed. "Don't you know," the cruelest admonished me, "that Karen is on the A list and you're on the C list? You can only pick from the C or D lists." It was a relief to learn there was a list lower than mine, but a shock to be confronted with my official ranking. I went to the prom alone and danced with my cousin, who was also on the C list.

…

Those were miserable years, all right. They were years of self-doubt, sexual guilt without sexual pleasure, fears and transitions. Before you were comfortably into one stage you were already entering another, more precarious, one. They popped up as if on schedule, like the beginning of the yo-yo, marbles or mumble typeg seasons. So I asked myself why I insisted on recapturing the most miserable period of my life. This was my answer:

> [W]hen a man reaches the age of counting backward, maudlin nostalgia sets in and he begins to run, not walk, to every restored toy emporium he hears about from other retrievers of lost youth.[14]

HOUSE_OVERSIGHT_017124

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Our wives—most of whom had known us as adolescents—agreed that we had been pretty nerdy back then, but they prided themselves on having seen through the external faults that had relegated us to C lists. "You don't need to buy the 50's in a store," one spouse quipped, "you guys are walking memorabilia." Another turned an old phrase: "I was able to take my husband out of the 50's, but I can't take the 50's out of him."

The early 1950s—my high school years from September 1951 to June 1955—were not my finest hours. Yet they were as formative as any other period, though the formative dynamic was mostly reactive. I think about them often. My wife says I am obsessed with nostalgia for my troubled adolescent past.

Perhaps that is because I would like to relive them—both to regain my vigorous youth and to use it in a more productive manner. I'm not sure. But I am sure that my early teens laid a firm foundation for my very successful late teens—my college years at Brooklyn between the ages of 16 and 20. I had something to prove, and I went about proving it with a vengeance.
My parents were hoping I would make a B average in college, which was very respectable in those days before grade inflation. They didn't want me to get A's because A students became teachers, and they certainly didn't want me to get C's, as I had in high school. I could never satisfy them. I went straight from C's to A's, almost never getting a B in anything. I really blossomed in college, though I didn't do anything very different from what I had done in high school. I was a "smart aleck" and a "wise guy," but these qualities were appreciated and rewarded at Brooklyn College, while at Yeshiva High School they were punished. Whenever I came up with anything original in my high school religious classes, my rabbis would say: "If your idea is so good, then the ancient rabbis, who were so much smarter than you, would have came up with it first. If those rabbis, who were so much smarter than you, didn't come up with the idea first, then it can't be any good." End of discussion. It was all different at college.

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[14] Salesmen at the nostalgia shops tell me that men in their 40's and 50's experience the need to "collect" their adolescence more than women do. "When I see a guy with a goofy looking grin dragging a couple of teen-age kids through my door on a weekend, I know my summer vacation will be paid for," one shop owner told me. "But if he's got his wife with him, he'll probably buy just one sensible memento for his office."

HOUSE_OVERSIGHT_017125

Chapter 2: My Secular Education—Brooklyn and Yale

I loved everything about Brooklyn College. The inner city campus was green and lush. The professors were phenomenal teachers—many of them en route to more elite universities. The students, though mostly Jewish, seemed diverse to me because so few were Orthodox. Intellectual and political debate filled the classrooms, the lunchrooms and the quad. No one said "Meturneshed." Every idea was acceptable (except, perhaps Communism, since the stench of McCarthyism still hung in the air.)

I felt free to experiment with my thoughts and words, but not yet with my actions. I remained an Orthodox Jew in practice and I did not try drugs or even alcohol. (I tried to try sex, but couldn't find any willing partners.)

My friends and I founded a "house plan" – an urban fraternity for students who lived at home with our parents, as we all did. We called it "Knight House" and our boastful Latin slogan was "semil equis satis"—"once a knight is enough." Since we were all orthodox Jews, we could not attend the usual Friday night parties, so our orthodox Jewish house plan had its parties on Saturday or Sunday night. We were desperate to defy the stereotype of orthodox Jewish wimps, so we worked hard on our athletic skills, ultimately winning the house-plan championship in several sports. I still have newsclippings attesting to my athletic accomplishments: "Knight soccer champs"—"Al Dershowitz led the knighters to victory, scoring two large goals."

In my senior year in college, a group of friends decided it was time to lose our collective virginities. We heard that there was a special deal over Christmas vacation to travel to Havana, then a wild city. We all went down to Florida in another friend's old car and bought round trip tickets to Havana for $59. We had the name of a house, which specialized in transitioning young boys into men. We were scheduled to make the hour-long flight the day before the 1959 New Year. We couldn't wait to get to Havana, but a bearded guy named Fidel got there first and we couldn't make it. For years, I had been telling people that the flights were cancelled, but a couple of summers ago I was at a party with a man (now married to a prominent public figure) who was at Brooklyn College with me. He and several of his friends were also going to Havana for the same reason. I had forgotten that the trip to Florida was actually sponsored by the Brooklyn College Student Government. When I told him my story, he said, "I made it to Havana," and I said, "but the flights were cancelled." He said, "No they weren't. The State Department just issued a warning that it was a little bit dangerous." I guess he was more determined to lose it than I was. His wife, who was then his college girlfriend, said that she didn't "touch him for a year after that."

I took another trip with my college friends. It was to Washington D.C. On the day we arrived, the king of Saudi Arabia was a state visitor. In his honor, green Saudi flags draped all of the important federal buildings and monuments. When I saw the flag of that slave-owning dictator on the Lincoln Monument, I got angry and tore it down. I was immediately taken into custody by a park policeman. His superior was sympathetic, however, and let me go with a warning: "Next time, make sure no one sees you when you tear down the rest of those damn flags."

HOUSE_OVERSIGHT_017126

Mostly, I worked very hard, achieving an A average and Phi Beta Kappa Honors, winning debate tournaments and being elected president of the student council and captain of the debate team. Reading became my passion: literature (Dostoyevski, Shakespeare, Bellow); philosophy (Kant, Aristotle, Plato, Neitsche; history (_____) and politics (_____). I loved arguing with my professors. One of my favorites was John Hope Franklin, the first African American appointed to the chairmanship of a department (history) in a college that was not historically black. We remained friends and colleagues until his death in his mid-90s.

My presidency of the student council brought me into repeated conflict with Professor Harry Gideonese, the President of the College, a Midwestern conservative who was brought to Brooklyn to "clean out" what had become "the little red schoolhouse." Several professors had been fired, or not hired, because of the "red" or "pink" affiliations and I fought against this post-McCarthy purge, on freedom of speech grounds. Leading the other side was a professor of romance languages named Eugene Scalia, an elegant and brilliant reactionary, whose son Antonin has followed in his ideological footsteps.

Despite my conflict with President Gideonese, the school nominated me for a Rhodes Scholarship. In my application, I wrote the following:

> I believe that my college career has been a period of moral and intellectual growth throughout which time I have felt an increasing responsibility to my conscience in matters of self improvement. I felt this personal responsibility so strongly in college because I had almost completely neglected it throughout high school. A firm determination to show myself, as well as my high school contemporaries, that I could become an outstanding student in college has been a most potent motivating force.

I also listed my academic, political and athletic achievements, and promised that if admitted to Oxford:

> I would read for the Oxford B.A. in the Honor School of Jurisprudence and then enter Law School in the United States.

In those days Jewish boys (only males were eligible for Rhodes) from Brooklyn were not selected by the Rhodes Committee, and despite my academic, political and athletic accomplishments, I did not even get an interview. It took several decades before Brooklyn College received its first Rhodes Scholarship.

By my senior year at Brooklyn, I had decided to go to law school. That path seemed natural in light of my success in debate and school politics. I had no idea what the practice of law was, except what I had read about the careers of such legal luminaries as Clarence Darrow, Thurgood Marshall, and Louis Brandeis. My uncle Morris was a lawyer, but he spent most of my formative years in the Army and when he returned he specialized in contract cases, which held little interest for me. I asked Grandma Ringel to introduce me to an old friend of hers, whom she always referred to as "Judge Berenkoff." I had no idea what kind of judge he was, but he was the only judge I knew. My grandmother wondered why I wanted to meet Judge Berenkoff. I told her that since he was a judge, he might have some good career advice for an aspiring lawyer. My

HOUSE_OVERSIGHT_017127

grandmother laughed and said: "Berenkoff's no judge, he's a butcher." She explained that "his first name is Judge," and then she spelled it out: "G-E-O-R-G-E," which she, with her Yiddish accent, pronounced "Judge."

Shortly after New Year I got my letters of acceptance from the various law schools to which I had applied. Since I had done very well in college and was president of the student government, I got into all the law schools to which I applied. I chose Yale, much to my mother's regret. She wanted me to go to Harvard. Until the day she died at age 95, when people ask her where I went to law school, she replied, "He got into Harvard, but he went to Yale."

I also got into Columbia Law School, and the dean of Columbia, William Warren, wrote a letter to my parents, congratulating them on my admission and on the fancy scholarship I had won. (I still have the letter addressed "Dear Mr. and Mrs. Dershowitz"). I interpreted his letter as an attempt to have my parents try to persuade me to go to Columbia. So I wrote back—not to Dean Warren, but to "Dean Warren's parents, care of Dean Warren, Columbia Law School." I told his parents that their son was writing to my parents, and suggested that they tell him that if he wanted students to go to his law school, he should write to the students themselves rather than to their parents. I thought it was pretty funny, but I stopped laughing several years later, when I was on the law school teaching market and I went to Columbia for an interview. After meeting several members of the faculty, I was taken in to meet Dean Warren. He was waiting for me, with my letter in his hand. I was sure I would never get a job offer, but he looked at me and said, "That was a really good letter. I stopped writing to parents after getting it." He offered me a job.

Immediately after graduating from Brooklyn College, I got married to a woman I had met in a Jewish summer camp that boasted of the many "shidachs" (meetings that resulted in marriages) for which it was responsible. I was not yet 21. Sue was 19. My mother wouldn't let me go to an out of town law school unless I was married, for fear that I would meet "the wrong kind of girl." A year after we were married, Sue became pregnant with our first child, Elon.

I loved Yale Law School. During my first year, I had Professor Guido Calabresi as a teacher. It was his first year of teaching. When I came home for the Jewish holidays, my mother asked me how I found my professors. I told her that they were all brilliant mentioning Professor Pollak and Professor Goldstein, but I told her my most brilliant teacher was Professor Guido Calabresi. Without missing a beat she said, "Is he an Italian Jew?" I replied, "Ma, you really are a bigot. Non-Jews can be smart too." She looked at me as if to say, "Wait, you'll see." Sure enough, several weeks later, my wife and I invited Calabresi, who was a bachelor at the time, to our apartment for dinner. We served him lamb chops and a baked potato with margarine on it. Calabresi looked at the margarine and the lamb chops and said, "Isn't this fleishicks mixed with milichicks," using the Yiddish words for meat and milk. I explained that the margarine did not contain dairy, although it looked like butter. I then asked him how he knew these words. He explained that he was an Italian Jew. I refuse to give my mother the satisfaction by telling her that she was right, at least about Calabresi.

One of my teachers was Abe Goldstein who had grown up in Williamsburg, near where my family had lived. My class contained lots of students with famous names—William Brennan, Jr. (son of the Justice), a grandson of Chief Justice Warren, a descendent of President and Chief Justice Taft,

HOUSE_OVERSIGHT_017128

John Marshall and others. When Abe Goldstein called on each of these men, he did it nonchalantly without mentioning their heritage. But when he came to my name, he paused and said, "Dershowitz, from the famous Dershowitz family?" The class burst out laughing. For a moment I thought he was mocking me, but he explained that in Williamsburg, the Dershowitz name was quite well known.

Yale Law School was an institution of meritocracy, where one could rise to the top, regardless of name or lack of heritage. I was first in my class, and became editor-in-chief of the law journal. That wasn't enough for the fancy white shoe Wall Street firms. During my second year, I applied to about thirty such firms, and was turned down by every one of them. The hiring partner of Sullivan and Cromwell, looked at my transcript and saw all A's, except for one C in Contracts. (I was so angry with my Contracts professor that I immediately enrolled in Advanced Contracts with the same teacher, and got an A). The hiring partner looked at my transcript and brushed me away and said, "We don't take C students at Sullivan and Cromwell." Years later he approached me at a Yale reunion function and told me that he had saved me from a bad experience. He disclosed that he was a closet Jew and realized that I would never fit into the culture of that firm. Within several years however, that firm along with most other Wall Street firms, had significant numbers of Jewish associates and partners. (In the late 1960s, I sued one of the firms that didn't hire me for refusing to promote an Italian-American to partnership and won a ruling that discrimination in promotion was prohibited by the law).

I got two job offers, both with Jewish firms, but even one of them discriminated against me on account of my religion. Paul, Weiss, Rifkin, Wharton, and Garrison offered me a summer job at $100 a week. (I still have the letter!) I immediately accepted and wrote to them that I could not work on Saturday. I did not give the reason, namely that I was an observant orthodox Jew. I was told to come and meet some of the partners when I was next in New York. I was introduced to Adlai Stevenson and several other partners and finally taken in to see the firm's major "rainmaker," Simon Rifkin, a prominent Jew who was active in numerous Jewish organizations. He told me how pleased he was that I would be working with the firm, but asked me why I would not be available on Saturdays. When I told him it was because I was Sabbath observant, he replied, "Oh no, we can't have that here. I thought it was just a restriction on your availability this summer. I need associates who are available seven days a week." I took a job with the other Jewish firm, Kaye, Scholer, Feirman, Hays, and Handler. They were perfectly comfortable with my being Sabbath-observant. The big "rainmaker" at that firm was Milton Handler, who was so busy seeing clients, that he would make time for associates only when he could not fit in a client. He would ask associates to drive home with him, or to go with him to Columbia when he was going to teach. One day his secretary called and said Mr. Handler wants you to meet him at a particular address. She gave me the address; I proceeded to walk up Park Avenue not knowing where I would find him or in what setting. When I got there, his private barber was cutting his hair. I was seated next to him while he got his haircut, and he dictated notes to me. It wasn't as bad as what Lyndon Johnson would do, requiring aides to join him in the bathroom.

While working at Kay, Scholer, I had the first fancy restaurant meal of my life. I was asked to join two of the partners at an elegant Park Avenue establishment. Though I was twenty-two years old, I had never eaten out except at delis. When the waiter put a napkin on my lap, I didn't

HOUSE_OVERSIGHT_017129

know what to do with it so I tucked it under my neck to protect my new tie. One of the partners pulled it off and said "Young man, this is a restaurant, not a barbershop."

All first year law students at Yale are required to participate in a moot court competition. My opponent was a classmate named Taft, one of whose ancestors was the President of the United States and the Chief Justice; another a senator from Ohio and the third the mayor of Cincinnati. It is fair to say at that time that Taft was one of the most prominent names in America. My mother was convinced that I couldn't possibly compete with a Taft and that I would be demolished in moot court. To provide support, she and my father came up to New Haven to watch me argue. I did fine. When my mother told my grandmother that I had beaten a Taft, she replied, "Taft? That's a funny name. I wonder what he changed it from?" In my neighborhood, many short names, like many short noses, had once been longer.

In my third year, I served as editor-in-chief of the Yale Law Journal. I was the first orthodox Jew to serve in that capacity, and there were some who doubted that this seven day a week job could be done by a six-day a week worker. But I managed to get the job done, and at the end of the year a few of my associate editors presented me with a mock copy of the law journal in which every seventh page was blank.

The speaker at my law school graduation was President John F. Kennedy. He used the occasion to make the statement about having the best of both worlds, a Harvard education and a Yale degree. (I now have what I think is the best of both worlds, a Yale education and a Harvard teaching job). My son Elon was a year old at graduation, and I brought him along. During Kennedy's speech, he started crying. A local New Haven television station caught him in the act, and the voiceover said that Yale was always a Republican school. (I don't think Elon has ever voted for a Republican in his life.)

During my years at law school, I developed an interest in writing academic articles. At Brooklyn College, I wrote a paper about the 5th Amendment. In it, I explored the history, policies and applications of the privilege, especially in the context of legislative investigations, where many of the battles over the scope of the 5th Amendment were then being fought. I pointed out that the privilege had "traversed many cycles" over the years and had been "adapted to changing times and needs," and concluded that though we "are considering the very same constitutional phrase, we are dealing with a completely new and hitherto unknown privilege."

I would repeat the theme of a changing Constitution in much of my writings over the years and would eventually write a book about the 5th Amendment. At Yale, I wrote two articles for the law journal—one about attempted murder, the other about corporate crime—that brought me to the attention of the faculty not only at Yale but at Harvard as well. Both schools had their eyes out for me as a potential faculty recruit. I worked with several professors at Yale, serving as a research assistant to Professor Guido Calabresi, Joseph Goldstein, Jay Katz, Alexander Bickel and Telford Taylor. They each became mentors to me and I tried to follow in their very large footsteps.
The professor who most influenced my legal thinking were Joseph Goldstein, who taught me criminal law, but he really didn't teach me much about the actual law; his job was to get the students to question everything, to accept nothing and to rethink every principle of law. Some

HOUSE_OVERSIGHT_017130

students hated his course, because they learned no law. Goldstein had failed the bar and had never practiced a day in his life. I loved his course and seminars and was deeply influenced by his approach to law.

Another professor who influenced my approach to law, but in a rather different way was Alex Bickel, who taught me advanced constitutional law. He looked at our constitution politically and structurally and had a coherent, if imperfect, theory of how the constitution should be interpreted. Both of these mentors defied conventional labels, such as liberal or conservative.

The professor who had the most influence on my career choice was Telford Taylor, who combined an active constitutional law practice with teaching and writing. Although we could not have been more different in background and bearing—he was a tall, elegant WASP, had served as a general in the Army, was the Chief Prosecutor at the Nuremburg Trials, always wore a suit and tie, and was polite to a fault—we had much in common and became close friends and colleagues. (So much for needing mentors of the same ethnicity, religion, race, gender, etc!) I consciously tried to model my career (except for the Army part) after his.

Shortly after John Kennedy was elected president, rumors began to circulate that Taylor was being considered to head the C.I.A. He took me aside one day after class and asked me, in confidence, whether I would consider coming with him to Washington, if he were to get the appointment, and serving as his executive assistant. I told him I would certainly consider such an offer. Eventually President Kennedy appointed someone else, deeming Taylor too liberal for the job. Years later, Telford and I discussed how different our lives would have been if we had both joined the CIA. "One thing I know would have been different," Telford quipped. "There would have been no Bay of Pigs."

Telford Taylor made me another offer, during my second year in law school, which I also could not accept. He had been hired to go to Jerusalem to broadcast the trial of Adolf Eichmann, a job for which he was eminently suited, having been the Chief Prosecutor of Nazi war criminals at Nuremberg and also Chairman of the Federal Communications Commission. He asked me to come with him to serve as his research assistant and translator. But I had just been elected Editor-in-Chief of the Yale Law Journal and didn't feel comfortable being away for so long. I declined the offer, and have always regretted missing that important historical event. (Years later, I observe and write about the trial of accused Nazi war criminal John Demjanjuk in Jerusalem.)

During law school I also developed a keen interest in the relationship between law and other disciplines, such as economics and science—both physical and social. I worked as a research assistant on Professor Calabresi's groundbreaking article on law and economics, and a research assistant to Professors Goldstein and Katz on their teaching and writing on law and psychiatry. I eventually collaborated with Goldstein and Katz on a book entitled Psychoanalysis, Psychiatry and the Law. Later I collaborated with Telford Taylor n several human rights projects.

During law school I also developed interests in civil rights, especially with regard to desegregation. In college I had joined the NAACP and had participated in a bus protest to Washington. In my second summer at law school I went to Howard University in Washington

HOUSE_OVERSIGHT_017131

and trained to become a civil rights observer in the South. My family was frightened when I traveled to Georgia and Alabama, but I returned unscathed but forever sensitized to the evils of segregation.

My law school career was a resounding success and I was ready for the next stage in my life—a clerkship in the nation's capital.

HOUSE_OVERSIGHT_017132

Chapter 3: My Clerkships: Judge Bazelon and Justice Goldberg

Appellate court clerkships, most especially with a Supreme Court Justice, are the most coveted positions following graduation from law school. Today, many law firms pay huge signing bonuses--some as high as $250,000--to attract Supreme Court clerks. In my day, the value of such clerkships were not measured in dollars, but rather in status and prestige. In 1962, there were approximately 18 clerks serving the 9 justices; the chief justice had 3, the associate justices were entitled to 2, but Justice Douglas--who rarely used his clerk--opted for only one. Today, each justice has __ law clerks and the chief justice has ___.

The competition for these coveted positions has always been fierce. Although, theoretically, any law school graduate can apply, most of the clerkships go to a handful of elite schools, with Harvard, Yale, Chicago and Stanford generally garnering the most. (Probably because so many of the Justices attended elite schools: The current Supreme Court has 5 justices who graduated Harvard, 3 Yale and 1 who attended Harvard but graduated Columbia.) Some clerkships were reserved for those who met certain criteria. Justices Brennan, Frankfurter and Harlan picked only from Harvard. Justice Douglas generally picked from the West Coast, often from Washington State. Justice Black favored southerners, tennis players, and "kissin' cousins", but was open to accepting recommendations from certain Yale Law School professors. Chief Justice Warren favored "hail fellows well met" and athletes! Justice Clark preferred Texans. Justice Goldberg (who replaced Justice Frankfurter shortly after I graduated) liked to have one clerk with Chicago connections.

I fit none of the pigeonholes, except that I was male and white--as were all the law clerks. This meant that, effectively, I was competing for 3 or 4 slots. My best shot was with Justice Black, because one of my mentors at law school was his recent clerk, Guido Calabresi, and he strongly recommended me to the Justice. But there was a problem. I had alienated another Yale law professor, who was also very close to Justice Black. Professor Fred Rodel was something of an iconoclast. He insisted on teaching his seminar on the Supreme Court at "Morrie's," a private club near the law school (whose "tables" had been made famous by the Wiffenpoof song: "From the tables down at Morries to the place where Louie dwells....") Morrie's was a men's club that did not serve women, so Rodel, who fancied himself a left-wing radical, simply excluded women from the seminar. When I learned of this policy of exclusion, I quit the seminar, earning the everlasting hatred of Rodel. To add insult to injury, I substituted a seminar by Professor Alex Bickel, who Rodel despised, because Bickel took a "Frankfurtiarian" approach to constitutional law, rather than a "Blackian" approach. Though I myself favored Justice Black's "absolutist" view of the Bill of Rights, I admired Professor Bickel's writings and loved his class. This was enough to make me unkosher for Rodel.

Professor Bickel gave me an important, if difficult, piece of advice when I asked him to recommend me for a clerkship. "Alan, I'm going to recommend you for clerkships, but you have to promise me you're going to turn off at least one of your barrels when you go and clerk for these judges. They're not used to being confronted directly, and you have to really be very respectful and polite and if you want to say anything critical put it in writing and read it very carefully, but don't do it in front of them." So he taught me the etiquette of being a law clerk, because in Law School, I was doing to my law professors what I had done to my Rabbis. At

HOUSE_OVERSIGHT_017133

Yale, this confrontational approach was generally admired. It had not been acceptable to the Rabbis, nor would it be to justices and judges.

Even at Yale, my chutzpah was not welcome by all the professors. Professor Fritz Kessler, was an older European trained academic who taught jurisprudence. One day, he was lecturing on Freud's influence on German jurisprudence and he misunderstood one of Freud's most important theories. I raised my hand and corrected him. After class, an older student, who had been a Marine and was married to another student in our class, grabbed me and said, "You embarrassed someone I love. If you ever do that again, I'll deck you." I was startled and replied, "How did I embarrass your wife?" He said, "Not my wife, stupid. Professor Kessler, you embarrassed him. Don't ever correct him again publicly." So much for academic freedom. But Professor Bickel was wise to caution me about toning down my aggressiveness if I wanted to succeed as a law clerk.

Guido Calabresi offered similar cautionary advice, but it was more about style than substance. He really pushed hard to get Justice Black to select me.

Professor Rodel was so concerned that I might contaminate the elderly Justice Black that he took the train to Washington to try to persuade him to reject the recommendation of his recent law clerk. In the end, Justice Black told Professor Calabresi that he had to defer to his friend's veto for that year but that he would consider me for the following year. This was the best possible news because it allowed me to accept a clerkship with Judge David Bazelon on the United States Court of Appeals for the District of Columbia.

Judge Bazelon was actually my first choice, but I also wanted--indeed I felt I needed--the status that came along with a Supreme Court clerkship in order to obtain the kind of job offers I would be seeking after finishing my clerkships. Two of my other mentors at law school, Professor Joseph Goldstein and Professor Abraham Goldstein (not related) had both clerked for Judge Bazelon. One of my primary interests in law school was the relationship between law and psychiatry. Another was criminal law. Those were also Judge Bazelon's specialties. Making the Bazelon clerkship even more appealing was the likely upcoming vacancy that would be left when Justice Frankfurter, who had suffered a stroke, retired. Bazelon was on the short list to fill the so-called "Jewish seat" on the Supreme Court. So if Judge Bazelon were to be promoted to the Supreme Court, he might take his law clerk with him.

In the end, Judge Bazelon was regarded as too liberal for the Kennedy Administration and was passed over for labor secretary Arthur Goldberg, who had no judicial experience, but boasted a distinguished career as a labor lawyer before he joined the Cabinet as Secretary of Labor. Bazelon and Goldberg were close friends, both having grown up in the Jewish neighborhoods of Chicago and being the same age. I ended up clerking for both Judge Bazelon and for Justice Goldberg, which was a dream come true. I spent two years in Washington from the summer of 1962 to the summer of 1964. These were extremely eventful years, not only for me, but for the country and the world. The Cuban Missile Crisis took place several months into my clerkship with Judge Bazelon. Martin Luther King's "I have a dream" speech was delivered in the summer of 1963. And in the fall of 1963, early in my Supreme Court clerkship, President Kennedy was

HOUSE_OVERSIGHT_017134

assassinated and Lee Harvey Oswald was murdered. I had personal connections to each of these momentous events.

Those years were also eventful in terms of judicial decisions. Many of the most important civil rights, criminal law and freedom of speech cases were decided during my tenure as a law clerk. It was a period of liberal judicial activism—the Zenith (or for those more admiring of judicial restraint, the Nadir) of The Warren Court. It was a heady time for a young liberal lawyer to be in the nation's capital.

My year of clerking for Judge Bazelon

Even more important than my substantive experiences in working with these two important judges, was the personal impact they both had on my life. Each was to serve as a mentor, though in very different ways, throughout their entire lives. Indeed, I continue to be influenced by them even years after their deaths.

I arrived in Washington during the summer of 1962, in the midst of the Kennedy Administration. Although Judge David Bazelon was a court of appeals judge—early in my clerkship he became Chief Judge—he was at the center of Washington life, both socially and politically. He knew everyone. He socialized regularly with Senators, Congressmen, cabinet members, White House staffers, Supreme Court justices, diplomats and other movers and shakers.

He had two clerks, but I was very much his senior clerk, and he didn't much like or respect his junior clerk. He saw me as a protégé and he took me with him everywhere that it was appropriate for me to go. At the center of his social life were the weekly lunches at the office restaurant of a local liquor distributor named Milton Kronheim, whose personal chef would prepare simple but superb lunches for "Milton's boys." Kronheim himself was in his mid-seventies when I met him. (He would live to 97, pitching in his weekly company softball game until his late 80s). His frequent guests, in addition to Judge Bazelon, included Chief Justice Earl Warren, Justices Thurgood Marshall, William Brennan and William Douglas, Judges J. Skelly Wright, Senators Abe Ribacoff and Jacob Javits and many other judicial and political notables. The small lunchroom where Milton's entertained had photographs of Kronheim with every president since Harding. Hundreds of other wall-to-wall photographs showed him with just about every important political, business and sports figure of the Twentieth Century.

Judge Bazelon once told me a joke about Kronheim, which, with a change of name, from Kronheim to "Katz," became a standard part of the Jewish joke cannon.

"There was a guy named Kronehiem who bragged he was so famous he could be photographed with "anyone in the world." A skeptical friend challenged him. "You can't be photographed with the President!" Within days, Kronheim was standing on the White House balcony with JFK, as photographers snapped pictures.

"Ok," the friend conceded "maybe in the United States, but not in other parts of the world!" He then issued another challenge: "You could never be photographed with Israel's Prime Minister

HOUSE_OVERSIGHT_017135

David Ben Gurion." The next day they were on a plane to Israel, and that afternoon Kronheim was standing on the balcony of the Prime Minister's house being photographed.

"Ok, here's the final challenge: maybe among Jews and Americans, you're famous, but you'll never get a picture with the Pope." Next day, they're off to Rome, and by afternoon, Kronheim is standing on the balcony of St. Peters next to the Holy Father. A nun standing in the crowd turns to the skeptical friend and asks, "Who's that guy standing next to Kronheim?"

Presidents and Prime Ministers come and go. So do Popes. But not Milton Kronheim, who was a fixture of Washington life for more than 60 years.

I was privileged to participate in many of their lunches—mostly as a quiet observer—during my clerkship. (When I became a professor, Judge Bazelon invited me whenever I visited—then as a full participant).

The first time I went to Kronheim's for lunch, we picked up two justices at the Supreme Court building: William O. Douglas and William Brennan. I had previously met Justice Brennan through his son Bill, who was my law school classmate and moot court partner. Justice Brennan was just about the nicest, sweetest, most modest, important person I had ever met. I continued a friendship with him until his death in 1997.

Justice Douglas was entirely different. Nobody ever accused him of being nice or friendly. He was surly, arrogant, dismissive and—I later learned—a blatant hypocrite. I learned this several weeks after the Kronheim lunch, when Judge Bazelon buzzed me into his office and pointed to the extension phone, signaling me to pick it up. The voice on the other end of the phone was familiar. He was berating Judge Bazelon for canceling a speaking engagement that he had previously accepted. Bazelon turned to me and silently mouthed the words "Bill Douglas," pointing to the phone. I listened as the Justice lectured my judge. Bazelon kept trying to reply, saying "I just can't do it, Bill. It's a matter of principle." Douglas responded, "We're not asking you to join, just to speak." Bazelon replied, "That's the point, Bill. They wouldn't let me join. They don't accept Jews or Blacks."

It soon became evident that the two great liberal judges were arguing about a private club that excluded Jews and Blacks. Douglas was a member of that club and had invited Bazelon to give a luncheon talk to its members. Bazelon had originally agreed, but when he learned of the clubs "restricted" nature, he withdrew his acceptance. Douglas was furious, Bazelon adamant. Neither relented. I couldn't believe that the great liberal justice not only belonged to a restricted club that discriminated on the basis of race and religion, but that he was utterly insensitive to Bazelon's principled refusal to speak at such a club. This was the height of the civil rights movement, and Justice Douglas was writing decision after decision decrying public segregation and supporting efforts to demantle it. Yet he himself was participating in private segregation and condemning Bazelon's principled refusal to become complicit in it.

This phone call had a profound effect on my own subsequent actions and my refusal to speak, or remain silent about, private clubs that discriminate, whether it be the Harvard Club of New York,

HOUSE_OVERSIGHT_017136

which refused accept women for many years, or Jewish clubs, which limit their memberships to my own co-religionists. (More on this later.)

Judge Bazelon played hard and worked even harder. For his law clerks it was all work, no play. We had to be in the office before he arrived, and his arrival time was never predictable, though his secretary would sometimes tip us off about an unusually late or early arrival. We had to stay until after he left, and he often worked late. He did not believe in vacation for the clerks—"It's only a one year job, and that means 365 days"—no personal time off. When I first came to work over the summer, I asked him for a few days off to take a preparation course for the DC bar exam. He assured me that I didn't need time off to prepare! "I hired you because you were first in your law school class. You don't have to study for this test." I told him I had been first because I always prepared, but he was dismissive of my request. I tried to prepare myself late at night, but the material was so dry and boring—the criteria to qualify for the "bulk sales act" and other information I would never use—that I always fell asleep. "I'm going to fail the bar," I told him worriedly, "and it may embarrass you." He told me that one of his earlier star law clerks who was my professor at Yale Law School had failed the bar and it didn't embarrass him. Finally, he relented when I told him that I was really having trouble focusing on the ridiculous bar exam questions and he allowed me to leave a bit early for a week to take a crash course that met from six to nine in the evening.

A few weeks after I took the exam, Judge Bazelon came storming out of his office holding a paper and not smiling. I knew that he got advance notice of the bar results and I thought that he was coming to tell me I had flunked. Instead he shouted, "You didn't need time off. You got the goddamn highest grade in the city. You're a faker," he complained, not bothering even to congratulate me on passing.

Several months later when my second son, Jamin, was about to be born, I asked the judge for the day off to accompany my wife to the hospital. He asked, "Isn't Sue's mother here?" She was. "You did your part of the job already. You can visit after the baby is born. It isn't your first child. You don't have to be there for the birth."

Fortunately, he was traveling on the day of the birth and I made it to the hospital in time.

In light of these actions and attitudes, one can only imagine how shocked I was when Judge Bazelon came back to the office from a lunch at the White House in mid-October and told his entire staff, including his clerks, to "go home and be with your families." He was grim-faced and pale. "Why?" we asked. "There may be a nuclear attack," he said solemnly. "I've just been briefed on the presence of Soviet nuclear rockets in Cuba. Neither side is backing down. Nobody wants war, but each side is calling the other's bluff. No one knows how this will turn out. Go home. Be with your families."

We all left in a panic. Bazelon called me later that evening at home. "I have no faith in those Kennedy brothers and their friends. They're a bunch of spoiled brats—their fathers' children, he said contemptuously of Joseph Kennedy. I don't like them and I don't trust them. Look at the way they screwed up the Bay of Pigs. A bunch of arrogant amateurs."

HOUSE_OVERSIGHT_017137

Early the next morning, he called me back. "I've spoken to Abe Chayes," he said referring to a Harvard Law professor who was then serving as legal counsel in the State Department. "He's a bit more optimistic that cooler heads will prevail. Come into work."

So off I went to the courthouse, where Bazelon gave us hourly updates on the Cuban Missile Crisis until it was resolved by a deal. "I misjudged those Kennedy boys," he told me when the crisis was over. "Abe tells me they did good. Much better than Bay of Pigs. They were actually quite mature. They're quick learners. They did good."

Just a few weeks into my clerkship, Justice Felix Frankfurter resigned from the Supreme Court, leaving the so-called "Jewish seat" vacant. Judge Bazelon was on the short list, along with Senator Abraham Ribicoff and Labor Secretary Arthur Goldberg. Ribicoff and Goldberg were close friends of Bazelon. All three wanted the job, but Bazelon was regarded as too liberal, especially on criminal justice matters, and was strongly opposed by Justice Department officials. I vividly remember the day Goldberg was nominated. "Arthur will be a great justice, if he has the sitzfleish to stay on the bench," Bazelon told me. "He's used to the active life of the labor lawyer. Always in the middle of the action. He's going to have to get used to the isolation, but he's smart as hell, and he's always wanted to be on the Supreme Court."

Clearly Bazelon was disappointed but he knew it would have taken a miracle to overcome the objections of the Justice Department, and he didn't have close connections to the Kennedys.

"Good for you. Not so good for me. And good for the country," is how he summarized the appointment to me a few days later. Good for me, because the new justice would certainly consider a recommendation from his old Chicago friend, when picking his next year's law clerks. I immediately began to dream of clerking for the new justice when I completed my year with Bazelon.

Judge Bazelon became Chief Judge soon after I began working for him and dominated that important court of appeals—second only to the Supreme Court—during his long tenure. His rival—both professionally and personally—was Judge (later Chief Justice) Warren Burger. Bazelon was deeply committed to equality in the criminal justice system—between rich and poor, white and black, and mentally sound and mentally ill.

These passions brought him into constant conflict with the executive and legislative branches of government, and especially with prosecutors. He knew he could never win his battles by relying on current public opinion, which showed little compassion for those who came into conflict with the criminal justice system. His weapons were education and elite academic opinion. His goal was to change minds through his opinion writing, speeches and articles. He chose his law clerks based on their ability to assist him in these tasks. "Every case presents an opportunity to change minds, to teach, to influence," he would say. "The court is a bully pulpit and we must make the most of it." His favorite story was about the New York judge who complained, "Why does Cardozo always get the interesting cases," referring to the great New York Court of Appeals Chief Judge (later Justice) who transformed tort law and other parts of the legal landscape with his elegant and influential opinions. The point, of course, is that the cases weren't at all interesting until Benjamin Cardozo got his hand—or pen—on them. He turned mundane legal

HOUSE_OVERSIGHT_017138

controversies, such as a railroad accident or a conventional contract dispute, into monumental legal decisions.

Judge Bazelon did the same with regard to criminal cases, especially those involving defendants who could not afford an adequate defense and those with serious mental illnesses. He would ask his clerks to scour the records of cases—even those not assigned to him—for evidence of injustice. He told me that most indigent defendants—and most defendants in DC were indeed indigent—did not have adequate lawyers: "You're their lawyer of last resort," he would tell me. "Search the record for errors. Tell me if you find any injustices."

"But the case isn't even before you," I would protest, or "there were no objections and so the issues aren't properly preserved for appeal."

"No matter. We will find a way to secure justice. Your job is to find injustices. My job is to figure out a way to bring about justice."

He told me about a conversation between the great Justice Oliver Wendall Holmes and one of the justice's law clerks (who were called "secretaries"). After the justice rendered an opinion denying relief to a morally deserving litigant, the clerk complained, "But Mr. Justice, the result in this case is unjust." To which Holmes reportedly responded: "We're in the law business, young man, not the justice business."

David Bazelon was in the justice business, though he used the law—sometimes stretching it beyond existing precedent—to bring about what he regarded as a just result. He was a "judicial activist", at least when it came to doing justice to the poor, the disadvantaged and the sick, and proud of it. That catch phrase had not yet become a term of opprobrium, as it has to so many today. I was proud to assist my activist judge and eagerly pursued my assigned task of searching for injustices.

I recall telling Bazelon, who was Jewish but not well educated in Jewish religion tradition, that the Torah commands not merely that we <u>be</u> just, or even that we <u>do</u> justice, but rather that we <u>actively</u> pursue justice, as if injustice never rests. The exact words of Deuteronomy—which I recalled because I recited them in my Bar Mitzvah portion—were "Justice, justice, you must actively chase after." The traditional translation "pursue" doesn't quite capture the essence of the Hebrew words, "Tzedek, Tzedek, Tirdof," since "Tirdof," comes from the root that means to run or chase after.

Bazelon asked me to make a sign for his office with these words, in Hebrew and English. He quoted them frequently in defense of his activism. They became his mantra, as they have become mine. The sign now hangs in my office. Another example of the good that has come from my not-so-good Jewish education!

The other good lesson—this one taught by Bazelon to me by example—was that justice requires some degree of compassion.

HOUSE_OVERSIGHT_017139

When I told Bazelon about the justice quote from the Torah, he asked me why the word justice was repeated. Wouldn't it have been enough to say "justice you must actively chase after." "Why 'justice, justice.'" No word, or even syllable of the Torah is supposed to be redundant. Every one has a meaning. I told Judge Bazelon that the rabbis had a field day providing interpretation to the repeat of justice. My favorite, the one I had proposed in my Bar Mitzvah speech, was that the first "tzedek" meant legal justice, while the second meant compassionate justice. Judge Bazelon corrected me: "Compassion must come before the law. The first means compassionate justice, the second legal justice." Whichever came first in Judge Bazelon's court, every decision that he wrote or joined combined elements of both. His compassion wasn't always appreciated, even by its objects. Judge Bazelon once showed me a letter he received from his most famous defendant, a man named Monte Durham. Durham was the defendant in the case in which Bazelon announced his innovative approach to the insanity defense in the form of a new rule called "The Durham Rule" that declared a person to be legally insane, and thus not guilty, if his crime was "the product" of a mental disease or defect. This controversial rule revolutionized the relationship between law and psychiatry. The letter from Monte Durham complained about the rule bearing his name. "Now everyone calls me 'Durham the Nutcase.'" He noted that when doctors discover a new disease, they name it after themselves and not after the patient. He wondered why the new rule wasn't called "The Bazelon Rule" instead of the "Durham Rule!" Bazelon apologized to Durham and noted that if judges could name new rules after themselves there would be too many new rules.

Judge Bazelon and I were a match made, if not in heaven, at least in legal nirvana. I learned a lot from him and even taught him a little. We remained lifelong friends, though the year of clerking was more like hell than heaven, at least as regards to working conditions.

Bazelon was never satisfied. He never told me that a draft opinion or article was good. It always needed to be "made better." "It's getting there" or "it's close," was the highest compliment he ever paid. But when it was done and published, and colleagues complimented him on the finished product, he would always give me credit. But never to my face. I always had to hear it from others. He was beyond a perfectionist. He knew his opinions would be read by generations of law students, professors, lower court judges and assorted critics. He was on a never-ending mission, and nothing was ever good enough. Even if it was good enough to publish or deliver because of artificial deadlines, it was never quite good enough for David Bazelon. But the long hours, demanding boss and difficult working conditions were well worth it. Law clerks who endured this trial by fire went on to great careers. Former Bazelon clerks include the deans of Harvard and Yale Law Schools, the President of New York University, the former Chancellor of the New York City school system, a prominent reform rabbi, numerous law professors, lawyers and business and political leaders. He influenced us all, and his influence continues in the work that many still do. As Peter Strauss, a law professor at Columbia once aptly characterized the relationship between Judge Bazelon and his clerks: "He the pebble, we the ripples."

The primary job of the law clerk related to the appellate cases that came before the United States Court of Appeals for the District of Columbia. In the years I was a clerk, that court served not only as a federal appellate court, but also as the Supreme Court of the District of Columbia, a reasonably sized city with a racially mixed population and a relatively high violent crime rate. Many of our cases involved very high level appeals relating to federal administrative

HOUSE_OVERSIGHT_017140

agencies—the so called "alphabet agencies"—such as the FCC, FPC, SEC and FDA. The rest were run of the mill criminal cases—murder, robbery, rape, assault and other street crimes. It was a perfect combination for a budding law professor who was interested in constitutional and criminal law.

Our task began with a case record, which consisted of the appellate briefs filed by the lawyers and an "appendix," which included relevant excerpts from the trial transcript and motions filed before the trial court. Some records were relatively short, perhaps 300 pages in total. Others were humongous, as many as 5,000 pages. Then there was the complete trial transcript—a verbatim account of every word spoken during the trial, as well as during the pretrial and post-trial proceedings. Judge Bazelon would often ask me to read the entire transcript in search of errors or particular issues that were of interest to him.

When we completed the review, we would discuss the case with the judge, who had read the briefs and perused the appendix in preparation for the oral argument in court. Occasionally, we were permitted to listen to the oral argument, especially when leading lawyers were arguing (which was rare), or when issues close to the judge's heart were being considered. But generally, we were required to remain in the chambers working while the judge presided over the oral argument.

Since Bazelon was the Chief Judge, he always presided and got to assign the opinion to one of the three judges on a panel (or nine when on rare occasions the entire court heard the case "en banc"). Following the oral argument, there was a conference among the judges during which a tentative result was reached and the case assigned. Bazelon always assigned the most interesting cases to himself, or to a judge whose decisions he wanted to influence.

When the conference was over and the case assigned, we would meet with the judge and he would tell us which clerk was to work on the opinion. I always got the interesting cases (at least the ones that interested the judge). My co-clerk, who the judge didn't much like, got the dregs. This was fine with him, since he didn't much like working closely with the judge.

Then the real work would begin. Draft after draft was submitted, marked up by the judge and rejected with the admonition, "You can do better," or sometimes "start over, this draft isn't right."

After many drafts, and some pressure from the other judges on the panel, the opinion was released to the public. Generally, they were majority opinions, often unanimous, but frequently they were dissenting or concurring opinions. This was a deeply divided court and the dissenting opinions pulled no punches in criticizing the majority, and vice versa.

At the end of the year, the clerks would prepare bound volumes of all the opinions we worked on during our clerkship. One was given to the judge and the others to us, as mementoes of our year. As I write these words, I have in front of me the maroon volume engraved with the following words:

"Chief Judge David L. Bazelon

HOUSE_OVERSIGHT_017141

Opinions 1962-1963
Alan M. Dershowitz, Law Clerk"

It is a treasured possession. A year in the life of! And what a year it was.

My first case involved a man named "Daniel Jackson Oliver Wendell Holmes Morgan"—Quite a name! Any lawyer would be proud to have been named after. "Daniel Webster," "Andrew Jackson" and "Oliver Wendell Holmes." That's what Mr. Morgan thought too. The only problem was he wasn't a lawyer and that wasn't his name! He was an uneducated, but slick, African American man whose parents were sharecroppers and who made his way to the District of Columbia, where he apparently bought a dead lawyer's bar certificate in a junk shop. He started to practice law, and he did extremely well, beating real prosecutors in several cases involving street crimes. For more than a year, he went to court and argued to juries and judges. His reputation spread in the downtown area, as he kept winning difficult cases. Ultimately the feds checked him out, discovered that despite his name, he wasn't a lawyer, and charged him with multiple counts of fraud, forgery, impersonating an officer of the court and false pretenses. He represented himself at trial, was convicted and sentenced to 3 to 10 years in prison.

The court appointed a lawyer named Monroe Freedman to argue his appeal. Judge Bazelon invited me to watch the oral argument.

I was blown away by Freedman's eloquence, erudition, command of the record and ability to further his argument while responding to hard questions. I had participated in moot court appeals as a law student, and I had done very well—even earning a job offer from one of the judges who was a partner at a Jewish law firm. But this was a different league. I remember thinking "I want to be like this guy," and wondering whether I could ever be that good. The lawyer for the prosecution was also quite good, though not up to Freedman's high standards. He was an African American named Charles Duncan, who, I later was told, was the son of the singer Todd Duncan, who had played "Porgy" in the original Broadway run of the Gershwin opera.

Following the argument, the judges conferred and unanimously decided to affirm the conviction. I was upset, because Freedman had clearly "won" the argument and had certainly convinced me that his client deserved a new trial, or at least a reduction in the sentence. I pleaded with Bazelon to let me try to draft an opinion reversing the conviction. He said, "go ahead," because he too was somewhat sympathetic to the defendant. "But you must find a valid legal basis for reversal. It's not enough that the defendant's lawyer was better than the government's lawyer. Nor is it enough that we think the defendant should get relief. There has to be a solid legal basis. Go ahead and look for one."

I searched and searched, but Freedman had mined every possible nugget from the sparse record and to no avail. There was no plausible legal basis for reversal. I learned several important lessons from this exercise in futility: there's an enormous difference between winning an appellate argument and reversing a conviction; there's an equally significant difference between wanting to see a conviction reversed and finding a valid basis for reversal; all the hard work in the world cannot bring about a result if the facts and the law don't justify it. (At least that's what I believed until such cases as Bush v. Gore, of which more later.)

HOUSE_OVERSIGHT_017142

Subsequently, I later learned a series of related lessons that parallel the above: even when there is a firm basis for reversal, a bad job of lawyering will not bring it about in most cases; a court that is determined to affirm a conviction—because they don't like the defendant or for some ideological reason—will not be convinced even by the most compelling arguments and the most egregious record; without hard work, many of the most persuasive reasons for reversal are never uncovered. I learned these lessons later, because in Judge Bazelon's court, the judge and the law clerks often did the jobs that the lawyers were supposed to do. Not in the case of Daniel Jackson Oliver Wendell Holmes Morgan, because his lawyer, Monroe Freedman, had done all the hard work and made all the plausible arguments.

Eventually Freedman and I became friends and colleagues, and he went on to become Dean of Hofstra Law School and one of the nation's leading experts in legal ethics. I tried to follow in his large footsteps but I'm not sure I ever made as good an oral argument as he did in the Morgan case. It was quite a way to begin my career as a law clerk.

The remaining cases during my year were in many ways representative of the Supreme Court's future docket during the haydays of the Warren Court. Many dealt with the rights of indigent defendants—an issue that came to the fore in the Supreme Court's decision in Gideon versus Weinright, decided toward the end of the year of my Bazelon clerkship. That decision ruled that every indigent criminal defendant in a serious case had the right to appointed counsel.

The opinions of Judge Bazelon over the years had the laid the foundation for this decision and several of them were cited in the briefs filed by his friends Abe Fortas and Abe Krash, who had been appointed to Represent Gideon. (My friend John Hart Ely was working for the Fortas firm during the summer the briefs were being prepared and I reviewed and edited several drafts with John.) Bazelon's opinions—more often dissents than majority—had established the conceptual framework for a broad-based claim of equality in the criminal justice system. He had gone considerably further than the Supreme Court would ever go in seeking to assure that indigent defendants were treated no differently from wealthy ones. Many of the cases my year dealt with this issue.

Other cases dealt with the pervasive problem of police perjury—today it's called "testilying"[15]—especially in the context of searches and interrogations. If a search or interrogation is found to be unconstitutional, its fruits are generally excluded, even if they would conclusively prove the defendant's guilt. Not surprisingly, many police officers (as well as prosecutors) hate these "exclusionary rules" and do whatever they can to circumvent them. Some policemen even resort to perjury, occasionally assisted by prosecutors in making their "testilies" fit the law. I was shocked when Judge Bazelon first told me about this phenomenon. We didn't learn about this dark side of the law at Yale, and at first I was skeptical. But then when I read case after case in which police officer—often the same ones from the same drug unit—would give essentially the same scripted testimony, I began to believe it.

Bazelon had no patience for testilyers, for the prosecutors who coached them, or for trial judges who pretended to believe their obvious lies. He would call them on it, much to the chagrin of

[15] See Reasonable Doubts, Best Defense

HOUSE_OVERSIGHT_017143

some of his fellow judges, especially Warren Burger. Sparks would fly and Bazelon generally ended up in dissent, but he had made his point.

Years later, in my first popular book, *The Best Defense*, I summarized what I had first seen in Judge Bazelon's chambers and had then experienced in several cases I had litigated as a practicing lawyer. I called my summary "The Rules of the Justice Game:"

Rule I: Almost all criminal defendants are, in fact, guilty.

Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.

Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.

Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.

Rule V: All prosecutors, judges and defense attorneys are aware of Rule IV.

Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.

Rule VII: All judges are aware of Rule VI.

Rule VIII: Most trial judges pretend to believe police officers who they know are lying.

Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.

Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.

Rule XI: Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).

Rule XII: Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.

Rule XIII: [Almost] Nobody really wants justice.

The seeds of my career as a criminal lawyer were planted deeply into fertile soil during my clerkship. So were the seeds of my career as an academic who focused, early in my years at Harvard, on the relationship between law and the social sciences, especially psychiatry and psychology.

HOUSE_OVERSIGHT_017144

One of the most intriguing cases during my year with Judge Bazelon began as an ordinary pick pocketing of a wallet containing $14. Based on the sparse evidence, "the jury could have inferred either that the wallet was picked from [the alleged victim's] pocket, or that it was accidentally dropped from his pocket and was picked up by someone who ran off with it."[16] The judge instructed the jury that there is a legal presumption that a defendant's "flight may be considered by jurors as evidence of guilt."

There was no dispute that the defendant did flee when confronted by the alleged victim shouting , "Hey, that's my wallet. Give it back to me." But of course the defendant might well flee even if he simply picked up a dropped wallet and didn't want to return it. Such an action would be immoral and perhaps even minimally criminal—the misdemeanor of failing to return a found wallet, for which he had not been charged. But the defendant here was charged with the felony of robbery. The jury convicted him of robbery and the judge sentenced him to prison for two to six years.

When the case came across my desk, I saw it as an opportunity to use my law school background in psychiatry and law—I was working on a casebook with two of my law school professors on "Psychoanalysis, Psychiatry and the Law"—to reverse what appeared to be a possibly unjust conviction. The great legal commentator Wigmore had written the following about evidence of guilty feelings:

> "The commission of a crime leaves usually upon the consciousness a moral impression which is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by a delusion, and not by the action doing of the act."[17]

This view had become the accepted wisdom by lawyers, judges and professors and was the basis for the judge's instructions to the jury in the pick pocketing case. I found it highly questionable, especially in the context of the facts of the case.

In an effort to support my conclusion that the defendant's flight in this case was equally consistent with the legally innocent explanation that he was fleeing to avoid returning a dropped wallet, or the guilty explanation that he was fleeing from a pick pocketing crime, I introduced a quote from Sigmund Freud:

> "You may be lead astray…by a neurotic who reacts as though he were guilty even though he is innocent—because a lurking sense of guilt already in him assimilates the accusation made against him on this particular occasion. You must not regard this possibility as an idle one; you have only to think of the nursery where you can often observe it. It sometimes happens that a child who has been accused of a misdeed denied the accusation, but at the same time weeps like a sinner who has been caught. You might think that the child lies, even while it asserts its innocence; but this need not be so. The child is really

[16] Miller v. US (June 14, 1963)
[17] Centuries early, the Jewish scholar Maimonides had provided a more nuanced psychological insight. [quote]

HOUSE_OVERSIGHT_017145

> not guilty of the specific misdeed of which he is being accused, but he is guilty of a similar misdemeanor of which you know nothing and of which you do not accuse him. He therefore quite truly denies his guilt in the one case, but in doing so betrays his sense of guilt with regard to the other. The adult neurotic behaves in this and in many other ways just as the child does. People of this kind are often to be met, and it is indeed a question whether your technique will succeed in distinguishing such self-accused persons from those who are really guilty.

In addition to citing Freud and dozens of other psychological sources, I also invoked my favorite novelist, Dostoevski, noting that in the Brothers Karamazov:

> "the author describes how Ivan—the brother who had desired death of the father but had not perpetrated the act—manifests all the traditional symptoms of guilt described by Wigmore, whereas the actual murderer reacts in a cool dispassionate way, consistent—according to Wigmore—with innocence."

Judge Bazelon approved of my somewhat sophomoric display of erudition, so long as at least one other judge agreed to reverse the conviction and order a new trial with a proper instruction on flight and guilt.[18]

Judge Fahey did agree, while writing a short concurrence. Judge Burger wrote a scathing dissent—arguing that our proposed instruction "may be appropriate to a philosophical interchange between judges, lawyers and experts in psychology…but was unnecessary to a jury." Judge Bazelon assured me that Burger's dissent "proves we're right."

All in all the Bazelon clerkship proved to be a turning point in my life. He helped shape me into the person I have become. He influenced me as a lawyer, teacher, writer, public intellectual and as a liberal Jew. His highest praise for any person was that he or she "is a mensch." I have aspired to that accolade. When Judge Bazelon retired in 1985, I wrote the following about his contributions to our nation:

> David Bazelon is certainly not a household name to most Americans. Yet Judge Bazelon—who just retired after thirty six years of distinguished service on the US Court of Appeals for the District of Columbia—has been your conscience in Washington since 1949.
>
> No single judge—whether on the Supreme Court, the lower federal courts or the state courts—has had a more profound impact on the law's sensitivity to human needs.

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[18] The new instructions were to follow these principles:

> "When evidence of flight has been introduced into a case, in my opinion the trial court should, if requested, explain to the jury, in appropriate language, that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given, that they are not to presume guilt from flight; that they may, but need not, consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt."

HOUSE_OVERSIGHT_017146

…

> As a judge, he saw the enormous disparities between how the wealthy are treated in court and how the poor are mistreated. Although he provided few final answers, he pricked the conscience of a nation, and he goaded the US Supreme Court into action in several cases….

I pointed out that no student can go through a three-year course at any major law school without studying the life work of David Bazelon—and I predict that this will be true well into the next century. The reason for Bazelon's continuing impact is that his primary role—as he saw it—was to raise enduring questions, not to provide transient, trendy solutions. He saw the role of the courts—especially the intermediate appellate courts, such as the one he served on—as uniquely capable of raising questions and directing them at the Supreme Court, the lower District courts, the legislatures and the executives. Bazelon was at his finest when he threw the ball back at government officials, making them think hard, reconsider and question their own programs and political solutions.

…

Over my own career, I have certainly not been known for effusively praising the judiciary. Indeed, part of the reason I have been so critical of so many judges is that I learned at the feet of one who set a tone and provided a model that few can meet. Perhaps in that respect Bazelon has made me too tough a critic of others. I know he would be proud of having provoked hard questions, even about the judiciary that he loves.

Several years after retiring, David Bazelon called to inform me that he had early stage Alzheimer's, a disease that also afflicted my father. I visited with David all through his illness, often with his closest friend Bill Brennan. We would take David on walks, reminisce with him and tell him stories. I remained his law clerk until he died at age 93.

My clerkship with Justice Arthur Goldberg was, in many ways, more exciting than my clerkship with Judge Bazelon. It was, after all, on the Supreme Court, where nearly every case made headlines. During my Goldberg clerkship, President Kennedy was assassinated, Lee Harvey Oswald was killed, and Lyndon Johnson ascended to the oval office. Many transforming decisions were rendered in areas as wide-ranging and important as desegregation, freedom of the press, the rights of criminal defendants, the law of obscenity, the death penalty and trial by jury. Yet, in a more personal way, my second clerkship was somewhat anticlimactic. I learned far more during my year on the court of appeals than during my year on the High Court, in part because Judge Bazelon was such a remarkable teacher and in part because it was my first exposure to the judiciary in action. This is not to diminish the impact Justice Goldberg had on my life. It too was profound and enduring. The major difference was that Justice Goldberg, who saw me as a protégé, had a specific life plan for me: he wanted me to follow in his footsteps. He saw my professional life unfolding in parallel to his. He wanted me to work in the Kennedy

HOUSE_OVERSIGHT_017147

administration. Indeed he arranged for me to become an assistant to then Attorney General Robert Kennedy—without even asking me! It was well intentioned, and it might even have been the right choices of jobs following the clerkships, but it was his choice, not mine. He wanted me to aspire to a judgeship, perhaps even as a Justice of the Supreme Court, but I never wanted to be a judge. (Neither, it turned out, did he, since he resigned from the Supreme Court after only 3 years.)

Judge Bazelon, on the other hand, encouraged me to create my own unique career path and avoid the "cookie cutter" paths for which most elite young lawyers opt. "Don't follow in anyone's footsteps," he urged me. "Your feet are too big to fit anyone else's print. Create your own life. You are unique. Live a unique life. Take risks. Live boldly." It was scary, but it fit my personality to a T.

Half way through my year with David Bazelon I was offered a clerkship with Justice Arthur Goldberg. I had also been offered a clerkship with Justice Hugo Black, but I strongly preferred to clerk for a new Justice whose views were not as firmly formed. I asked to see Justice Goldberg before I formally accepted his offer. I told him that I wanted him to know that I would not be able to work on Saturday or Friday night and asked him if he still wanted to extend the offer. He angrily replied, "I should withdraw the offer just because you asked me that ridiculous question. What do you think I am? How could I possibly turn down somebody because he is an orthodox Jew?" I apologized for asking the question, but told him that I had been previously been turned down by the firm of Paul Weiss, Rifkin, Wharton and Garrison. He said, "Paul Weiss turned you down because you were orthodox? I'm going to call my friend Si Rifkin. He won't let them get away with that." I sheepishly replied that it was Simon Rifkin who turned me down. (Years later, Arthur Goldberg was offered a partnership at Paul, Weiss and before accepting he insisted on being assured that what happened to his law clerk would never happen to another Orthodox Jew. Paul, Weiss now has many Orthodox Jews). Goldberg told me that my co-clerk was Christian and didn't work on Sunday, so he had assistance available to him seven days a week. Me on Sunday and my co-clerk Lee McTurnan on Saturday. It worked very well, except that on one Saturday an emergency death penalty petition came to Justice Goldberg, and I was the death penalty specialist. So Justice Goldberg had his driver take him to my house in Hyattsville, MD, where he knew I would be, and we conferred on the case and he made his decision.

A few months before I started my Supreme Court clerkship, my grandmother came to town and I took her and my son Elon, who was then 2 years old, to see the Supreme Court. We got permission to go to Justice Goldberg's chambers, but he was not there. His secretary, Fran Gilbert, invited me to take my grandmother and my son in to the Justice's private office to look at the paintings, which were all done by his very artistic wife, Dorothy. The new decorations in his office had just been finished and his secretary told me that Goldberg was proud of how nice they looked. My son, however, had no appreciation for the new rug and proceeded to leave a large yellow stain right in front of Justice Goldberg's desk. When the Justice finally came in I was on my hands and knees scrubbing the rug with soap, only making it worse. This time, he almost did fire me, but with my grandmother there he would have had a hard time. My grandmother did have an argument with him. She told him that she noticed that morning that I had davened (prayed) for only twenty minutes. "It takes at least a half hour," she said. "He's skipping. Tell him to take the full half hour." Justice Goldberg shook his finger at me and said, "Listen to your

HOUSE_OVERSIGHT_017148

Grandmother." (Justice Steven Breyer, who succeeded me as Goldberg's law clerk, now sits in Goldberg's old office.)

Before I knew I was to be selected by Justice Goldberg, I interviewed with several of the other Justices, including John Harlan, an elegant aristocrat whose grandfather had also served on the Supreme Court. He was impressed with my grades and my law review experience, but he gently asked me why I hadn't worked during the summer for one of the "Great Wall Street firms." I couldn't believe that he didn't know that the "Great Wall Street Firms" were not hiring Jewish kids from Brooklyn whose ancestors came over from Poland and who hadn't attended an Ivy League college. Harlan had himself been the senior partner in one of those firms, and I assumed that he was familiar with their bigoted hiring policies. I later learned from one of his Jewish law clerks – he hired many Jews to work for him when he was a judge – that Justice Harlan was probably oblivious to his firms hiring practices, or at least never really thought about them. Maybe!

An interesting event marked a transition between my two clerkships. I began working for Justice Goldberg on August 1, 1963, just ___ days before Martin Luther King delivered his "I have a dream" speech from the steps of the Lincoln Monument. A large rally was planned and I wanted to attend. But Justice Goldberg told me that Chief Justice Earl Warren did not want members of the judiciary—which included clerks—to be on the mall that day, because there might be violence and cases growing out of the violence might come before the courts. I really wanted to hear Martin Luther King speak and so I asked Judge Bazelon what I should do. "Come with me," he proposed. He and another judge were planning to go to the mall and listen from the rear, and off to the side, in relative anonymity. I went with them and heard—and barely saw—that remarkable speech (following several long winded speakers representing the groups that had organized the event.) I never told Justice Goldberg that I had disobeyed the Chief Justice order.

HOUSE_OVERSIGHT_017149

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My Year of Clerking For Justice Goldberg

Justice Arthur Goldberg was a man of action. Before being nominated at age 54 to the Supreme Court by President John F. Kennedy, Goldberg had accomplished an enormous amount. Unlike most of the current justices, he would have been in the history books even had he never served on the High Court.

Arthur Goldberg helped establish the profession of labor law. He represented the most important labor unions in the country. He helped merge the American Federation of Labor (AFL) with the Congress of Industrial Organizations (CIO). He helped rid unions of communist influence. He argued some of the most significant cases before the Supreme Court and other courts, including the Steel Seizure Case of 1951. He was, perhaps the most successful Secretary of Labor in history, settling one strike after another and being recognized as a legendary mediator.

The Supreme Court is not a place of action, it is an institution of reaction—to cases and controversies generated by others. It is a place of thoughtful, often solitary, meditation and research. Justice Goldberg was used to working with many people. He was accustomed to crisis. His phone had always rung. When he arrived at the Supreme Court, as he once summarized the situation, "my phone never rings." The High Court is the loneliest of institutions. As Justice Brandeis once put it, "here we do our own work." The Justices only occassionally interact: on the bench, in the weekly, somewhat formal, conference; and in informal one-on-one meetings, which were rare then and even rarer today. It is fair to say that Justice Goldberg was somewhat lonely, often restless and craved the active life he had left behind.

This is not to say that Justice Goldberg was not a serious intellectual. He was. He was also one of the smartest justices in history. He loved the Supreme Court. He loved the law. He loved having intense discussions with his law clerks about jurisprudence and the role of the Supreme Court. But he needed more than contemplation, deliberation and discussion. The "passive virtues," as Professor Alexander Bickel once characterized the Supreme Court's role in not making decisions, was a vice to Arthur Goldberg. He wanted to get things done. He too was an unapologetic judicial activist. He came to the High Court with an agenda—a list of changes he wanted to help engender.

I will never forget my first meeting with my new boss when I came to work in the Supreme Court during the summer of 1963. He tossed a certiorari petition at me from across his desk and asked me to read it in his presence. It was only a few pages long and I did. He then asked me, "What do you see in it?" I said, "It's just another pro se cert petition in a capital case." He said, "No, what you're holding in your hand is the vehicle by which we can end capital punishment in the United States." Abolishing the death penalty was the first item on his "to do" list as a justice.

My major responsibility during the first part of my clerkship was to draft a memorandum supporting Justice Goldberg's views that the death penalty was cruel and unusual punishment in violation of the Constitution. He knew we had no chance of getting the majority to support that view—at least not yet—but he wanted to start a dialogue that would ultimately lead to the judicial abolition of the death penalty. He decided to focus first on an interracial rape case involving an African American defendant and a white victim, since almost no whites had been executed for

HOUSE_OVERSIGHT_017150

raping Blacks, but many Blacks had been executed for raping, or even assaulting, white women. I recount this story in greater detail in the chapter on the death penalty. For now, suffice it to say that he knew that the key Justice would be William Brennan, since if liberal Brennan would not go along with him he had no chance of beginning any meaningful dialogue. Since I had done all the research, he assigned me the delicate task of trying to get Justice Brennan to join our opinion. It was a daunting task for a 24-year-old law clerk to persuade a Justice of anything, but I went in to see Justice Brennan and he listened to me politely without committing himself. Eventually he did join Justice Goldberg's dissenting opinion and the dialogue was begun. Within less than a decade, it resulted in the judicial abolition of capital punishment, but soon thereafter in its resurrection of the "game" of two steps forward, one step backward is still ongoing.

My conversation with Justice Brennan marked the beginning of what developed into a lifelong friendship and mutual admiration society. One of my great treasures is a handwritten letter from the justice in 1982 that includes the following:

> "There are winds swirling these days that too few resist---it's a comfort to know that outside there are steadfast champions who are putting up a gilliant fight. You are first among them and that's a matter of special pride for those of us who have followed your career with increasing satisfaction." [check quote]

As I write these words, the death penalty is now deemed constitutionally permissible, at least for certain crimes, though I am convinced that Justice Goldberg's "pet project" marked the beginning of what will be its ultimate demise in the United States.

Justice Goldberg's "pet project" and the way he sought try to implement it, tells us much about the man and his relationship to his law clerks, but it doesn't tell us everything. He regarded his "one year clerks" as "law clerks for life." After I completed my clerkship, Justice Goldberg continued to give me assignments, ranging from helping him pick future clerks and assistants, to editing his speeches and articles, to helping him draft resolutions at the United Nations (most notably Security Council Resolution 242, following Israel's victory in the Six Day War of 1967), to assisting in his campaign for Governor of New York. He called me for help, advice and just to "schmooze" about the state of the world until his death at the age of 81.

Even while he served on the Supreme Court he took an interest in his law clerks and their intellectual development. He included us in his weekly Friday afternoon lunches or teas with noteworthy people. When such people came to visit the justice, he always introduced us and encouraged us to sit on part of the discussion. Knowing that I was interested in Israel, he invited me to meet the Israeli Ambassador to the United States, Avraham Harmon as well as visiting Israeli public officials. When I went to Israel in 1970 he asked me to smuggle a carton of Lucky Strike cigarettes to Israel's Prime Minister Golda Meir, who he had known from their earliest Zionist days together in the Midwest.

Since Justice Goldberg had very few clerks—he served only three terms—he was able to remain close to all of us. He invited us to his famous Passover Seders, where he and his wife Dorothy sang labor and Zionist songs from their youth. When he moved to New York, he attended High

HOUSE_OVERSIGHT_017151

Holiday services with my family in Brooklyn. The Lyon's Den, a popular New York gossip column, carried the following vignette: [C] He was close to each clerk in a different way, following our careers, advising us on life choices and encouraging us to "do great things."

Three months after I started working for Justice Goldberg I was in his secretary's office while she was talking on the phone to her husband who was an officer in the U.S. armed forces. I think he had something to do with communications, because he told her that shots had been fired in Dallas. We turned on a small television set that had been in my cubicle ever since the World Series a couple of months earlier. Nothing was yet on the news. A few minutes later everyone in the world knew that President Kennedy had been shot. It was a Friday morning and the nine Justices of the Supreme Court were in their weekly private conference, which no one, except for the Justices, was allowed to attend. There were no secretary, clerks or messengers. I had been given strict instructions never to interrupt Justice Goldberg during one of these conferences, but I knew this was an exception. And so I went to the door of the private conference room and knocked. Justice Goldberg, being the junior Justice, answered the door and gave me a dirty look, saying, "I told you not to interrupt me." I said, "Mr. Justice, you are going to want to know that the President has been shot." Several of the Justices immediately gathered around my little television set which, it turned out, was the only one in the entire Supreme Court building. We watched, as the news got progressively worse, finally leading to the announcement that the President was dead. The Chief Justice asked all of the Justices to disperse for fear that there might be a conspiracy involving attacks on other institutions. The clerks stayed behind to finish the court's business.

The following night, right after the Sabbath was over, Justice Goldberg asked me to pick him up and drive him to the White House. He was closely connected both to the Kennedy family and to Lyndon Johnson, and the new President wanted his advice. I picked up the Justice in my old Peugeot, which was filled with children's toys. I drove him to the White House gate. Goldberg asked me to wait for him, since the meeting would be relatively brief, and drive him home. When the White House guard looked into the car, he immediately flung the back door open and grabbed a toy plastic gun. Nerves were pretty tense. He wouldn't let me wait inside the White House gate, so I had to wait outside until the Justice returned. I also drove him to the funeral and was with him when the news came over the radio that Lee Harvey Oswald had been shot. Goldberg exclaimed angrily, "What kind of a country are we living in!"

Shortly thereafter, Chief Justice Earl Warren told the Supreme Court staff and employees that he was becoming Chairman of the newly formed Warren Commission. I asked Goldberg why he would do that. Goldberg told me something, which only in retrospect became clear. He said that the President had asked him to perform a patriotic duty and to convince the American public that the act was that of a lone gunman, and not a conspiracy by the communists. Warren agreed because he did not want to allow any excuses either for a return of McCarthyism or for military hostilities between the Soviet Union and the United States. I later learned that Lyndon Johnson personally believed that there was a conspiracy behind the Kennedy assassination, but handpicked the Warren Commission to assure that even if the evidence pointed in that direction, it would be covered up in the interest of national security.

HOUSE_OVERSIGHT_017152

Another controversial issue during my year on the Supreme Court was obscenity. I recall Justice Goldberg coming back from a screening of an allegedly obscene movie called "The Lovers" and saying "That damn movie ought to be banned, not for obscenity, but for fraud. There were no good dirty parts." There was another case involving a dirty book called *Fanny Hill*. The book was not included in the record, but Justice Goldberg wanted to read it. He was embarrassed about going to a bookstore and buying it himself, so he asked me to go and buy a copy of the book, but not to read it. Hah!

Some people think that Goldberg was bored on the Supreme Court. He was used to his phone ringing all the time. The truth is that his phone rang all the time he was on the Supreme Court. He always had visitors and guests. He lived a very hectic life.

Sometimes the guests were unwelcome. I remember one situation where a man knocked at the door of Justice Goldberg's chambers (in those days, anybody could walk into the chambers; today, that is impossible). He told me that he had met Justice Goldberg and that he knew that the Justice was making a great financial sacrifice to serve on the Supreme Court. He was starting a foundation, he told me, to help people make the transition from lucrative private life to low paying government jobs, and he would like to offer the Justice the opportunity to have his salary supplemented. When I told the Justice the story, he told me to "Throw the bum out." The "bum" turned out to be Louis Wolfson, a man facing stock fraud charges, who later made a similar offer to Justice Fortas. Justice Fortas accepted the offer and lost his seat on the Supreme Court as a result. Justice Goldberg was far more scrupulous. One day he received a basket of fruit. I don't remember if it was for Hanukah, Christmas or a birthday. But he immediately looked at the card and saw that it was from Katherine Graham, the publisher of the Washington Post. The important case of *New York Times v. Sullivan* was then pending before the Supreme Court. Goldberg insisted that we immediately send the basket back. I told him that I had eaten a banana from it. He insisted that I go to the fruit store and buy one to replace it before having the basket returned.

Justice Goldberg was a deeply ethical, but only marginally religious, man. He did not attend synagogue regularly, though he was very active in numerous aspects of Jewish public life. Every year he had a Passover Seder, to which he invited all the Washington luminaries. When I was his law clerk, he invited me and I gladly accepted. Knowing that I was strictly kosher, he arranged to have the entire Seder dinner catered by an expensive kosher caterer. At the last minute, my mother forbade me from attending a Seder other than hers, and I had to decide whose views trumped, a Justice of the Supreme Court or a Jewish mother. I don't have to tell you who won, and Justice Goldberg remained angry with me for months, saying, "All those people had to eat catered kosher food because of you, while you ate your mother's home-cooked food."

Shortly after I received the offer to clerk with Justice Goldberg, my second son Jamin was born. Since we did not know many people in Washington, we asked for a recommendation for a mohel - - the man who performs the ritual circumcision. His name was Goldberg. We duly entered his name in our address book. One night I called him to discuss the upcoming bris. A man answered the phone and I inquired, "Mr. Goldberg?" He replied, "Who is this?" I said, "Is this Mr. Goldberg the mohel?" He replied, "No, this is Mr. Goldberg the Justice." I quickly apologized and addressed him as Mr. Justice Goldberg. I still don't know the appropriate way to address a mohel.

HOUSE_OVERSIGHT_017153

One day while he was hearing arguments, and I was working in the office, I received a note from the Justice asking me whether it was required under Jewish law that an orthodox woman always wears a hat, even while arguing a case in the Supreme Court. The Supreme Court had a rule prohibiting wearing any head covering. But Goldberg was willing to insist that there be an exception if there was a religious obligation. I wrote back saying that there was such a rule for strictly orthodox women. He wrote back asking me to come into the courtroom, which I did. When I got there I looked at the offending hat. Just as I did so, I got another note from Justice Goldberg saying is there anything in Jewish law that requires a woman to wear such a big ugly hat. I assured him that there was not. Nonetheless they made an exception, but Justice Goldberg told me to discreetly inform the woman that next time she argues, she should wear a smaller hat.

Justice Goldberg also asked my advice about whether he should sit on the opening day of Court, which fell on Yom Kippur, the holiest day of the Jewish calendar, during which all work is prohibited. I looked at the calendar of cases to be argued that day and noted that there was a capital case. I told him that Jewish law permitted violation of nearly all religious precepts if human life was at stake and recommended that he call the rabbi of his congregation. The rabbi confirmed my view and told him to sit only on that case. He did and helped save the life of the condemned man.

The Supreme Court had a small basketball court on the fifth floor. The clerks called it "The Highest Court in the Land," since it was directly above the Supreme Courtroom itself. Rumor had it that in previous years the clerks used to play basketball while the Justices were hearing arguments, and the sound of the bouncing ball could be heard through the ceiling of the Court. A rule was established therefore prohibiting the playing of basketball during Court sessions. By the time I got there the games were in early evening, and occasionally Justice White, who had been a former professional football player, participated. As a basketball player, White was a great football player - - not much finesse, but lots of elbows. I played only occasionally, but was there once when Justice White was in a game. He boxed me out for a rebound and, in the process of grabbing the ball, hit me in the face with his elbow. I instinctively yelled, "That's a foul, damn it!" to which I quickly added, "Mr. Justice." I was overruled by His Honor.

According to historians of the Supreme Court, the 1963-64 term was among the most significant and innovative in the history of the American judiciary, and Justice Goldberg was at the center of the action. He assigned me to draft the famous *Escobedo* opinion, which changed the law of confessions and led to the even more famous *Miranda* decision. Escobedo was suspected of killing a relative and he was interrogated without his lawyer being present, even though his lawyer was in the police station, trying to advise him on his right to remain silent. I penned the following words that became an important part of my legal philosophy throughout my career:

> We have…learned the…lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the

HOUSE_OVERSIGHT_017154

> effectiveness of a system of law enforcement, then there is something very wrong with that system.

The theme of this paragraph – the right to know of one's rights – has pervaded my thinking and teaching.

During that term, I also drafted opinions—some majority, some concurring, some dissenting—on trial by jury, freedom of speech, desegregation, reapportionment, immunity and other important and changing areas of the law. There could be no better foundation for the next phase of my career—teaching law students at the nation's largest and most prestigious law school, Harvard.

Before I leave the Supreme Court, I must recount one vignette regarding Justice Goldberg that caused me considerable disappointment. One of the great villains of the day to all liberals was J. Edgar Hoover, the head of the FBI. On several occasions, I let my negative views about Hoover be known to Goldberg, but he never said a word. I didn't understand why. A few years later, I asked Bazelon, who smiled, and said "I probably shouldn't tell you, but it's important for you to know that there are no perfect heroes." He continued, "Hoover and Goldberg got along well, because when Goldberg was the lawyer for the labor movement, he worked hard to rid the C.I.O. of Communist influence." I asked whether that meant he informed on Communist with the Union. Bazelon replied, "I wouldn't use the word informed, but he worked closely with Hoover on a common goal: to rid the C.I.O. of Communist influence."

Bazelon then told me that Thurgood Marshall had played a similar role with regard to the NAACP—trying to cleanse it of Communist influences."

"That's how Thurgood and Arthur made it to the Court. If Hoover had opposed them, they might not have been appointed."

I was shocked. "But there have been other liberals appointed as well," I insisted.

"Yes, Douglas, but he was Joe Kennedy's boy, and Hoover liked Joe Kennedy, at least back in the day when Douglas was appointed. With Hoover, it wasn't so much what you believed as were you with Hoover or against him."

"What about Justice Brennan?," I asked.

"Bill was an accident, an Eisenhower mistake. They didn't know he would be so liberal. Eisenhower regarded Warren and Brennan as his worst mistakes."

Bazelon then paused and said he would tell me something else, if I promised to keep it a secret until Goldberg and Marshall were both dead. I promised.

"Hoover had something on both of them."
"What?" I asked.
"Goldberg apparently had a brief 'friendship' with some European woman who may have been a Russian spy. Hoover covered it up."

HOUSE_OVERSIGHT_017155

"What about Marshall?"
"Thurgood had a drinking problem that got him into some sexual trouble. He went into therapy and Hoover gave him a pass."

I asked Bazelon how he knew, and he told me that Marshall had sought his advice about a therapist and that the Goldberg story was well known among his close circle of friends.

I was deeply disappointed, but the new information didn't diminish my respect for the two giants of the law. It did confirm my belief that there are no heroes without clay feet. It also confirmed my belief that J. Edgar Hoover was among the most powerful and dangerous forces in Washington.

About a year after I finished my clerkship with Justice Goldberg the phone rang one night. It was Dorothy Goldberg, she was sobbing, "Alan, make him change his mind." Justice Goldberg had decided to leave the Supreme Court in order to become the U.S. Representative to the U.N. Mrs. Goldberg was very upset with her husband's decision, but there was nothing I could say that would make him change his mind. He talked about patriotism and the need to end the war in Vietnam and insisted that he was doing the right thing.

Five years after he retired from the Supreme Court, Justice Goldberg decided to run for governor. He asked his former law clerks, including current Supreme Court Justice Stephen Breyer and me, to help him in his campaign. Goldberg was a stiff campaigner, and not particularly knowledgeable about New York. Once while eating a knish at Yona Shimmel's on Houston in the Lower East Side, he told the assembled press how pleased he was to be in Brooklyn. A few days later a friend of mine who was a reporter with the Daily News called to have me comment on a story he was writing concerning how stiff and formal Justice Goldberg was. He said he had heard reports that he required his former law clerks still to call him "Mr. Justice." It was absolutely true. I told my friend that I would get back to him with a comment. I then went in to see the Justice and told him about the upcoming story. He replied, "Well it's true so why don't you just confirm it." I said, "Mr. Justice can't we just change it." He said, "No, I want you to continue to call me Mr. Justice." I replied with a compromise, "How about if we continue to call you Mr. Justice in private but we call you Arthur or Art or Artie in public?" He reluctantly agreed to be called "Arthur" in public, so long as we still continued to call him "Mr. Justice" in private. I called him "Mr. Justice" till the day he died. Needless to say, he lost the election to Nelson Rockefeller.

Justice Goldberg always wanted me to become a judge, perhaps even a Justice. I never had any interest in wearing a robe since judging requires the kind of passivity that is not suitable to my temperament. I was surprised that Justice Goldberg was so insistent since he himself had left the bench after only 3 years. I don't think I would have lasted 3 months. In any event, I never lived my life so as to make it possible to be nominated for anything that required confirmation. I was once flattered by a magazine article that listed some of the most talented but unconfirmable people in America. I was included on that honor roll. My friend Steve Breyer on the other hand, was always the perfect judge and I worked hard behind the scenes to do everything I could to help his chances of serving on the bench. I helped him get confirmed for the Court of Appeals and lobbied President Clinton to appoint him to the Supreme Court. On the night of his nomination, he had his wife came to our home for an intimate celebration of his assuming the

HOUSE_OVERSIGHT_017156

Goldberg seat on the Supreme Court. He has proved to be an extraordinary judge and is one of the fairest people I know.[19]

Some lawyers describe their clerkships as interesting or career-enhancing "jobs." My clerkships were life-changing experiences, which continue to influence me to this day. There could be no better preparation for my life as a professor at Harvard Law School.

[19] When he was finally appointed to the Supreme Court, he invited me to come to his swearing in at the White House, after which there was a little party, where wonderful White House cookies were being served. My daughter was then in elementary school and I thought it would be nice to bring to her class a bunch of White House cookies for their next snack period. I took a paper napkin with White House markings and I started to put as many cookies as I could in it and then into my pocket. Suddenly there was a tap on my shoulder, "Stealing cookies from the White House, huh?" It was Hillary. She told me I didn't have to do that. She would be happy to give me a large box to take home. The kids in my daughter's class loved the cookies and the story. But the truth is they weren't quite as good as my mother's.

HOUSE_OVERSIGHT_017157

Chapter 4: Beginning my life as an academic—and its changes over time

I moved to Cambridge with my wife and two sons during the late summer of 1964. We rented an apartment, first in Brookline and a year later in Cambridge.

I began my teaching career at Harvard at the age of 25. Some of my students were older than I was, and a lot more experienced. I was called the "Boy Professor."[20] It was intimidating and scary.

Preparing for classes that I had never before taught was a full time job. When I began teaching in 1964, the two "best" teachers were reputed to be Clark Byse and Ben Kaplan. I wanted to learn from the best, so I asked them if I could sit in on some of their classes to observe their teaching techniques and styles. They both refused. Professor Kaplan asked me, rhetorically, whether I "allowed people to watch while you make love with your wife?" I replied, "of course not." He smiled and said "well, I make love with my students and don't want anyone watching." I was tempted to respond that if I had 160 wives and made love to them all at once, I wouldn't even notice if people watched, but I accepted his rebuke and had to figure out how to teach based on trial and error. There were no classes at Yale Law School on how to teach law—and no instruction books. For the first several years I did nothing but teach and write. It was a full time job, and I had no time for cases or other outside activities. That was soon to change, but not until after I learned how to be a professor.

My first assignment was to teach the required first year course in criminal law. On my first day of teaching, I encountered 160 eager faces. The men were dressed in shirts and ties; the handful of women wore skirts. The teaching style of the day was Socratic, with the teacher posing difficult hypothetical questions based on cases the students were assigned from a case book. The "Socratic Method" came naturally to me because of my Talmudic background and argumentative nature. Right from the beginning I sensed that the traditional case books did not give the students an appropriate balance between the theory of law and its real world practice. I decided to write my own case book, along with my criminal law mentor at Yale, Joseph Goldstein. I also decided to supplement my case book on a weekly basis with materials about contemporaneous developments in the law. My goal was to keep the students current while also preparing them to practice, teach, judge or legislate about criminal issues until the end of their careers a half century hence. I also wanted to introduce my students to other disciplines—psychology, sociology, economics, biology, literature—that would enrich their lives as lawyers. It was a daunting task, but one that I approached with enthusiasm and eagerness. I rejected any sharp distinction between "theoretical" and "practical" approaches to teaching, believing that theory must be tested by practice, and that practice should be informed by theory. To this day, I bring my practice into the classroom and my theory into the courtroom.

I immediately loved teaching, particularly the Socratic exchange with my students. But I noticed that even though several of my students were older than me (William Bennett was among them), many of them were intimidated by the fact that I was the Professor. The "Paper Chase" professors were still the rule at Harvard and students were terrified of making a mistake. I wanted very much to loosen up the students and so I decided on a ploy. About a month into the

[20] Harvard Law Record, October 22, 1964, p. 3

HOUSE_OVERSIGHT_017158

class I deliberately made a mistake in asking about a case. I asked what the jury instruction had been. A student sheepishly raised his hand and said, "Professor, there was no jury instruction - - the case was tried before a judge." I said, "Woops - - I made a mistake. You're right," and I moved on. I noticed that after that "mistake" the students loosened up and were prepared to take many more risks. I have repeated this ploy many times to loosen up a class.

Sometimes my mistakes in class were completely unintentional and darn embarrassing. Once I was teaching about a criminal concept that required the prosecution to build a wall separating information obtained under grant of immunity from information independently secured through investigation. The courts described this as a "Chinese Wall" because it had to be impenetrable. I was raising the possibility that one prosecutor may have improperly leaked information to another prosecutor, and I described it as follows: "There may have been a chink in the Chinese Wall." A Chinese American student in the class immediately took offense, erroneously believing that I was referring to Chinese people with that racial epithet. The thought had never occurred to me, but I never used that particular phraseology again.

I also offended some of my Jewish students once when I was comparing Canada's approach to affirmative action to our own. In Canada, only "visible minorities" are eligible for affirmative action. A student asked me whether Jews were a visible minority. I responded, "No, we're an audible minority." Even though I was joking about my own group, I got flack from a number of Jewish students who thought I was reaffirming an old stereotype. I quickly learned that humor was important to my teaching but that humor based on racial, gender or religious stereotyping could raise sensitivities.

I was sympathetic, therefore, when I asked a first year student how we would have responded to a particular plea bargain offer by a prosecutor. His response: "I would have tried to Jew him down a bit." The class was appalled at his ethnic slur and so was I, but I understood that he was probably just regurgitating what he had heard at his dinner table. I spoke to him privately after class. He was genuinely mortified at his lack of sensitivity. I'm sure he never repeated that particular slur.

Because I was a rookie, I tended to spend an enormous number of hours preparing for each class. I stayed up the night before planning my questions and strategies and got to the law school at 7:00 am before each class. Naturally I parked in the first available slot in the parking lot. Several days into the semester Professor Clark Byse mentioned at lunch that Dean Griswold was sizzling mad because someone was taking his parking spot every day. Nobody had told me that the first spot was traditionally reserved for the Dean.

Erwin Griswold was quite concerned about my lack of sophistication. I had never been outside the United States when I first started teaching at Harvard. I had barely been out of the Northeast. I still spoke with a pretty thick Brooklyn accent and, occasionally, allowed Yiddishisms to creep into my conversation. Griswold decided to take me on as a project. In the spring of my first year, he told me that he wanted me to go to England and France to look into criminology institutes in those two countries. The school would pay for the entire trip and various alumni would meet me in Paris and London and show me around. I was thrilled, but a bit surprised, when I got to Paris and discovered that there was no criminology institute to speak of. I still had a wonderful time.

HOUSE_OVERSIGHT_017159

In London, I was invited to represent the Harvard Law School at the 750th anniversary of the Magna Carta at Westminster Abby, where I sat several rows behind the Queen. It was only years later that Griswold acknowledged to me that the criminology institutes were just an excuse to have me travel abroad and get a little culture. It worked. I bought my first piece of art in Paris on that trip – a Kandinsky lithograph for which I paid $25. While in Paris, I was offered the opportunity one night either to attend a Paris opera or to hear a new group of British pop singers. Because I was trying to gain some culture, I chose the opera, and missed an opportunity to hear the Beatles in person. My children still kid me about that one.

My mother loved to write me letters at Harvard and she would always address me as "Ass Prof," the abbreviation for assistant professor. Naturally, a student came upon one of the envelopes, and the word got around that my mother was calling me "The Ass Professor." My grandmother couldn't get the pronunciation rate, calling me the "Profresser" (in Yiddish, fresser means overeater).

One day in criminal law I had a particularly obnoxious student who kept trying to one up other students by referring to his extensive background in philosophy, a subject in which he had a PhD. He would always begin his statements by saying, "Kant would say" or "Hegel would say." One day we were going to be studying an essay by one of the great contemporary philosophers, Robert Nozick. I knew that this particular student had studied with Nozick and would invoke him during the next class. Unbeknownst to the student, Bob Nozick was one of my closest friends. This was shortly after the release of Woody Allen's film "Annie Hall," in which Woody is standing in line for a movie and overhears a pretentious man regaling his date with information about Marshall McCluen. Woody Allen then pulls Marshall McCluen from behind a sign and has McCluen confront the pompous man, saying, "You know nothing of my philosophy." It was a wonderful putdown scene. I told Bob Nozick about the student. He knew him and agreed with my assessment. On the day in question, Bob sat in the back of the room with a hat over his head. As soon as the student began, "As Professor Nozick would say," Bob took his hat off, strutted to the front of the room and declared, "You know nothing of my philosophy." He then turned to me and said, "And neither do you." We all had a good laugh and Bob co-taught the rest of the class with me.

Shortly after I began teaching, the Harvard Law Record wrote an article, headlined "The Psyche and the Law," describing my somewhat unusual approach to teaching criminal law.

> "His course in criminal law seems to some not to be a law course at all. For in place of abstracted appellate decisions, the would-be lawyers read pages by Margaret Mead. Where one would expect a capsule treatment of criminal procedure, he is apt to find a papal lecture on medical research and morality. Instead of listing categories of offences, the students skim Alfred Kinsey's report on the sex life of American males."
>
> It described me as "probably the youngest man ever named to the Harvard Law School faculty, [who] got his appointment at age 24." It quotes me as making the heretical statement that: "there's no such thing as The Law….Law is one of our many processes for ordering society. You can't view this process as a neatly compartmentalized entity. It must be viewed in its full perspective as an ongoing system."

HOUSE_OVERSIGHT_017160

> Professor Dershowitz sees his job not as teaching "the specifics of law in any jurisdiction; anyone can find that on his own," but to teach his students how "to ask the right questions and bring to bear the right information for the right purpose." In short, her purports to teach his students how to think critically and teach themselves.
>
> "I can only present the problems," he explains. "In many instances there are no answers, and I don't particularly care what answers the students find. As long as they see the process in perspective and are equipped to ask the right questions, that's all that counts."
>
> We deal with common day-to-day documents of the law—indictments, probation reports, transcripts—not merely sterile abstracts of appellate cases…Every major problem faced by the practicing lawyer will come up eventually. But the student will have to find them; they won't pop out at him…We don't play the logical, cute little game that often typifies criminal law courses. There are rarely pat answers and clear distinctions in this course; the student will have to make his own chapter titles."

Some traditionalists were appalled at my interdisciplinary approach. One distinguished alumnus spoke for many when he wrote:

> "Professor Dershowitz seems to epitomize some of the lack of reality at the law school….Until such time as our whole penalogical system is changed, the law student is going to have to know his 'law' as his preliminary basis for the experience to cope with existing institutions and do a lawyer's job. One cannot deny the credentials of Professor Dershowitz's genius, but I question whether the application of his genius as apparently applied, is of any help making good lawyers out of Harvard law students."

My approach was defended by Justice Arthur Goldberg, for whom I had just finished clerking, who assured my critics that: "Mr. Dershowitz's students will be the beneficiaries of his engaging personality and extraordinary insight into the subjects he will teach, just as I was."

The Harvard Law Record also editorialized that:

> It is good to know that many of these subjects are being injected into the Harvard Law curriculum by young Professor Alan M. Dershowitz; no doubt, even with our liberal arts backgrounds, we could stand and benefit from more such learning.

Shortly thereafter, a lead article in the New York Times Magazine, comparing Harvard and Yale law schools, described me as "a fresh wind blowing through Harvard" and as an extremely popular teacher.[21] That article afforded me legitimacy, even among some of the faculty and alumni who remained skeptical about my non-traditional approach to teaching law. At the end of my first year, I was given the highest teaching rating among the faculty. A subsequent article said that, "his students have praised him as 'the master of the hypothetical—answer one correctly, and he's got one in his arsenal that's guaranteed to tie your tongue in knots.'" Soon, younger teachers were asking to sit in on my classes. I always said yes.

[21] New York Times Magazine, September 11, 1966, Victor S. Nevasky, The Yales vs. The Harvards

HOUSE_OVERSIGHT_017161

I had a goal for every class, and when I think back on it, it was far too ambitious. I had to, with every single class, say something original, teach something original that had never been written or said before by anybody. That was my aspiration, and I worked hard to achieve it. Law, of course, was based on precedent: you got points for showing that someone, particularly a judge, had said earlier what you are saying now. I hated that approach. It reminded me of my Yeshiva education. I wanted to be original. Every single class had to have something new. I knew the students wouldn't appreciate it because they didn't know it had never been said by anybody, but that was my way of satisfying myself. And I would rip up the notes at the end of the year and I'd say, we have to start from scratch all over again. I was a very energetic teacher and I really tried to put everything I had into each class.

I introduced a lot philosophy and psychology into the classroom, and because I was teaching criminal law. I had a lot of freedom since no one really cared about criminal law at Harvard. Our students were unlikely to become criminal lawyers in those days. In fact, I started out one of my classes by saying, "statistically, more of you are going to be criminal defendants than criminal lawyers, so pay attention." My first year of "crim" class was kind of a course designed to stretch the mind and teach analytic skills because it was not regarded as a "bread and butter" course like corporations or tax. So I had a lot of flexibility in what I could teach.

A few years after I became a full professor, Derek Bok became the Dean of the Law School. We never got along all that well. One day he called me into his office with a smile on his face and told me that I was a very expensive professor. Since salaries are fairly standard at Harvard, I didn't know what he was talking about. He pulled out a letter from a Harvard alum saying that he would make a very considerable donation to Harvard Law School on one condition, namely, that I was fired. Many of the old-fashioned alumni were upset by my liberalism and the fact that I was teaching subjects like Psychiatry and Law, in addition to traditional subjects such as Criminal Law, but this particular alum had a more personal grievance. I had represented, on a pro bono basis, a young man I had grown up with in Brooklyn, who had been accused of making a bomb for the Jewish Defense League that had caused the death of a young woman employee of Sol Hurok. The young woman, as it turned out, was the sister-in-law of this wealthy alumnus. He would not contribute a single penny to Harvard Law as long as I remained on the faculty, but if I were fired he would donate a large building worth millions of dollars. In jest, I suggested to Derek Bok that maybe we could make a deal for a significant severance package. We both laughed. He knew that a great university like Harvard could never be intimidated, by the threat of withholding any amount of money, into firing a tenured professor.

In my second semester of teaching, I was assigned the class in family law, which was an advanced elective popular with women students, because women lawyers were thought suitable to practice in such "soft" areas of law as divorce and child custody. My class included some of the most prominent women graduates of that era, including Lydy Dole, who became a United States Senator, Elizabeth Holtzman, who became a member of Congress and the District Attorney of Brooklyn, Elizabeth Bartholet, who is a professor at Harvard Law School and several other prominent figures.

HOUSE_OVERSIGHT_017162

When I began teaching, Harvard Law School had been admitting women for only about a decade, and some of the professors still didn't believe that women could make really good lawyers. I encountered this prejudice at the end of my first year of teaching.

The star student in my first year class was a woman from New York who eventually became a distinguished judge. She received an A grade on the final exam. Three of her other first year teachers also gave her A grades, but her contracts teacher gave her a D. She came to me upset about her D grade and asked me to read her exam. I read it and it was clearly of A quality. I was sure that her contracts professor had simply made a transcription error and so I went to his office to discuss it. He glanced at the exam and said, "Oh yes, I remember her. She doesn't think like a lawyer. That's why I gave her a D." I later learned that this professor has been opposed to admitting women to Harvard Law School because he believed that women don't think like lawyers.

This episode persuaded me that something had to be done about the lingering prejudices of some of the faculty. Accordingly, I proposed "blind grading" of all exams, so that professors could not find out the gender of the student until after the grades were submitted.

Several years later, my wife and I, and my son Elon, had dinner with then President Clinton and the First Lady. We had invited them to our synagogue on Martha's Vineyard for Rosh Hashanah services and they asked us to join them for dinner after the services. (More on this later) During dinner, I asked Hillary why she had chosen Yale Law School over Harvard. She laughed and said, "Harvard didn't want me." I said I was sorry that Harvard had turned her down, but she replied "no, I received letters of acceptance from both schools." She explained that a then boyfriend had invited her to The Harvard Law School Christmas dance, at which several Harvard Law School professors were in attendance. She was introduced to one of them and asked him for advice about which law school to attend. The professor looked at her and said, "We have about as many women as we need here. You should go to Yale. The teaching there is more suited to women." I asked her who the professor was and she told me she couldn't remember his name but that she thought it started with a "B." A few days later, we met the Clintons at a party. I came prepared with yearbook photos of all the professors from that year whose name began with "B." She immediately identified the culprit. He was the same professor who had give my A student a D, became she didn't think like a lawyer. It turned out, of course, that it was this professor—and not the two brilliant women he was prejudiced against—who didn't think like a lawyer. Lawyers are supposed to act on the evidence, rather than on their prejudgments. The sexist professor ultimately became a judge on the Internal Court of Justice—a perfect fit! (More on this later.)

Nor was Professor "B" alone in his negative views of women as lawyers. One teacher refused to call on women, except on one day of the year, which he called "ladies day." On that day, he picked on them and verbally abused them to the point that some deliberately stayed away. The dean of the law school, Erwin Griswold, a great defender of civil liberties and civil rights, was a blatant misogynistic. Near the beginning of my teaching career, he invited the new assistant professor—me—and all the women students—a small number—to his home for dinner. He warned the women that if they came to law school to find husbands, they would be disappointed: "Harvard Law School men don't date Harvard Law School girls. They date girls from Lesley" (a neighboring women's college). He then went around the table asking all the women students why

HOUSE_OVERSIGHT_017163

they were taking up the place of a man who would actually practice law, while they got married and raised children.

Dean Griswold wasn't particularly comfortable with Jews either. At the same dinner, he noticed that I didn't eat the meat, and he asked me why. I told him I was kosher, to which he responded: "Even the Catholics have eliminated the prohibition against eating meat on Friday. Don't you think it's time for your people to eat what everyone else eats." I thought he was kidding, so I said: "I'll check with my people." He wasn't kidding. The next time I saw him I said: "I've checked with my people and they said that they've been keeping kosher for thousands of years, so a few more centuries couldn't hurt." He didn't laugh. I think this exchange kept me kosher for an extra few years!

For more than a year, Griswold called me "Shapiro," which was the name of another assistant professor, with whom I had nothing in common, except a Jewish sounding name. Griswold demanded that I teach classes on Saturday. I refused. He said he couldn't make a special exception for me because I was a practicing Jew. I still refused. So he abolished all Saturday classes.

Shortly after I was appointed to the Harvard Law School faculty, I received a call from Judge Aldrich inviting me to present a talk to the members of his private club, called the "Club of Odd Volumes." He assured me that its members included some of the best and most important lawyers in Boston, including several Justices of the Supreme Court and other judges. "We invite all the new dons to tell us about their work," he advised me.

Remembering Judge Bazelon's refusal to speak to the members of Justice Douglas' restricted club, I politely told Judge Aldrich that I would get back to him. I then called the head of the local Anti-Defamation League and inquired about the Club of Odd Volumes. "They don't accept Jews, Catholics, Blacks or women as members," he quickly responded. I called Judge Aldrich, and told him that I had a strict policy against speaking at any "restricted" club and so I would respectfully have to decline his kind invitation. (I adopted that "policy" that day, having never before been invited to speak at a restricted club.) He thanked me for considering it and hung up the phone. Within an hour, I was abruptly summoned into the Dean's Office.

Dean Erwin Griswold informed me that I had offended one of the Law School's most important and influential alumni, that I was the only assistant professor ever to turn down an invitation to speak at that club and that it was important for untenured faculty to present their work there because several of the members served on the Harvard Board of Overseers that had to approve all tenure decisions. "You've hurt your chances," he chided me. "Why did you decline their invitation? Will you reconsider it if I can get them to invite you again?"

I explained my reasons. Griswold, who despite his Midwest origins considered himself an honorary Brahman, was a cautious advocate of civil rights and civil liberties, so I thought he would understand. What I did not know was that he himself was a member of a restricted club. Nevertheless, he paused, looked directly at me and said, "While I don't agree with you, considering your background I can understand why you would feel uncomfortable at that club. I'll call Bailey and try to explain. I hope he understands, and I hope you haven't hurt your

HOUSE_OVERSIGHT_017164

chances." That was the last I heard, until a few years later when Dean Griswold informed me that the chairman of the overseers subcommittee being asked to review and approve the faculty decision recommending me for tenure, was an active member of "the Club." I was ready for a fight. But there was no fight. I was approved, the dean later told me, by a unanimous vote.

Several years after I began teaching, I was invited to deliver a distinguished named lectureship at a major university. Following my talk, there was a dinner in my honor at the local university club. When I got to the club, there were several women standing outside picketing because it was a men's only club. I refused to cross the picket line and the dinner had to be moved to a different venue, over the strong objections of the Chief Justice of the State, who was one of the sponsors to the dinner. I had a similar experience in Columbus, Ohio, after I argued an important case on behalf of a local law firm. They invited my female associate and me to have dinner with them at the local university club. When we got there, they asked my associate if she wouldn't mind walking in through the side door since the main entrance was for men only. Since she was a young associate, she reluctantly agreed, but I refused to let her demean herself. We had lunch at the local McDonald's. Several years later, I was invited to Australia to give a series of lectures, and the Harvard Club of Sydney asked me to give a luncheon talk to Harvard alumni. I agreed. When I mentioned to a friend that I was going to be speaking at the Australia Club, he advised me that it was closed to Jews, women, and Blacks. I gave the Harvard Club two options: I would keep my commitment and make my speech, but I would speak about why it was wrong for Harvard to hold events at segregated clubs; or they could move the speech and I would give a talk about life at Harvard. They chose the second alternative. When I returned to Harvard, I wrote to the dean and a memo was circulated mandating that henceforth no Harvard professors, speaking on behalf of Harvard, should appear in a segregated venue. When a Jewish country club in Boston asked me to talk, I told them about my policy and declined the invitation. They explained that the club had been established in reaction to the unwillingness of other country clubs in the area to accept Jewish members. I told them that I did not think this justified further discrimination. A few days later, the membership chairman called and told me that, in fact, the club had six non-Jewish members and that it was open to accepting more. I made the speech. A young member approached me following my speech and told me I had been conned, "Sure, we have six non-Jewish members, but they're all sons-in-law of Jewish members." I have never spoken at that club again.

When I joined the faculty, it was quite small—perhaps two dozen full time professors. (Today there are more than 100, with a student body that hasn't increased in size.) The entire faculty would meet for lunch every day in a small dining room around a large table presided over by the dean, and in his absence by a senior faculty member. The discussions would revolve around legal issues. The criteria for judging an argument and its maker was its "soundness." That word still rings in my ear, like my grandmother's "meturnished." All faculty nominees had to have "sound" judgment. Their writing had to be "sound," rather than creative, speculative, quirky or provocative. I was concerned because my views were anything but "sound"—as least as judged by some of the more traditional faculty members.

Recently, I told one of my long-time colleagues that when I was choosing between teaching at Harvard and Yale Law Schools, my Yale Law School teacher, mentor and friend, Professor Alex Bickel, who had been turned down for a professorship at Harvard because his views of

HOUSE_OVERSIGHT_017165

constitutional law weren't sound enough, and subsequently became one of the most distinguished law professors at Yale, advised me against going to Harvard: "You won't fit in there," he warned me. When I recounted this story to my Harvard colleague of 50 years, he replied: "Alex was right. You don't fit in here." I never tried to.

In order to obtain tenure, each assistant professor had to publish a "tenure piece." I wrote an article on the relationship between law and psychiatry that was critical of the law's overreliance on psychiatry in judging whether mentally ill criminals could be held responsible for their crimes, and whether people thought to be dangerously mentally ill should be preventively detained in asylums. Because the article insisted that these decisions should be based on legal rather than medical criteria, and because it was somewhat critical of certain views espoused by my mentor Judge Bazelon—who was regarded at the epitome of unsoundness by the Harvard Law School establishment—it was deemed sound and I was voted tenure.

While I was being considered for tenure, I began to get offers from the other elite law schools—Columbia, Chicago, Stanford, Yale, NYU. I was earning $12,000 a year at Harvard and would be offered a raise to $14,000 when I received tenure. Stanford offered me $20,000, which was the highest offer any assistant professor had ever received in the history of law teaching. It was well above what many full professors at Harvard were then making. I went to Dean Griswold and told him I couldn't afford to turn down an additional $6,000 since I had two kids in private school and no money in the bank. He told me sternly that he could not pay me more than older professors so he raised <u>everyone</u>'s salary starting with mine to $21,000. I became the most popular professor among my young colleagues who all benefited from what became known as "the Dershowitz bump."

Over my long career at Harvard, I've published a great deal. I've never counted but one of my secretaries estimated that she typed a million words a year for me (including legal briefs). This would amount to 500 books! I love writing. I write every day, on hundreds of subjects, and I write everything by hand on yellow pads. I venture to guess that I've probably published more words (not necessarily wiser or better, but more) than any professor in the law school's history—more than 30 books, hundreds of chapters in other books, dozens of law review articles and thousands of newspaper and magazine articles.

I've probably also taught more different courses than most other professors. These include:

Criminal Law; Constitutional Litigation; Family Law; Psychiatry and the Law; the Prediction and Prevention of Harmful Conduct; Race and Violence; the Scriptural Sources of Justice; the Law of Sports; the Legal, Moral and Psychological Implications of Shakespeare's Tragedies; Ethics and Tactics in the Trial of Criminal Cases; Human Rights; Terrorism and the Law; Probabilities and the Law; a Comparative Analysis of Talmud and Common Law; Wikileaks and the First Amendment; the Arab Israeli Conflict through Literature; Black Power and its Legal Implications; The Writings of Thomas Jefferson; and Constraining Prosecutorial Misconduct.

In addition to my classes at the law school, I have also taught numerous classes at Harvard College, including a very large course that I created and taught jointly with Professor Robert Nozick and Stephen J. Gould, entitled *Thinking about Thinking*; a seminar with Professor Steven

HOUSE_OVERSIGHT_017166

Kosslyn on *Neurobiology and the Law*; a large class with Professor Steven Pinker on the subject of *Taboos*; and a series of freshman seminars entitled *Where Does Your Morality Come From*?

My teaching and academic writing have centered on several overarching themes. Between my earliest articles on the preventive detention of the dangerously mentally ill and my recent series of books on the prevention of terrorism, my major academic focus has been on prediction and prevention of harmful conduct. I've taught numerous classes about that and related issues. The writings ranged from the preemption and prevention of harmful conduct by the mentally ill, to the effort to predict which kinds of speeches and writings might lead to violence.[22] They included articles and books on preventive detention of suspected terrorists, preventive interrogation and surveillance methods designed to secure real-time intelligence information necessary to prevent terrorism, preemptive military actions, pre-trial detention of ordinary criminals, preventive genetic testing and inoculation, preventive character testing,[23] and preventive profiling. As to all of these issues, I have sought to balance the imperatives of due process, liberty and decency, against the legitimate needs of national security and crime prevention. I coined the term "The Preventive State" and have been thinking, teaching and writing about its increasing dangers for half a century. I believe I was the first academic to focus on this problem in a systematic way.

The *overt text* of many of my books, articles and classes dealt in large part with the substantive and procedural issues growing out of prediction and prevention of harmful conduct—the movement we are experiencing toward "the preventive state"—and the jurisprudential problems associated with this movement. There is, however, a more subtle *subtext* that runs through not only the writings about prevention, but virtually all my other writings as well.

This subtext is the need in a democracy for *openly articulated criteria and standards,* whenever states (or state-like institutions) take actions that affect the rights of individuals whether these actions are preventive or reactive in nature. This need may seem obvious, since democracy cannot operate in the absence of visibility and accountability. Yet in virtually all of the areas about which I have chosen to write and teach, the criteria and standards for government action have been unarticulated or hidden from public view. Moreover, there have been some who have argued that it is wiser, even in a democracy, sometimes to hide from public view (and hence public scrutiny) what the government is doing.[24]

Some governmental decisions and actions must, of course, be kept secret, at least for a time. Espionage activities, weapon development, military planning and the like must, by their very nature, be kept under wraps if they are to succeed. But broad policy decisions should, in a democracy, be subjected to the checks and balances not only by the other branches of

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[22] See Alan Dershowitz, *Finding Jefferson* (Hoboken, NJ: John Wiley & Sons, 2008).

[23] See Alan Dershowitz, "Preventive Disbarment: The Numbers Are Against It," *American Bar Association Journal* 58 (Aug. 1972): 815.

[24] As I wrote in *Why Terrorism Works:*

> In my debates with two prominent civil libertarians, Floyd Abrams and Harvey Silverglate, both have acknowledged that they would want nonlethal torture to be used if it could prevent thousands of deaths, but they did not want torture to be officially recognized by our legal system. As Abrams put it: "In a democracy sometimes it is necessary to do things off the books and below the radar screen."

Alan Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002): 151. See also Richard Posner, Quoted pp _____ infra.

HOUSE_OVERSIGHT_017167

government, but of non-governmental organizations such as the media, the academy and, most important, the citizenry. As I wrote in Rights from Wrongs:

> This balance is part of our dynamic system of governing, which eschews too much concentration of power. American sovereignty, unlike that of most other Western democracies, does not reside in one branch of government or even in the majority of the people. Our sovereignty is a process, reflected in governmental concepts such as checks and balances, separation of powers, and judicial review. More broadly it is reflected in freedom of the press, separation of church from state, academic freedom, the free-market economy, antitrust laws, and other structural and judicial mechanisms that make concentration of power difficult.

These checks on abuse cannot operate effectively in the absence of visibility, accountability and public discourse. What is needed, and what is sorely lacking, is a theory of when governmental actions may appropriately be kept secret (and for how long) and when they must be subject to open debate and accountability. I have been seeking to contribute to the development and articulation of that theory by writing and teaching about areas of law in which the criteria and standards for state action are either hidden from public view or so vague that they invite the exercise of untrammeled discretion not subject to the rule of law.

Perhaps it is my interest in this issue of standards and accountability that is one of the reasons why I chose to focus my academic career around areas such as the prediction and prevention of harmful conduct, where there are few articulated standards and little public accountability. Or perhaps it was my focus on prediction and prevention that sensitized me to the more subtle issue of lack of visible standards and criteria. Whichever was the chicken and whichever the egg, these two paramount areas of my interest have worked symbiotically to generate my body of scholarship.

My insistence on articulate standards and accountability has not been without controversy. When I espoused the need for "torture warrants" to cabin the widespread use of extreme methods of interrogation, such as waterboarding, by the Bush Administration, I was accused of being an apologist for torture. When I have sought to learn the actual criteria by which students are admitted pursuant to affirmative action programs, I have been accused of insensitivity to racial issues. When I have demanded clearly articulated rules for limiting "offensive" speech on campus, I have been accused of favoring censorship. (More on these issues later.) When I have insisted on neutral standards of human rights, articulated with clarity. I have been accused of being a special pleader for Israel. The reality is that neutral standards and public accountability are essential to democratic governance. That is why I have devoted so much of my writing and teaching to these issues over the years.

I will continue to work on these issues as long as I can think, write and speak—even after my active teaching career at Harvard comes to an end. I am a teacher first and foremost. All of my work—classroom pedagogy, academic and popular writing, lecturing, media appearances, even litigation—is teaching. Only the audience is different.

HOUSE_OVERSIGHT_017168

The question I'm most often asked about my classroom teaching is how the students have changed and how the teaching of law has changed during the 50 years I have been at Harvard.

The change in the student body has been dramatic. The vast majority of our students are no longer the white American males that dominated the classroom in the early 1960s. Nearly half the class is comprised of women, about a quarter of the class of racial and ethnic minorities, and approximately 10% from foreign countries. This increased diversity brings with it a wide range of viewpoints and experiences that enrich the class discussion.

Today's students are also older, with more work experience. They come to the classroom with firm, if not always clear, views of who they are and what they want to be. They are not the naïve, sycophantic, uncritical consumers that characterized my generation of students right out of college. This is all good, because it makes teaching them more challenging.

Equally important has been the globalization of law over the past quarter decade. When I began teaching, all law, like all politics, was local. Today, virtually all law is global. A typical case that comes across my desk and that I now teach about is as follows:

> A man born in Israel becomes a British citizen and moves to Houston where he works for a multinational firm which allegedly paid a bribe to an African prince from one country to build a gas facility in another African country using French funds transmitted from a Swiss bank. The person is now in Canada and the United States and Great Britain are both seeking his extradition. The laws of each of the countries differ considerably as to what constitutes a bribe, as distinguished from a proper or merely unethical payment. The laws of each country also differ as to the propriety of preparing witnesses and gathering evidence.

A lawyer confronting this kind of case must know how to deal with these transnational problems. Law schools have traditionally offered courses in international law, teaching the students about international tribunals and treaties. The source of problems confronted today are not decided by international law or international courts. They are transnational, rather than international, in nature and require an ability to navigate the very different terrains of many nations' legal systems.

Among the areas of law in which political and legal boundaries are frequently crossed, are: internet law, environmental law, antitrust law, corporate law, criminal law and many newly emerging fields of law. We are just beginning to teach our students how to practice in this global environment. We must do more if we are to stay ahead of major changes and prepare our students to be great lawyers through the middle of the 21st Century.

I have been privileged to teach nearly 10,000 students over my half century career as a law professor. Among the students I have taught, mentored, advised and encountered have been Presidents, Supreme Court justices, judges, senators, congressmen, corporate CEO, deans, professors, university presidents, journalists and other movers and shakers. With the privileges of teaching tomorrow's world leaders comes enormous responsibilities. Among these responsibilities is not to use the classroom to propagandize one's captive audience. My goal is not to turn conservatives into liberals, but to make conservatives more thoughtful conservatives,

HOUSE_OVERSIGHT_017169

better able to articulate and defend nuanced positions. The same is true of liberals and everyone else. I always play the devil's advocate, challenging every view, questioning every idea, pushing every opinion.

In doing so, I learn a great deal from my students. My classroom is truly a marketplace of ideas. This should not be surprising, considering my life-long commitment to freedom of expression and the widest exchange of views, as I describe in the next chapter.

When I was offered the job at Harvard at age 24, I knew that I was qualified to teach theoretical subjects, but I worried about my lack of real world legal experience, since I had never practiced law. (One summer at a law firm between my second and third year at Yale does not a practitioner make.) Unlike some academics, my Brooklyn upbringing gave me a practical bent of mind—"street smarts"—but I craved some real world experience. I looked for opportunities to become involved in cases that would provide a smooth transition from theory to practice. Within a few years of beginning my teaching career, I found a natural transition in the form of First Amendment cases challenging governmental censorship.

HOUSE_OVERSIGHT_017170

Part II: The changing sound and look of freedom of speech: from the Pentagon Papers to Wikileaks and from Harry Reems' Deep Throat to Woodward and Bernstein's "Deep Throat."

Chapter 5: The Changing First Amendment—New Meanings For Old Words

I always wanted to be a First Amendment lawyer. Everything in my upbringing and education led me to the defense of freedom of speech. I was always a dissident—though they used the less polite term "trouble-maker." I argued with everyone, all the time. I defended other trouble-makers. I questioned everything and everybody. I may have had a Fifth Amendment right to "remain silent," but I rarely exercised it. I spoke up. For me, the freedom to speak, to write, to dissent, to seek a redress of grievances, to assemble, to doubt, to challenge, has always been central not only to democratic governance but to life itself. The First Amendment has always been my favorite part of the Constitution, not because it is first among the Amendments—in its original, proposed form, it was the Third Amendment[25]—but because without its protection, all other rights are in danger.

Not everyone agrees. Listen to Charlton Heston: "I say that the Second Amendment is, in order of importance, the first amendment. It is America's First Freedom, the one right that protects all the others. Among freedom of speech, of the press, of religion, of assembly, of redress of grievances, it is the first among equals. It alone offers the absolute capacity to live without fear. The right to keep and bear arms is the one right that allows 'rights' to exist at all."

Both history and geography have proved Heston wrong: Nearly every other freedom loving country in the world has severe restrictions on gun ownership; while none has severe restrictions on expression.

The stirring words of the First Amendment—"Congress shall make no law…abridging the freedom of speech or of the press…"—haven't been amended between my first case defending freedom of expression in the 1960s and my most recent one, but the meaning of these words has undergone dramatic transformation over the past half century. The major reason has been the rapid change in the manner by which speech is transmitted. Technology has altered the sound and look of freedom of expression.

Over the past 50 years I have defended every means, manner and mode of expression from films to plays, books, magazines, newspapers, photographs, leaflets, pamphlets, megaphones, websites, internet postings, speeches, heckling, cartoons, faxes, composites, noises, threats, incitements, videos, ads, prayers, classes, live and filmed nudity (frontal, sideal, backal), defamation, blasphemy, and digital communication (by which I mean a raised middle finger).

I have defended right wing Neo Nazi and racist speech, hard left Stalinist rhetoric, soft core erotica, hard core pornography, nude photographs of children and disgusting videos of bestiality. I have defended the right of major newspapers and book publishers, as well as anonymous and not-

[25] Congress originally voted to submit 12 Amendments to be ratified by the States. The First and Second—which dealt with the size of Congress and the compensation of Senators and Congressmen—were not ratified and the Third Amendment became the First.

HOUSE_OVERSIGHT_017171

so-anonymous bloggers, tweeters, website operators and whistleblowers to disclose classified information, state secrets and other material the government would prefer to keep under wraps.

I have represented people I love, people I hate and people I don't give a damn about—good guys, bad guys, and everything in between. H.L. Mencken used to bemoan the reality that:

> "The trouble about fighting for human freedom is that you have to spend much of your life defending sons of bitches: for oppressive laws are always aimed at them originally, and opression must be stopped in the beginning if it is to be stopped at all."

In each instance, I've stood up for an important principle: the right of the individual, rather than the government, to decide what to say, what to show, what to hear, what to see, what to teach, what to learn. I have opposed the power of the state (and other state-like institutions) to censor, punish, chill, or impose costs on the exercise of the freedom of expression—even, perhaps especially, expression with which I disagree and despise or believe may be hateful, hurtful or even dangerous.

I have myself been the victim of outrageous defamations (including that I beat and killed my wife! And that I plagiarized my book "The Case for Israel"). I have been accused (falsely, I believe) of defaming others. I have been informally charged with inciting war crimes, and formally charged with criminally defaming a judge—to which I plead not guilty! I have defended the right of my enemies to lie about me, to boo and heckle me and even to try to get me fired. While defending the right of my political, ideological and personal opponents to say nearly anything they want, I have insisted on my own right to criticize, condemn and vilify them for the wrongness of what they have chosen to say. Freedom of expression includes the right to be wrong, but it does not include the right to be immune from verbal counterattack.

I am not a free speech absolutist when it comes to the First Amendment—at least not in theory. But in practice I nearly always side with the freedom to speak, rather than the power to censor.

It's not that I trust the citizenry; it's that I distrust the government. It's not that I believe the exercise of the freedom of speech will always bring about good results; it's that I believe that the exercise of the power to censor will almost always bring about bad results. It's not that I believe the free marketplace of ideas will always produce truth; it's that I believe that the shutting down of that marketplace by government will prevent the possibility of truth.

My family and educational background—especially my constant arguments with rabbis, teachers, neighbors and friends—made me into a skeptic about everything, even skepticism. I am certain that certainty is the enemy of truth, freedom and progress. Hobbs has been proved wrong by the verdict of history in his inclusion among the "rights of sovereigns" the power to censor "all books before they are published" that are "averse" to "the truth," or not conducive to peace.

I know that I will never know "the truth." But neither will anyone else. All I can do is doubt, challenge, question and keep open the channels of knowledge, the flow of information and the right to change my mind. To me, truth is not a noun; it is an active verb, as in "truthing" (or knowing, learning or experiencing).

HOUSE_OVERSIGHT_017172

My favorite characters in the Bible and in literature are those who challenge authority: Adam and Eve defying God and eating the forbidden fruit of knowledge; Abraham chastising God for threatening to sweep away the innocent along with the guilty; Moses imploring God to change his mind about destroying the "stiff-necked" Jewish people.

My favorite Justices of the Supreme Court are the dissenters. My favorite historical figures are political and religious dissidents. My closest friends are iconoclasts. Some of my best teachers were fired.

The First Amendment would have been nothing more than a parchment promise had it not been given life by brave political dissidents and bold judicial dissenters. Because of these provocateurs, the First Amendment has not become ossified with age. It has changed with the times, sometimes for the better, sometimes for the worse. Although the literal words have remained the same for more than two centuries, two of the most important ones have been changed beyond recognition. These words are "Congress" and "no." ("Congress shall make no law….") The controversial role of these two words can best be illustrated by a story; perhaps aprocrophyl but reflecting reality, about two great and contentious justices, Hugo Black, who claimed to be an absolutist and literalist when it came to the words of the First Amendment, and Felix Frankfurter, who advocated a more functional balancing approach despite the seemingly clear words of that Amendment. In a case involving censorship by a state, Black pulled out his ragged old copy of the Constitution, turned to the First Amendment and read it out loud to the lawyer representing the state. "Read the words," he shouted at the intimidated lawyer. "It says Congress shall make NO law abridging the freedom of speech." He banged the table as he shouted and repeated the word "no." "What don't you understand about the word 'no,'" he asked rhetorically. Justice Frankfurter interrupted and said, "You're reading the words wrong." The lawyer looked startled as the Justice explained. "It doesn't say 'Congress shall make NO law.' It says, 'CONGRESS shall make no law,'" banging the table as he shouted and repeated the word "Congress." He then continued, "This law wasn't passed by Congress, it was passed by the state. What don't you understand about the word 'Congress,'" he asked, mocking his fellow justice.

By emphasizing different words, the two justices were giving radically different meanings to the very same language of the First Amendment.

The reality is that both of these words—"Congress" and "no"—have been excised over time. The first—"Congress"—was central to the history of the Bill of Rights, which was seen by its framers largely as a bill of restrictions on the power of the national legislature—namely "Congress." There was considerable concern that the Constitution, which replaced the Articles of Confederacy, bestowed too much power on the national legislature, thus reducing the rights (really the powers) of the states to legislate for their citizens.[26] The First Amendment was not intended by its framers to impose restrictions on the states. In fact when the Bill of Rights was enacted, and for many years thereafter, many states had laws severely abridging the freedom of speech and of the press. (Several states also had officially established churches and officially discriminated against Catholics, Jews, Turks and "other" Pathens.) If the framers had wanted to impose restriction on the states, it would have been simple to have written a more general

[26] The rarely invoked 10th Amendment makes this clear: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

HOUSE_OVERSIGHT_017173

declaration protecting the right of free speech from abridgment by any government. For example: "the freedom of speech shall not be abridged by Congress or by the states." Indeed, many scholars and judges believe that this was accomplished three quarters of a century later when the 14th Amendment was ratified. It provides in relevant part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The current judicial view is that the words in the 14th Amendment "incorporated" the First Amendment (along with most but not all of the others) and applied it to the states. According to this view, the First Amendment now reads, in effect, as follows:

> "Congress and the state legislatures shall make no law abridging the freedom of speech."

Actually, it now reads even more broadly, since the courts have not limited the prohibitions of the First Amendment to the legislative branches, but have extended them to the executive and judicial branches—to any governmental action—as well. So the First Amendment now reads, in effect, as follows:

> "Congress and the state legislatures, as well as the executive and judicial branches of the federal and state governments, shall make no law and shall take no executive or judicial action abridging the freedom of speech."

Thus the first major change—from "Congress" to "government"—has considerably expanded the meaning of the First Amendment and broadened the right to free speech. The second change has narrowed the right, at least as literally written, by excising the word "no" as in "no law." The words "no law"—an absolute prohibition on all legislation abridging any speech—are somewhat understandable if limited to Congress. A democracy can survive if the national legislature has absolutely no power to abridge speech of any kind, no matter how dangerous or harmful, so long as the state legislatures can pick up the slack and enact what all reasonable people would agree are essential limitations on some forms of expression, such as disclosing the names of spies, the locations or warships, the plans for battle, the nature of secret weapons and other matters that must be kept from enemies.[27] But the words "no law" make little sense when applied both to the federal and state legislatures, indeed to all governmental bodies, because there really is no rational case to be made for a total and absolute prohibition by any and all governmental institutions on any and all abridgment of any and all possible utterances.

Even those, such as Justice Hugo Black, who purport to be absolutist for the protection of all speech, have figured out ways to finesse the problem. Consider the case of Cohen v. the United States in which an opponent of the Viet Nam War wore to court a jacket displaying the words "Fuck the draft." Justice Black joined a dissenting opinion that would have affirmed Cohen's

[27] Interestingly, it is the National Congress, rather than the states, that should have the power to protect the national security interests of our nation, but many of the exceptions to an absolute right of speech, that were recognized at the time the First Amendment was ratified, were matters of state concern, such as defamation laws, obscenity laws and blasphemy laws.

HOUSE_OVERSIGHT_017174

conviction on the ground that "Cohen's absurd and immature antic" was "mainly conduct and little speech." Under this approach, "all" speech remains constitutionally protected, but if you don't like the content of a particular speech—"Fuck the draft" worn on a jacket—simply call it "conduct" and by slight of hand (or abuse of language), the constitutional protection vanishes. In other words, First Amendment absolutists—those who claim to read literally and apply absolutely the words "no law abridging the freedom of speech"—simple declare a genre of expression that they do not wish to protect to be "not speech." It reminds me of the story of the Theodore White's famous visit to Communist China in the days when only a select few were invited. He was hosted by Chou en Lie at a banquet at which the main dish was roasted pork. White, a moderately observant Jew, told the Communist leader that he could not eat pig. Without missing a beat the leader told his guest that in China only he has the power to declare what a food item actually is. "I hereby declare this to be duck," he said. So White ate the "duck."

According to the absolutist view, obscenity—including dirty words used in the context of a political protest—is not speech. (Perhaps it's "duck.") The same is true for other categories of expression that do not—in the view of at least some absolutists—warrant the protection of the First Amendment. I know of no absolutist who would argue that all expression—including words of extortion, falsely shouting fire in a crowded theater, or disclosure of all secrets—are protected by the First Amendment.

Non-absolutists recognize that these forms of verbal expression are indeed "speech," but they argue that the words of the First Amendment should not be read literally. Some argue that they must be understood in the context of the times when they were written, and they point to restrictions on speech that were widely recognized in 1793. Under this approach, much of what we take for granted today as protected speech—such as blasphemy, truthful criticism of judges and serious art and literature of a sexual nature—would not fall within the First Amendment.

Other non-absolutists reject this "originalist" approach, preferring instead to argue for a "living," "evolving" and "adapting" view of the First Amendment (and the Constitution in general), which explicitly acknowledges that courts must have the power to redefine old words to meet the new needs of changing times.

Whichever approach is taken, it is clear that not all verbal and other form of expression are protected by the First Amendment. There is widespread disagreement over what are appropriate exceptions, as reflected by the divided votes of the Justices in many cases and the lack of consensus among scholars. All seem to agree with Justice Oliver Wendell Holmes that even "the most strident protections of free speech would not protect a man in falsely shouting fire in a theater…." (More on this soon.)

Several general categories of speech that may result in harms purport to flow from the "shouting fire" paradigm. They include the following:

1. Offensiveness: Expressions that offend others, such as sexist, scatological, racist, anti-Semitic, anti-Muslim, anti-Christian, homophobic and other demeaning or repulsive speech.

HOUSE_OVERSIGHT_017175

2. Fighting Words: Speech that is so offensive to some that it may cause those who hear it to react violently. This includes racial or religious epithets hurled at minorities.
3. Criminogenic speech: Violent sexualized images that may cause, directly or indirectly, such harms as rape or sexual harassment.
4. Disclosure of information that may harm the nation or individuals. This includes military and diplomatic secrets, and other information that the government or individuals may have a right to keep from the public. It may also include disclosure of personal information that may embarrass individuals.
5. Defamatory speech: Expressions that libel, slander or harass others, by conveying false or ridiculing information about them.
6. Incitements: Expressions that are calculated to incite others to commit violent or other illegal actions.
7. Disruptions: Expressions that are designed to disrupt speakers or otherwise prevent opposing views from being expressed or heard.[28]

These alleged harms sometimes overlap, as with obscenity which may offend and also cause violence against women, or racist speech which may both offend and provoke violence.

In the pages to follow, I will recount my experiences—both professional and personal—with each of those purported exceptions to the First Amendment. I will describe how the First Amendment has changed over the half century I have been litigating freedom of expression cases. In some instances, these exceptions have been narrowed, while in others they have been expanded. I will begin by exploring the roots and rationality of the "mother" of all exceptions to the First Amendment: "Falsely shouting fire in a theater." This metaphor has been invoked to justify censorship in nearly all of my cases: pornography, revealing state secrets, defamation, ridicule, incitement and fighting words. Those advocating censorship generally argue that these exceptions "are just like shouting fire in a theater." It is important, therefore, to consider whether this paradigm has a strong enough foundation to support the many exceptions to freedom of expression that purport to rest on it.

Shouting Fire: The mother of all exceptions to the First Amendment

Justice Oliver Wendell Holmes' statement that freedom of speech does not protect someone who falsely shouts "fire" in a theater has been invoked so often, by so many people, in such diverse contexts, that it has become part of our national folk language. It has even appeared —most appropriately — in the theater: In Tom Stoppard's play *Rosencrantz and Guildenstern Are Dead,* a character shouts at the audience, "Fire!" He then quickly explains: "It's all right — I'm demonstrating the misuse of free speech."

Shouting "Fire!" in the theater may well be the only jurisprudential analogy that has assumed the status of a folk argument. A prominent historian has characterized it as "the most brilliantly persuasive expression that ever came from Holmes' pen." But in spite of its hallowed position in both the jurisprudence of the First Amendment and the arsenal of political discourse, it is and always was an inapt analogy, even in the context in which it was originally offered. It has

[28] An additional, quite controversial, mechanism involves the financing of political campaigns. See Citizen's United Case [cite]. I have not yet litigated cases in this area.

HOUSE_OVERSIGHT_017176

lately become —despite, perhaps even because of, the frequency and promiscuousness of its invocation — little more than a caricature of logical argumentation. From the beginning of my career as a First Amendment lawyer, I have taken aim at this analogy, both in my writings and in my cases. In my view, it is one of the least persuasive, though most influential, arguments for censorship that ever came from anyone's pen!

The case that gave rise to the "Fire!"-in-a-crowded-theater analogy— *Schenck v. United States*— involved the prosecution of Charles Schenck, who was the general secretary of the Socialist Party in Philadelphia. In 1917 a jury found Schenck guilty of attempting to cause insubordination among soldiers who had been drafted to fight in the First World War. He had circulated leaflets urging draftees not to "submit to intimidation" by fighting in a war being conducted on behalf of "Wall Street's chosen few." Schenck admitted that the intent of the pamphlet's "impassioned language" was to "influence" draftees to resist the draft. Nothing in the pamphlet suggested that the draftees should use unlawful or violent means to oppose conscription. As Justice Holmes found: "In form at least [the pamphlet] confined itself to peaceful measures, such as a petition for the repeal of the act" and an exhortation to exercise "your right to assert your opposition to the draft." Many of the pamphlet's words were quoted directly from the Constitution. It would hard to _____. A clear case of petitioning one's government for a redress of grievances, which is explicitly protected by the worlds of the First Amendment.

Holmes also acknowledged that "in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights." "But," he added, "the character of every act depends upon the circumstances in which it is done." And to illustrate that truism he went on to say, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic."

Justice Holmes upheld the convictions, finding that the pamphlet created "a clear and present danger" of hindering the war effort while our soldiers were fighting for their lives and our liberty.

The example of shouting "Fire!" obviously bore little relationship to the facts of the Schenck case. The Schenck pamphlet contained a political message—a series of ideas and arguments. It urged its draftee readers to *think* about the message and then — if they so chose — to act on it in a lawful and nonviolent way. The man who shouts "Fire!" in a theater is neither sending a political message nor inviting his listener to think about what he has said and decide what to do in a rational, calculated manner. On the contrary, the message is designed to force action *without* contemplation. The shout of "Fire!" is directed not to the mind and the conscience of the listener but, rather, to his adrenaline and his feet. It is a stimulus to immediate *action,* not thoughtful reflection.

[29] The core analogy is the nonverbal alarm, and the derivative example is the verbal shout. By cleverly substituting the derivative shout for the core alarm, Holmes made it possible to analogize one set of words to another—as he

HOUSE_OVERSIGHT_017177

Indeed, in that respect the shout of "Fire!" is not even speech, in any meaningful sense of that term.[29] It is a *clang* sound — the equivalent of setting off a nonverbal alarm. Had Justice Holmes been more honest about his example, he would have said that freedom of speech does not protect a kid who pulls a fire alarm in the absence of a fire, in a theater when there is no fire, and thereby causes a panic. But that obviously would have been irrelevant to the case at hand. The proposition that pulling an alarm is not protected speech certainly leads to the conclusion that shouting the word *fire* is also not protected, but it certainly does not support the very different conclusion that circulating a thoughtful pamphlet is also not protected.

The analogy is thus not only inapt but also insulting. Most Americans do not respond to written political advocacy with the same kind of automatic acceptance expected of schoolchildren responding to a fire drill. Not a single recipient of the Schenck pamphlet is known to have changed his mind after reading it. Indeed, one draftee, who appeared as a prosecution witness, was asked whether reading a pamphlet asserting that the draft law was unjust would make him "immediately decide that you must erase that law." Not surprisingly, he replied, "I do my own thinking." A theatergoer would probably not respond similarly if asked how he would react to a shout of "Fire!"

Another important reason the analogy is inapt is that Holmes emphasizes the factual falsity of the shout "Fire!" The Schenck pamphlet, however, was not factually false. It contained political opinions and ideas about the causes of war and about appropriate and lawful responses to the draft. As the Supreme Court has repeatedly stated, "the First Amendment recognizes no such thing as a 'false' idea." Nor does it recognize false opinions about the causes of war.

A closer analogy to the facts of the Schenck case might have been provided by a person's standing outside a theater, offering the patrons a leaflet advising them that in his opinion the theater was a fire hazard, and urging them not to enter but to complain to the building inspectors. That analogy, however, would not have served Holmes's argument for punishing Schenck. Holmes needed an analogy that would appear relevant to Schenck's political speech but that would invite the conclusion that censorship was appropriate.

Ironically, the "Fire!" analogy is all that survives from the Schenck case; the ruling itself is no longer good law. Pamphlets of the kind that resulted in Schenck's imprisonment have been circulated with impunity during subsequent wars.

Over the years I have assembled a collection of instances— including my own cases, speeches I have heard, articles I have read — in which proponents of censorship have maintained that the expression at issue is "just like" or "equivalent to" falsely shouting "Fire!" in a crowded theater and ought to be banned, "just as" shouting "Fire!" ought to be banned. The analogy is generally invoked, often with self-satisfaction, as an absolute argument stopper. It does, after all, claim the

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could not have done if he had begun with the self-evidence proposition that setting off an alarm bell is not free speech.

HOUSE_OVERSIGHT_017178

high authority of the great Justice Oliver Wendell Holmes. I have rarely heard it invoked in a convincing, or even particularly relevant, way. But that, too, can claim lineage from the great Holmes.

In the coming pages I will describe a series of pornography cases I have litigated. In several of them, those advocating censorship have cited a state supreme court that held that "Holmes' aphorism . . . applies with equal force to pornography." Another court analogized "picketing . . . in support of a secondary boycott" to shouting "Fire!" because in both instances "speech and conduct are brigaded."

A civil rights lawyer, in a *New York Times* op-ed piece, analogized a baseball player's bigoted statements about blacks, gays, and foreigners to shouting fire in a crowded theater. I responded with my own op-ed, disputing the analogy. The Reverend Jerry Falwell, in arguing that the First Amendment doesn't protect a parody of him having drunken sex with his mother, invoked the Holmes example: "Just as no person may scream 'Fire!' in a crowded theater when there is no fire and find cover under the First Amendment, likewise, no sleazy merchant like Larry Flynt should be able to use the First Amendment as an excuse for maliciously and dishonestly attacking public figures, as he has so often done." In the famous Skokie case, in which I supported the right of neo-Nazis to march through a heavily Jewish Chicago suburb, one of the judges argued that allowing Nazis to march through a city where a large number of Holocaust survivors live "just might fall into the same category as one's 'right' to cry fire in a crowded theater."[30]

Some close analogies to shouting "Fire!" or setting off an alarm are, of course, available: calling in a false bomb threat; dialing 911 and falsely describing an emergency; making a loud, gunlike sound in the presence of the president; setting off a voice-activated sprinkler system by falsely shouting "Fire!" (or any other word or sound). In one case in which the "Fire!" analogy was directly to the point, a creative defendant tried to get around it. The case involved a man who calmly advised an airline clerk that he was "only here to hijack the plane." He was charged, in effect, with shouting "Fire!" in a crowded theater, and his rejected defense — as quoted by the court — was as follows: "If we built fire-proof theaters and let people know about this, then the shouting of 'Fire!' would not cause panic."

[30] Outside court the analogies become even more absurdly stretched. A spokesperson for the New Jersey Sports and Exposition Authority complained that newspaper reports to the effect that a large number of football players had contracted cancer after playing in the Meadowlands— a stadium atop a landfill — were the "journalistic equivalent of shouting fire in a crowded theater." An insect researcher acknowledged that his prediction that a certain amusement park might become roach infested "may be tantamount to shouting fire in a crowded theater." The philosopher Sidney Hook, in a letter to the *New York Times* bemoaning a Supreme Court decision that required a plaintiff in a defamation action to prove that the offending statement was actually false, argued that the First Amendment does not give the press carte blanche to accuse innocent persons "any more than the First Amendment protects the right of someone falsely to shout fire in a crowded theater."

HOUSE_OVERSIGHT_017179

Analogies are, by their nature, matters of degree. Some are closer to the core example than others. But any attempt to analogize political ideas in a pamphlet, ugly parody in a magazine, offensive movies in a theater, controversial newspaper articles, or any of the other expressions and actions cataloged above to the very different act of shouting "Fire!" in a crowded theater is either self-deceptive or self-serving.

Abbie Hoffman, on whose Chicago conspiracy case I worked, once described an occasion when he was standing near a fire with a crowd of people and got in trouble for yelling "Theater, theater!" That, I think, is about as clever and productive a use as anyone has ever made of Holmes's flawed analogy. And it is about the right level of logical response Holmes's silly argument deserves.

In a 1989 article I wrote criticizing the Holmes Analogy, I concluded with the following plea: "Let us hear no more nonsensical analogies to shouting fire in a crowded theater. Those who seek to censor speech will just have to come up with a somewhat more cogent illustration — one that bears at least some relationship to real speech." And so, with that in mind, I will turn to the other commonly offered exceptions to the First Amendment, some of which are quite compelling, others less so. In each instance, I will focus on cases I have litigated challenging the exception.

HOUSE_OVERSIGHT_017180

Chapter 6 Offensiveness- Pornography: I Am Curious Yellow and Deep Throat

Freedom of speech is not free. The right to say, show or publish often carries a heavy price tag. As kids, we recited the following ditty: "Sticks and stones may break my bones, but names will never harm me." Before too long we learned, often from painful experiences, how wrong it was. Names—such as "kike," "fag," "wop," "nigger," "retard," "sissy," "fatso"—could harm far more than sticks and stones. Lies, rumors, gossip, slurs, insults, caricatures could all be painful. Even the truth can hurt.[31] That's why we learn to be "polite"—to self-censor. That's why families, schools, groups and other institutions have rules, sometimes explicit, more often implicit, regulating speech. "We just don't say that kind of thing around here," is a common, if informal, limitation on freedom of expression.

It is a far cry, however, from an informal family understanding to formal government legislation and enforcement of formal restrictions on expression. I would never use —or allow anyone I love to use—the kind of epithets listed in the prior paragraph, but nor would I want the government to prohibit, under threat of criminal punishment or prior restraint, the use of those or other hurtful or offensive words.

You may remember that in the 1970s, the comedian George Carlin listed the seven words that could never be uttered on radio or television. The list included such innocent words as "piss" and "tits." (Use your imagination for the other 5!)

Although the list was never officially promulgated by the Federal Communications Commission, the uttering of the prohibited words on a Pacifica radio station that broadcast Carlin's routine led to a Supreme Court decision setting out standards for what could and could not be said during certain hours of the day and night.

Carlin's routine also became fodder for other comedians and led to the widespread mocking of any attempts to create lists of approved and unapproved words.

Nonetheless, governments have understandably sought to protect some adult citizens[32] from being "offended" by the words or expressions of other citizens. Nudists are not free to bare their privates in public, since most people are offended by the sight of other people's naked bodies, thought they may be free to do so in special areas set aside for those who are not so offended.[33] I

[31] At common law, truth was not a defense to defamation because a "truthful defamation was deemed more harmful than a false one." See Alan Dershowitz, Finding Jefferson (Wiley 2008 pages 104-05).

[32] The exposure of such material raises separate issues but the Supreme Court has ruled that the potential exposure of children does not by itself justify censoring adults. See _____.
[33] *See Dershowitz, The Best Defense, Chapter 5.*

In any event, the issue of pornography illustrates at least two distinct types of harm that have the alleged basis for prohibiting expression. A related harm grows out of the expectation that certain people who are offended by certain kind of speech will react violently to the offending person. Thus, if a white person confronts a black person and calls him by the "N word," the black person may well respond by striking the offender. Similarly if a Jewish, Muslim, Italian, Irish, Polish or gay person is confronted with a word or name deeply offensive to him or his

HOUSE_OVERSIGHT_017181

defended the right of skinny dippers to an isolated section of the Cape Cod National Seashore. (In 197_, a federal district court recognized a limited right to nude sunbathing in areas that present no conflicts with the rights of others. The decision, despite its limited scope was characterized as a "Magna Carta for nudism.")

Pornography, like nudity, offends many Americans, but there are those who would ban not only public displays of pornography, but private use as well. They argue that three distinct types of harm are caused by pornography. The first, as with nudity, is that it is offensive to many people who are involuntarily exposed to it. No empirical evidence is required to prove this kind of harm: if people say they are offended, that is the end of the matter. The second is that some people are offended by the mere knowledge that other people, who are not offending by watching it, are watching it in private. Whether this type of what I call "vicarious offensiveness" warrants an except to the First Amendment raises profound legal issues. The third, very different, kind of harm is that pornography is alleged to cause rape and other physical violence against women. This allegation, which if true would warrant legal protection, is hotly disputed and unproven, if not improvable.[34]

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group, he might respond by striking back. Hence, such provocatively offensive expressions have been called "fighting words" and have been denied First Amendment protection by some courts over the years. This concept has assumed center stage recently, as some Muslim groups, individuals and even nations have threatened violence in response to the publication of "offensive" books, cartoons and other media critiques of Islam and its prophet. The stakes have also risen. Instead of merely fighting words, some radical Muslims regard insults to the prophet as killing and bombing words.

[34] The issue is somewhat complicated, because it may be true that certain kinds of violent pornography (as well as violent non-pornography) may be contributing factors in certain people's decision or propensity to rape, just as alcohol or other drugs may be contributing factors. What is undeniably clear is that only a miniscule fraction of men who view pornography go on to rape or commit violence, and that a great many rapists do not view pornography. See Alan Dershowitz, Why Pornography? in Shouting Fire (Little Brown, 2002) pp. 1630-1675.

HOUSE_OVERSIGHT_017182

I am Curious Yellow

My initial professional encounter with the First Amendment involved a direct challenge to the concept of offensiveness in the context of a Swedish anti-war film called I Am Curious Yellow. The story involved a young girl coming-of-age both politically and sexually during the Vietnam War. It included several scenes in which she was nude and engaged in sexual activities. By today's standards, it could be shown on cable television and in art theater with an R rating, but in the late 1960s, it was scandalous. (The young girl who played the lead role, and also starred in an Ingmar Bergmann film, recently died at the age of 66, thus bringing home to me how much time had passed).

The film was seized by US Customs and banned throughout the country. Grove Press, a radical publishing house in New York, owned the film and retained me to argue for its protection under the First Amendment. I don't recall whether I charged a small fee or whether I took the case pro bono, but I put everything I had into my new found role as part time litigator on behalf of my beloved First Amendment.

I decided on a bold challenge to the traditional power of the government to censor obscene material—indeed to censor any "offensive" material shown only to people who aren't offended by it. Instead of arguing that the film itself was not obscene, I decided to argue that it was none of the government's constitutional business to act as a board of censors—to tell its adult citizens what they could and could not watch in the privacy of a movie theater that was off limits to children and that did not advertise in a pandering manner that would reasonably offend people outside the theater. There was no legal binding precedent for such a challenge. Indeed the Supreme Court had just recently reaffirmed the power of the government to ban and prosecute obscenity, as an exception to the freedom of speech. In this respect, my bold and unprecedented challenge was much like the one I helped Justice Goldberg devise against the death penalty, with the difference being he was a Justice of the Supreme Court, while I was a novice lawyer litigating my first ___ case. What both challenges shared was a large dose of chutzpah. The leading case affirming the power of government to censor porn was *Roth v. United States*. But in a more recent case, *Stanley v. Georgia*, the court carved out an exception to the exception. A divided court ruled, in an opinion by Justice Thurgood Marshall, that the state had no power to prosecute an adult for merely possessing obscene material—in this case some old stag films—in the privacy of his home. The ruling was a combination of 4th Amendment (the right of privacy in one's home) and 1st Amendment principles and was somewhat unclear about its reach, because it went out of its way to reaffirm the holding in *Roth* that obscenity was not protected by the First Amendment.

I decided to try to use the *Stanley* case as a battering ram against the very idea that government has the power to tell adults what films they could watch in a theater. The mechanism I chose for this attack was to challenge the constitutionality of the Massachusetts obscenity statute under which the owner of an art theater located across the street from the famous Boston Symphony Hall was being prosecuted for showing *I Am Curious Yellow*.

In those days, a challenge to the constitutionality of a state statute could be brought in front of a three judge district court with the right to appeal its ruling directly to the Supreme Court. The

HOUSE_OVERSIGHT_017183

criteria for bringing such a challenge, particularly if one were seeking an injunction against a state prosecution, were quite narrow. Nevertheless, we decided to try it. We asked the three judges to enjoin the Boston prosecutor, a man named Garrett Byrne, from prosecuting the theater owner.

The three judges we drew were not a promising crew.

When I learned that Judge Aldrich would preside over the panel selected to hear the I Am Curious Yellow case, I was concerned that he would remember the incident we had when I turned down his invitation to speak at his restricted club, and hold it against me. I didn't know the other two judges, both of whom were Italian American and Catholic. One of them, Judge _____ Julian, had anglicanized his original Italian name, but his strict Catholic upbringing and world views became evident throughout the hearing. The third judge, Raymond Pettine, was from Providence, Rhode Island and he surprised me with his apparent liberalism. I argued the case for several hours over three separate days.

I began by presenting my broad challenge to the power of the state to regulate the content of films shown in adult-only theaters:

> If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our constitutional heritage rebels at the thought of giving government the power to control mens' minds.

I argued that the ruling in the Stanley case was analogous to what was occurring in our case:

> There is no distinction in law, in logic, in common sense between the individual [watching a film at home or] deciding to go to a movie theater [and] pay his $2.50 or $3.

I could see skepticism in the faces of the judges—they did not seem to see any connection between the Stanley case and this one—as I continued with my argument:

> I submit that it's indistinguishable whether a person makes a private, individual decision to go to a movie theater and there to satisfy his intellectual and emotional needs in the company exclusively of voluntary people, people who have sought out and decided to see this film (with the possible exception of a few policemen and officials who see this film because of business reasons and who may indeed be offended by what they see, but with respect, it's part of their job.)

I acknowledged that "the Supreme Court ruled only on [home] possession in the Stanley case," but I argued that there was no real difference between possession and exhibition:

> Surely Stanley could not have been prosecuted under Justice Marshall's decision if he were caught putting the film in the 8mm projector and showing the film to himself or his friends in the privacy of his basement.

HOUSE_OVERSIGHT_017184

Judge Aldrich immediately expressed skepticism about the reach of my argument, suggesting that the Stanley decision wasn't relevant to a movie theater. He told me about his grandmother who "once went to a movie entitled Sur Les Troits de Paris. She thought it was a travelogue. She didn't after she got there of course…I heard about it." I assured him that we had dealt with that problem by providing a "prologue" that advises the audience who are admitted only before the film begins what they are about to see:

> "the story of a young girl who is trying to work out her relationships. There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under various circumstances, some of them quite unusual. If you believe that you would be offended or embarrassed by the showing of such scenes, you are invited at this time to obtain a refund of your admission at the box office."

As Judge Aldrich continued to press me about his grandmother's sensibilities, I was reminded of the old Jewish joke about the man with the broken watch who goes into a storefront window and asks the man behind the counter to fix his watch. "I don't fix watches. I perform circumcisions," the man replied. "Then why do you have clocks and watches in your window," the customer wondered. "What do you think I should put in my window?" the store owner responded.

I had that joke in my head when I offered the following argument to Judge Aldrich:

> If a store were to open in Boston which was simply marked "Pornography Shop," it had nothing in the window, it had no advertising, it was a place where people like Stanley could come and quietly and discreetly purchase their 8mm films, [I submit] that Stanley vs. Georgia would proscribe prosecution of that seller. I submit that necessarily if there is this right to exercise one's freedom to read and see a film, there is necessarily the concomitant right to purchase it. But the state has a great interest in making sure that the purchasing is not done in a way that intrudes on sensibilities or intrudes on other legitimate interests.

The judges pressed me on whether obscene films, even when viewed in a restricted theater, could cause viewers to go out and commit crimes such as rape. I responded that if that were true, it would be just as likely—perhaps even more so—that a person watching such films alone in his basement would be influenced in that manner. I argued that Stanley had implicitly rejected that theory.

The questioning persisted, with Judge Julian wondering whether Judge Aldrich's aunt was typical:

> As a matter of common sense though, unless we are to be so gullible as to be incredibly gullible, don't the great vast majority of the people who go to a theater to see a film like this know what they're going to see?
>
> MR. DERSHOWITZ: Precisely.
>
> JUDGE JULIAN: So this prologue is a lot of nonsense, just a gesture to try to wipe out-----

HOUSE_OVERSIGHT_017185

> JUDGE ALDRICH: He's looking after my grandmother who went to see Sur Les Toits De Paris.
>
> MR. DERSHOWITZ: The only valid basis for punishing obscenity …is to protect people [like Judge Aldrich's grandmother] from being offended, from having something thrust on them in an unwilling manner and also to protect youngsters.

When I then advised the court that under my theory, the judges would not have to view the film. Judge Aldrich immediately interjected: "Are you trying to bribe us to decide the case so we don't have to see the film?...I will admit that's the best bribe I have ever been offered."

Judge Julian did not seem to understand my argument. He kept asking me whether I wanted the court to assume that I Am Curious Yellow was not "pornographic."

I tried to explain:

> "It's exactly the opposite. We do not ask you to decide whether or not the film is pornographic. We are asking you to decide that the film shown in a nonobtrusive way, advertised in the way that it's been advertised right from the beginning, with no hint, no suggestion of obscenity or prurience, played, if you wish, with the warning being given, although there have been no complaints by a single viewer of the film that he's been offended—because your Honor is of course right: everybody knows what they're going to see—exhibited in that manner, the film is protected by the First Amendment without regard to its contents."

Judge Julian then questioned me about whether this case was really about money, rather than freedom of speech, because Grove Press was a commercial distributor of films for profit:

> JUDGE JULIAN. These people are exhibiting this film for the box office receipts, are they not as a fact?
> Mr. DERSHOWITZ. The New York Times is selling its papers for the box office receipts as well.
> JUDGE JULIAN. Let's talk about this film not the New York Times. Isn't this film being exhibited for the primary purpose and perhaps…for the only purpose of getting money at the box office? Isn't that the actual fact?
> Mr. DERSHOWITZ. Your Honors, that fact is utterly irrelevant, I would submit.
> JUDGE JULIAN. But is it the fact though?
> Mr. DERSHOWITZ. I don't know. I can't probe Mr. Rosset's mind, who is the president of Grove Press…I think he probably has very mixed motives.
>
> •••
>
> JUDGE JULIAN. That's what troubled me immensely, to see the First Amendment used for the sole and obvious purpose of making a profit and for no other purpose.

HOUSE_OVERSIGHT_017186

> Mr. DERSHOWITZ. Well, I would submit that most politicians that get up and make political speeches are doing it for a motive which is not unrelated to that. Yet we don't probe the motives of Presidents and Vice-presidents and Senators in speaking. Nor should we probe the motives of newspaper publishers and film producers.
>
> JUDGE JULIAN. Perhaps they should be probed.
>
> Mr. DERSHOWITZ. I think the First Amendment would be virtually a dead letter; [if] we would only permit people to speak who spoke simply for art for art's sake or politics for politics' sake…
> Here we're talking about something where money is being paid in order to show the film and nobody can suggest that the film should be shown in this country for free or at cost. There would simply be no films being manufactured in this country and that aspect of the First Amendment will have substantially suffered.

I then returned to my distinction between an enclosed theater and an open display.

> If Grove Press were to put up a billboard…above a large area where people congregate and there were to be an alleged obscene picture on the billboard, and the state were to try to enjoin that, I would have to [concede that there might be some harm to people who didn't want to be exposed to obscenity.]
>
> JUDGE JULIAN. That's a very generous concession.
>
> Mr. DERSHOWIZ. But in this case I do submit nobody is being exposed to anything that he doesn't want to be exposed to at all. The only thing that people are being exposed to is the fact that they know that a film is being played in Boston or in Springfield, and that fact, if it offends people, is not entitled to constitutional protection so long as they can avoid being exposed directly to the contents of the film.

Judge Aldrich was intrigued by this last point and said that he wished to pursue it further. I knew I was in for some tough questioning:

> JUDGE ALDRICH. I wish to pursue that point. I happen to be very straight laced. Every time I walk down through Harvard Square and I see there is a movie going on there that I know is obscene, of course, I don't have to go in. I can protect myself. But I'm offended by the fact that I see all these students who are age 21 and a half going in and that we are maintaining in my home town, in which I have such great pride, we are maintaining this house—I use the word "house" advisedly—filthy pictures are being shown. Do I have any interests or rights?

Judge Aldrich had put his finger directly on the vicarious offensiveness rationale for censorship. I needed to come up with an answer that didn't devalue his concerns (and his grandmother's).

HOUSE_OVERSIGHT_017187

> Mr. DERSHOWITZ. It seems to me you have an interest but no right…I can understand how you would be offended by that. But one of the prices of living in a complex society, with freedom, is for you to have to simply tolerate the fact that you know that certain people are engaging in conduct that you don't approve of. That was precisely the argument made by the State of Connecticut in the birth control [clinic] case.[35] They said that people of the State of Connecticut are offended by knowing that this kind of immoral conduct is being engaged in by people, married people, all over the State. And the Supreme Court did say that this is something that members of the society must tolerate in a pluralistic society. There are a great many things which offend me, to know that they're going on in peoples' homes—I have an interest in that, but I don't think I have a protected constitutional right [to be] disturbed about what's going on.

Judge Julian asked whether "that interest [should] be legally protected?"

Mr. DERSHOWITZ. Now, there may be ways of protecting it, perhaps through zoning regulations…

> But if the issue is total banning on the one hand as against your interests being protected against knowing people are doing this kind of thing, I would submit that the Constitution has a clear answer to that. It must permit the film to be shown in a way to minimize your exposure to it and to permit you both fully to see and to avoid being exposed to the contents of the film.
> So I do submit that your Honor does have an interest and I can understand it. But I think you will realize that on balance this interest could be used to upset almost every kind of freedom that Americans ought to be at liberty to engage in."

Judge Aldrich seemed intrigued by our argument, while continuing to press me hard on its implications. At one point Judge Aldrich asked me what I would do if the Supreme Court ruled against my theory. "Will that be the end of the road…?"

I responded: "Well, I, as an attorney, will continue to urge the Court to accept this principle because I think it's the correct approach to the regulation of obscenity."

Following three days of intensive argument and questioning, the three judges issued a decision written by Judge Aldrich. He bought my argument totally. He began by accepting my assumption about the nature of the film:

> For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.

He then went on to discuss the implications of the Stanley decision, which the prosecutor had argued was "irrelevant" to this case and which, at the beginning of my argument, thought was not relevant to movie theaters:

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[35] Griswold v. Conn

HOUSE_OVERSIGHT_017188

> In Stanley [the] Court held that in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The Court then went on to consider the state's argument that an obscene film, even viewed in a restricted theater, can induce the viewer to commit rape.

> The question is, how far does Stanley go. Is the decision to be limited to the precise problem of "mere private possession of obscene material," is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the court in Stanley stated that Roth v. United States, was "not impaired by today's holding, and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, Roth cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant.
>
> Of necessity the Stanley court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful. Had the Court considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

The Court then rendered its conclusion:

> We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.
>
> …
>
> If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theater or library. We see no reason for saying he must go alone.

It was the first time in history that a court—any court—had ruled that the government had no power to ban or prosecute an "obscene" film that was shown to the public in a theater. I had achieved a total victory not only for my client, but for my novel approach to offensiveness under the First Amendment. It was a heck of a way to begin my career as a lawyer. The victory would, however, be short lived, at least in theory, if not in practice.

Not surprisingly, the District Attorney appealed our victory to the Supreme Court, which accepted the case. I was asked to argue for Grove Press. And so, at the age of 31, I argued my first case before the High Court.

HOUSE_OVERSIGHT_017189

I had prepared extensively for my oral argument. I expected to be questioned aggressively by the recently appointed Chief Justice Warren Burger, who I had known when I clerked for Judge Bazelon. Burger and Bazelon were arch enemies, both ideologically and personally. Burger knew I was close to Bazelon, and so I expected some tension, but I could not anticipate what awaited me. I had hardly reached the lectern to begin my argument, when Chief Justice Warren Burger asked if he could "interrupt" to inquire whether I thought a state had the power to prohibit a "bear-baiting contest." I didn't know exactly what a bear-baiting contest was, but I guessed that it must involve considerable cruelty to bears. I responded that the act of bear-baiting was not protected by the Constitution, since the states have the power to protect animals from suffering.

I tried to get the argument back on the film in question: "I think the example would be better if it were a film of bear-baiting." But the Chief Justice interrupted me once again: "Let's stay on the live." I drew a distinction between an act that harmed another creature and a film of consensual lovemaking that did not intrude upon the sensibilities of those who chose to view it. The Chief Justice shot back:

> [Y]our are saying that it's all right to kill one bear and five dogs in the filming process, but it isn't right to kill many more of them in live showings, is that a distinction….

I had no idea what he was getting at with his scripted questions, so I tried again:

> No I would say a state would have the right to prohibit the actual killing of dogs and bears whether for film or other purposes.

The Chief Justice persisted in his obsession with bears!

> Let's say 14 states didn't have any statutes against bear-baiting, and 4.5 million had watched bear baiting or the filming of bear baiting. Would that have the slightest relevance in your judgment on whether the showing of bear baiting in Boston, Massachusetts, could or could not be stopped…?

I tried to direct my answer away from bear-baiting and to the issue of whether the Constitution permitted a consenting adult to view an obscene film in the privacy of a restricted movie theater:

> No, the First Amendment protects the individual's right to receive information necessary to satisfy his emotional and intellectual needs. The thrust of our [position would take prosecutors] from [inside] the theater—that is only attended by people who want to go—and would put them outside the theater to protect you and me from the intrusion on our sensibilities that would occur if movies…thrust advertisements or pictures on unwilling viewers.

But the Chief Justice would still not be diverted from his bears. Though I had never mentioned a bear in my answer, he challenged me:

> Are you suggesting that it is a universal rule that everybody is offended by bear-baiting, for example?

HOUSE_OVERSIGHT_017190

That, of course, was precisely my point: those who were not offended should be free to watch a film in which no one was hurt.

Finally, the Chief Justice asked me about theaters:

> [H]ow about moving the bear-baiting into a theater and charging $5 admission for it? I don't want to overwork you on the bear-baiting, but in order to have a film of bear-baiting, you've got to go through unlawful process in the first instance.

With less than a minute before my time had expired, the Chief Justice asked whether I thought the analogy to the bear-baiting contest was "valid." I politely told him what I thought:

> I think the analogy of bear-baiting is not valid [because it] is an illegal act which hurts animals. It is different from [lovemaking] presented on a screen to a public which has chosen to view it.

By this point my time was nearly up. I quickly summarized my argument that under a functional definition of privacy

> A theater with its curtains drawn deserves [at least as much constitutional protection as] a home with its shades drawn up.

The Chief Justice had monopolized the entire argument with his bear-baiting analogy. He 9or his law clerks0 had apparently prepared a series of questions for me about bear baiting and Burger had simply gone down the list ignoring my answers. The other eight justices were unable to ask questions, though several of them seemed anxious to probe certain points. Some of them seemed embarrassed by their Chief's performance. By the end of the argument, I finally understood what a bear-baiting contest must feel like—at least to the bear. It was not only the dumbest series of questions I have ever been asked during an oral argument—with at the possible exception of those put to me by a senile judge about the facts of the next case scheduled for argument. It was probably the stupidest conversation I've ever had with anyone about the First Amendment. But no one ever said that intelligence was a criterion for being a judge, or even a Chief Justice. What mattered to Warren Burger was that he looked like what a Chief Justice is supposed to look like!

A few months later the Supreme Court rendered a 5 to 3 decision in the *I Am Curious Yellow* case that did not reach the broad issue decided by the district court (nor did it mention bear-baiting); instead, it decided the case on a narrow procedural ground. We eventually settled the case to the advantage of the defendants. The film was shown throughout the country and no one went to prison. Judge Aldrich's opinion, suggesting that all censorship of the content of movies exhibited to adults in discreet settings was unconstitutional, remained the only court decision on that issue until June of 1973, when the Supreme Court changed the definition of obscenity in a case called *Miller v. California* and a series of companion decisions.

In these cases Chief Justice Burger, writing for the majority, expressly and emphatically rejected the approach I had argued in the *I Am Curious Yellow* case.

HOUSE_OVERSIGHT_017191

> We categorically disapprove the theory…that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only…The States have a long-recognized legitimate interest in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.

But as I promised Judge Aldrich, I continued to press my principle in the court of public opinion and in a series of other obscenity cases over the next several decades. Ultimately my view would prevail, if not in law then certainly in practice, as we shall see. Chief Justice Burger may have won in the courthouse, but we won in theaters and on television sets throughout the nation, as sexually explicit films—far more explicit than *I Am Curious Yellow*—became pervasive and "legal" in fact if not in law. This disparity between the law, as set down in theory by the Supreme Court, and the law, as implemented in practice throughout the country, is an interesting story in itself.

HOUSE_OVERSIGHT_017192

Deep Throat: Why I Chose Not to Watch It

My initial victory in the *I Am Curious Yellow case*—getting a three judge court to declare unconstitutional all obscenity laws that applied to adults-only theaters—made me something of a hero in the "adult film" industry—and something of a pariah in the radical feminist community. (More about the latter soon.) Many "obscenity" clients came my way, including the musical play *Hair* which was "banned in Boston" and several "soft core" films such as the very forgettable "Belinda"[36] and the unforgettable hard core film, *Deep Throat*.[37]

I'm told that *Deep Throat* is a very hard core and very bad movie. I can't personally attest to these claims because, to this day, I have not seen it.[38] I avoided seeing the film not because I'm a prude—I enjoy a good erotic movie as much as the next guy—but rather because I wanted to make a point about the law of obscenity: the decision to watch or not to watch a particular film should be a matter of choice for every adult citizen. Just as I told the judges in the *I Am Curious Yellow* case that they didn't have to view the film in order to rule that an adult had the constitutional right to view it in an adults-only theater, so too I had the right to argue that position without myself viewing *Deep Throat*. To paraphrase my earlier case, I was "curious" about *Deep Throat*, but cared more about the principle of choice. I also believed that my not viewing the film was a good tactic that helped to dramatize my point.

I decided to use that tactic in two separate cases involving the *Deep Throat* case. The first was the prosecution of porno-actor Harry Reems for his role as an actor in the film. Reems was the first actor in history ever to be prosecuted for the crime of obscenity. He was charged with participating in a nation-wide conspiracy to transport an obscene film in interstate commerce.

The United States government charged him with conspiracy because Reems himself had nothing to do with distributing the film in interstate commerce. As the prosecutor acknowledged:

> "[Reems] made the film, got his money and got out back in 1972, that is, he didn't do anything else as a part of the conspiracy, he didn't do any more overt acts, he didn't participate any further, and the question arises why in the thunder does he wind up being charged [with acts that took place] four years later?"

His answer was that "once a person joins a conspiracy, he is liable for everything that happens in that conspiracy until it is ended." (Reems once asked me whether he could have been charged with murder under the prosecutor's theory, if some strong-arm methods used by the distributors had resulted in a death years after the film had been completed. I told him that—under the prosecution theory—he could charged with that crime.)

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[36] See *The Best Defense* pages 174-78.
[37] I was also involved—either as a defense lawyer, consultant or commentator—in the defense of several magazines and books. See e.g. Dershowitz, *Shouting Fire*, pages _____.
[38] During a preview of a film off Broadway about the *Deep Throat* controversy I saw some soft core excerpts. They were God awful.

HOUSE_OVERSIGHT_017193

In order to get out of the conspiracy, according to the government, Reems was obliged "to take up affirmative actions to defeat and destroy the conspiracy." But what could Reems have done? He could not have "exposed" the crime, as one might expose a secret conspiracy, since everyone knew that *Deep Throat* was being distributed throughout the world. He could not have prevented the distribution and exhibition of the film, since he retained no legal rights to it. The prosecutor apparently expected him to physically destroy the thousands of prints of *Deep Throat* that were then in theaters and on video.

The jury, selected from residents of Memphis, a city proud of being called "the buckle of the Bible Belt," convicted Reems and his co-conspirators and Harry went off in search of an appellate lawyer. Because of my involvement in the I Am Curious Yellow case, he called me.

When we first met, Reems described himself to me as "a nice Jewish boy earning his livelihood by doing what lots of people would pay to do." He was born in Scarsdale, New York, with the name Herbert Streicker, attended the University of Pittsburgh, dropped out, joined the Marines, and later set out to become a stage actor. He had performed with the La Mama troupe, the New York Theater Ensemble, and the National Shakespeare Company in New York City. He had even done a Wheaties commercial. During Christmas of 1969, "when things got rough and there was no work around…,a fellow said he knew where I could make $75 doing a stag film." He nervously accepted and reported for work. His two female costars, both doctoral students in sociology at NYU, put him at ease, and he completed several "loops." Streicher was successful, not so much because of his looks or size, but rather because of his extraordinary ability to perform repeatedly on cue. In a business where time is money and the major cause of delay is male incapacity, a porno actor capable of filming several sequences in one day's shooting is in demand.

Streicker told me how he ended up as the male star of *Deep Throat*. He had been hired—at $150 per day—as a sound and lighting technician for a sex film being shot near Miami, Florida, in January 1972. When the original male lead failed to appear, the director, Gerard Damiano, asked Streicker to fill in—at a $50 cut in salary. Since it took only one day to shoot the film's sex shots, he earned only $100 for his performance. His contract did not call for royalties. When the filming was completed, Streicker's role in the enterprise was over: he did not participate in the editing or distribution of the film—not to mention its enormous profits. Even his stage name "Harry Reems"—with some vague sexual allusion in mind—was picked by the director, without even consulting Streicker. He was pleased, of course, that the film was well-received and widely shown. He retained "Harry Reems" as his professional name, and performed in several other sex films. But his role in *Deep Throat* was over, or so he thought, until he was arrested two years later in his Greenwich Village apartment. An FBI agent handed him a warrant requiring his presence in Memphis, Tennessee, a city that Streicker had never even visited.

The prosecuting attorney was a young Bible Belt fundamentalist named Larry Parrish. (The names of all the participants sounded like puns: Reems, Streicker, Lovelace, Parrish.) Parrish was dubbed by the press as "Mr. Clean," "The Memphis Heat," and "the Memphis Smut Raker." A born-again Christian, and an elder in the First Evangelical Church, Parrish believed that pornography was the bane of modern America. He once told a reporter, "I'd rather see dope on the streets than these movies," explaining that drugs could be cleansed from the body, but pornography's damage was "permanent." When asked why be became a prosecutor, Parrish cited

HOUSE_OVERSIGHT_017194

the warning to evildoers in Romans 13:4, that God had appointed ministers on earth to carry out his wrath against them. He believed it was his mission to conduct "search and destroy" operations against the porno industry. As a prosecutor of pornography, he had already secured more than forty convictions.

Many observers saw the decision to bring Reems to trial as evidence of Parrish's creativity. As a Memphis lawyer, familiar with Parrish, put it: "Parrish figured that putting an actor on trial was the way to get publicity [and] a man is less likely to pick up public sympathy than a woman." Parrish acknowledged that his purpose in prosecuting Reems was to made it clear that no one involved with a porno film was immune from criminal liability.

Reems came to see me after he had been convicted and was facing years in prison. He wanted me to argue his appeal. He told me he had no money and asked me to take his case on a pro bono basis. I agreed. I told him I preferred not to watch the film and explained to him my theory of "choice" and "externalities," but assured him that I would make every argument that had any chance of freeing him.

There's an old saying that goes this way: "If you have the law on your side, bang on the law. If you have the facts on your side, bang on the facts. If you have neither the law nor the facts on your side, bang on the table." I have never believed that, but I do believe in a variation on that theme: If you don't have the law or legal facts on your side, argue your case in the court of public opinion. In the Reems case, the Memphis jury had rejected Reems' factual defense, and the judge had rejected his legal defense. The Supreme Court had rejected my "choice" and "externality" approach. I continued to believe, however, that the broader general public, or at least the most influential segment of the public, would be sympathetic to my libertarian approach to obscenity and free speech, especially in the context of an actor who was being prosecuted. Reems, to be sure, was not Helen Hayes or Marlin Brando, but to make the point that the principle was the same, we adopted the following slogan: "Harry Reems today, Helen Hayes tomorrow." We made a determined effort to elicit support from the mainstream entertainment industry and from the media.

We succeeded in getting The New York Times to cover the case. Its initial story told how the Reems prosecution was first seen "as a joke," but is now being understood "as a very serious issue":

> With Mr. Dershowitz as the lead lawyer and the American Civil Liberties Union and other prominent groups and individual prepared to help, Mr. Reems has some of the country's most impressive legal talent working on his appeal.
>
> He also has the support of some of the country's best known entertainers: Colleen Dewhurst, Ben Gazzaza, Mike Nichols, Stephen Soundheim…Warren Beatty, Jack Nicholson and Gregory Peck.
>
> As Mr. Dershowitz interprets the *Deep Throat* case, "Any person who participates in any way in the creation, production, editing or distribution of a sexually explicit film,

HOUSE_OVERSIGHT_017195

> newspaper, book, painting or magazine can be hauled into a Federal court anywhere in the United States and charged with participating in a national conspiracy."

Shortly thereafter, Nat Hentoff wrote a long front-page analysis of the *Village Voice*. Hentoff warned his readers of the consequences of a government victory in the *Reems* case.

> Alan Dershowitz, a Harvard Law School professor and one of the nation's preeminent constitutional lawyers, has never been known as an apocalyptic civil libertarian. Accordingly, when Professor Dershowitz speaks of the recent criminal convictions in a porno-film case as being so chilling as to ultimately also freeze the printed word, the warning is a weightier than if it had come from those who habitually clamor that the constitutional sky is falling…
>
> Should the verdict against Harry Reems be sustained, obscenity indictments throughout the country will pyramid.

Hentoff explained that the implications of the Reems prosecution go well beyond obscenity. If a conspiracy charge like this one was to be upheld on appeal, the government could make dangerous use of that precedent in political cases involving, for example, antiwar activists. Hentoff then quoted my legal argument:

> "[H]ere was an actor who, on the one day he worked on *Deep Throat*, had no idea what the ultimate film was going to look like. He knew it was a sex film, but he had not seen any script in advance. There was no way he could know whether it was going to be soft core or hard core. And, in fact, Harry never even saw the film before it was released. Yet he's convicted of a conspiracy to move the film, in the form it finally took, across state lines."

Following the publication of the Hentoff article had, hundreds of readers came forward and volunteered their assistance. It also generated numerous other stories—presenting our side of the case.

KING OF THE PORNO ACTORS FINDS HIMSELF IN DEEP THROES
IN TROUBLE UP TO HIS THROAT
HOW HARRY GOT REAMED
DEEP THREAT
PORN'S DEEP GOAT
REEMS SHAFTED IN BIBLE BELT

Reems and I crisscrossed the country, speaking at universities, town halls and other venues. Our appearances were widely covered by the media. The *New York Times* described a joint appearance at the Harvard Law Forum:

> Harry stood with a portrait of Supreme Court Justice Felix Frankfurter beaming down on him. Besides him sat Alan Dershowitz, looking like a tweedy Marx Brother with his wild nimbus of ash-blond hair, saying that he felt Harry Reems' trial was the most significant First Amendment conspiracy case since Dr. Spock.

HOUSE_OVERSIGHT_017196

> Dershowitz acted as a sort of kibitzer for Harry. He noted that the crew of the Glomar Explorer, [which] had been shown a videotape of *Deep Throat*, had more to do with transporting obscene material in interstate commerce than Harry Reems did. Would Larry Parrish prosecute them? When I asked Parrish, he said: "They're not insulated against prosecution."

Not all the stories were flattering. Mike Royko complained in a syndicated article how depressing it was that after two hundred years of men like Jefferson, Paine, Debs, and Darrow, "we are now asked to fight for the right of Harry Reems to be a public creep…Anybody who contributes to his defense fund," Royko concluded, "is a mental moonbeam."

But people contributed and Reems and I persisted in making our case in the court of public opinion. In time, the publicity had its intended effect on the public, on the Justice Department, and on the courts. We began to get the message that the Reems conviction was an embarrassment. This was exactly what we had hoped would happen.

In the end, the Justice Department decided to drop the case. Reems' conviction was vacated and his indictment was dismissed, over the strong objections of the Memphis prosecutor and judge. We did not have the law on our side, but we did have public opinion. We might have lost our case in the court of law (or won it on grounds other than my "choice", "externality approach,") but we had clearly won in the court of public opinion.[39] Harry Reems went free, retired from the porn business, became a born-again Christian and moved to Utah, where he sold real estate. As my legal "fee" for winning his freedom, he sent me a photograph of him with the following inscription: "To Alan Dershowitz who me everything I know." The First Amendment was safe from the likes of Larry Parrish—at least for a time.

My second encounter with *Deep Throat* presented a more daunting challenge to my theory. It took place on my home turf of Harvard, and the people urging criminal prosecution were Harvard students. The people who these students wanted to see prosecuted were other students, one of whom eventually became a founder of Microsoft.

It all began with some drunken Harvard College students viewing the film *Animal House* and throwing beer cans at the screen and damaging it. The Quincy House Film Society was responsible for the screen. In order to raise the several hundred dollars needed for repair, they decided to show *Deep Throat*.

Some women students who lived in Quincy House protested. "This is our home," one complained. "We shouldn't have to be subjected to abuse and degradation right in our own living room."

The uproar had caught the film society by surprise. The showing of *Deep Throat* had become a pre exam tradition at many colleges. My own nephew sponsored a showing at MIT. It was seen as a lark, an escape from the tensions of the tests. But feminists were beginning to take pornographic movies, especially *Deep Throat*, quite seriously.

[39] I relate the other legal theories on which we might have won the case in *The Best Defense* pages 155-174.

HOUSE_OVERSIGHT_017197

Several weeks prior to the scheduled showing, Gloria Steinem had written an article in *Ms*. magazine about *Deep Throat* and the exploitation of its female lead, Linda Lovelace. Pointing to the $60 million allegedly made on the film, Steinem characterized *Deep Throat* as "a national and international profit center and dirty joke." At the heart of the joke was Linda Lovelace "whose innocent face offered movie-goers the titillating thought that even the girl-next-door might be the object of porn-style sex." But, according to Steinem, it was a joke with widely felt consequences: "Literally millions seem to have been taken to *Deep Throat* by their boyfriends or husbands (not to mention prostitutes by pimps) so that each one might learn what a woman could do to please a man if she really wanted to."
Moreover, Linda Lovelace was now claiming that her innocent face had been a mask covering up a battered wife who had been imprisoned by her husband-pimp. Several years after the completion of *Deep Throat* was completed, Lovelace wrote an autobiography entitled *Ordeal*, in which she told a sordid story of how she had been compelled to perform her "sexual sword-swallower trick" at gunpoint.

After reading *Ordeal* I called Reems and asked him whether his recollections of the filming of *Deep Throat* corroborated her claim that she had been forced into performing. Harry, who was then working off-Broadway in a stage play, laughed and said, "Are you kidding? Sure her husband, Chuck, was an asshole, but he was hardly around during the filming. Damiano sent him away because he would get jealous of how much she was enjoying the sex. She was really into it. We had a good relationship before and during the filming."

I told Harry that Lovelace had written that when "she saw how upset Chuck was, [she] decided [she] would pretend to enjoy it with Harry." I asked whether it was possible that she was only acting.

"Linda Lovelace acting?" Harry exclaimed. "Have you seen her in a film? She couldn't even pretend to be acting."

Whether true or false, Lovelace's account struck a responsive chord among many feminists. Gloria Steinem's article presented a sympathetic portrait of Lovelace as the victim of everything the "sleazy pornocrats" had come to represent. Using Lovelace's *Ordeal* as a symbol of sexist repression, many feminists declared all-out war against pornography. The movie *Deep Throat* came to symbolize the anti-women evils of the sex industry. And I became the symbol of the "pornocrat lawyer," getting rich off the suffering of exploited women (even though I charged nothing for these cases).

The organization through which Gloria Steinem spoke—Women Against Pornography—advocated boycotts as its primary weapons in the war on porn. The boycotts were directed not only against theaters and bookstores, but against lawyers who represented them on First Amendment grounds. When I and several friends opened a Kosher deli in Harvard Square, it was picketed with signs of saying "How can a porn pig serve Kosher food?"

Although boycotts are themselves protected by the constitutional right of free expression, civil libertarians are appropriately concerned about the effect of overly broad boycotts, such as those

HOUSE_OVERSIGHT_017198

directed against general bookstores. We remember that boycotts had been employed widely during the McCarthy period. The threat to boycott motion-picture studios and television stations that employed "red," "pink," or "suspect" actors, directors, or technicians, led to the notorious "black lists" and "red channels." In an interview with Playboy magazine, I had expressed some of those concerns:

> "Take what [some of these] women are now doing and ask yourself the question. Would you favor it if their objection were to books about atheism or communism instead of pornography? If you would say no, then it seems to me that you can't be in favor of a boycott against stores that sell Playboy and Penthouse, because they're equally protected.

The dispute between civil libertarians and feminists had split the ranks of some liberals, and the issue was achieving some notoriety in the media. I had, perhaps, added some fuel to the fire by my criticism of the "new feminist censors" in several articles and speeches. I did not deny that some pornography could be degrading to women, but I argued that it is precisely the function of the First Amendment to protect those whose speech offends and degrades.

I pointed out that some of the most vocal opponents of pornography inadvertently provided the most compelling arguments for its constitutional protection by characterizing it as "Fascist propaganda." (The Fascists, not surprisingly, used to call it "Communist propaganda.") All propaganda is within the central core of the First Amendment. Nor did I dispute the claim that some pornography may contribute to an atmosphere of violence against women. But speech often causes undesirable consequences—political violence, riots, even revolutions. That should not, I argued, be a reason for suppressing speech itself.

Some radical feminists went beyond boycotts, shooting bullets through a bookstore window in Harvard Square to protest its sale of Playboy Magazine. Some theaters showing *Deep Throat* received threats of violence, and at least one was firebombed after the patrons left.

Some of the women of Quincy House who were opposed to *Deep Throat* were not content to protest. First they tried to cancel the showing by calling for a vote of the students who lived in the dormitory. They lost by a margin of three to one. Forty-nine percent of the women who voted opposed the showing; and forty-eight percent favored showing *Deep Throat*. Next they tried to get the Harvard University administration to forbid the scheduled showing. The Dean of Students wrote a letter to the Quincy House Film Society urging it not to show *Deep Throat*, but he would not ban it. The members of the film society, caught up in the adversary challenge by the feminists, voted to go forward with the event.

The Quincy House women, with the assistance of other feminists, decided to picket the performances and to use the occasion to sensitize students to the evils of pornography. I supported their protest. Pamphlets were prepared presenting the feminist perspective on pornography. A slide show, graphically depicting the exploitive and sexist nature of pornography, was scheduled for presentation in an adjoining room an hour before the first showing of *Deep Throat*. Several prominent local feminist speakers had been asked to address the hundreds of protesters expected in front of Quincy House on the evening of the first scheduled performance.

HOUSE_OVERSIGHT_017199

The First Amendment seemed to be in full bloom at Harvard. No one was being prevented from expressing his or her views. The Quincy House Film Society was going to show *Deep Throat*; the Harvard administration was expressing but not imposing its views; the feminists were preparing pamphlets, slide shows, and speakers to present theirs; and everyone was free to see and listen to all or none of these expressions.

The feminists seemed to be making their point quite effectively: more students were expected on the picket lines and at the slide show than at the movie itself. Many in the Harvard community, while supporting the right of the Quincy House Film Society to show *Deep Throat*, now believed that the society had been insensitive to the feelings of their feminist housemates by exhibiting an offensive film in the dormitory that was home to them all. I shared that view.

Then everything changed. Days before the scheduled showing, two women residents of Quincy House, not satisfied to protest and picket, called the local District Attorney's office and asked the police to prevent the showing of *Deep Throat* and to arrest the students who were planning to show it.

The local District Attorney was an elderly political hack named John Droney, who had repeatedly won reelection on an uncompromising law-and-order platform. When he learned that the twin evils of obscenity and Harvard might merge on that fateful night, he dispatched an assistant to court in an effort to secure an injunction against the scheduled showing.

If there is anything more obnoxious to a civil libertarian than the punishment of speech <u>after</u> it has taken place, it is the issuance of a <u>prior</u> injunction to prevent speech in the first place. Prior restraint—as an injunction against speech has come to be known—is the purest form of censorship. It seeks to prevent the speech from ever reaching the public. Now, almost ten years after the Supreme Court had rebuffed efforts to enjoin publication of the Pentagon Papers, the District Attorney of Middlesex County was seeking to enjoin the showing of a dirty movie to a small group of students in a college dormitory at Harvard.

Only hours before the scheduled performance, Carl Stork and Nathan J. Hagen—the co-presidents of the Quincy House Film Society—received telephone calls from the D.A.'s office directing them to be in Judge Charles R. Alberti's courtroom at two o'clock for a hearing. Stork and Hagen tried to call me in my office. But I was at lunch, and my secretary couldn't locate me. Stork and Hagen told her the story and requested that I come to the court to assist them as soon as possible. I returned from lunch at two-fifteen, to learn that I was expected in court—fifteen minutes earlier!

I quickly borrowed a colleague's ill-fitting jacket, dug an old brown tie out of my desk drawer, and drove to the courthouse in downtown Cambridge.

Within minutes, I found myself before Judge Alberti, arguing against the injunction. With no books, cases, or statutes in my possession, I had to wing it. The judge was most understanding, asking the Assistant District Attorney to let me look over his shoulder at the relevant statute and cases.

HOUSE_OVERSIGHT_017200

After some legal argument, Judge Alberti declared that he was ready to see *Deep Throat* to decide whether it was obscene. I argued that the judge need not view the film: no matter what its content, I said, it would be unconstitutional for him to enjoin the showing of any film. If the D.A. thought the film was obscene, he could wait until it was exhibited and then arrest those responsible for its being shown. Judge Alberti insisted, however, on having *Deep Throat* screened for him. As the equipment was being wheeled in the courtroom, I informed the judge that I had no intention of watching the film.

I was preserving an important point for any jury trial that the students might have in the future. I would tell the jurors that I had never seen *Deep Throat* because I had chosen not to, and that they had never seen *Deep Throat* because they had chosen not to. I would argue that the right to choose not to see a film is just as important as the right to choose to see a film. Indeed, most countries that prevent their citizens from seeing certain films also require their citizens to see other films. I would remind the jurors that it was the District Attorney who was making them see a film they had chosen not to see, in order to have them decide whether other people, who have also chosen not to see would be offended if they were to see it. I hoped, by this argument, to point out the absurd nature of the jurors' task in an obscenity prosecution, and to get them to focus on the important issue –namely, whether the outside of the movie theater, the only thing that the unwilling public may have to endure, is offensive to those who cannot avoid it.

Judge Alberti excused me from watching *Deep Throat,* and Stork, Hagen and I left the courtroom while the judge, half a dozen assistant D.A.'s, and a few court house personnel watched Linda Lovelace and Harry Reems on a small video machine.

After about forty minutes Judge Alberti abruptly stopped the videotape and summoned us back into court. "I've seen enough," he declared with a disgusted look on his face. Then, turning to me, he said, "You're the lucky one. I had to sit through that trash." The judge then declined to issue an injunction against the scheduled showing of *Deep Throat*, because although he regarded it as degrading both to men and women, he found that it was not obscene under the relevant Massachusetts standards. The film would be shown that night.

When I arrived at Quincy House shortly before eight o'clock, a circus atmosphere prevailed. Hundreds of pickets marched outside urging potential viewers to stay away. There was some pushing and shoving. Slogans were shouted: "Freedom of the Press is not Freedom to Molest." "Pornography is an incitement to violence."

I walked past the pickets and spoke to the assembled viewers and protesters:

> Whether you folks like it or not, you are part of a rather important political event…I am not here to either encourage or discourage the students who decided to see this film…Were I not involved in this lawsuit, I would be out there defending the rights of those picketers to…persuade you not to see this film.

HOUSE_OVERSIGHT_017201

Notwithstanding the judge's ruling that the film was not obscene, the District Attorney decided to arrest Stork and Hagen. The Deep Throat case was so important to Droney that he pulled one state detective off a murder investigation to watch the film and make the arrest.

I tried to secure a federal injunction against the arrest of my clients, by telephoning the emergency judge. But in the midst of our conference the first show ended and the officers arrested Stork and Hagen, confiscated the film, and seized the money the society had collected for the tickets.

Amidst shouts of "Free the Quincy House Two," Stork and Hagen were taken to Cambridge Police Headquarters and booked on charges of disseminating matter they knew to be obscene, despite the reality that they knew it not to be obscene, because the judge had so ruled. A band of students marched behind them and protested the arrest on the steps of the police station. Among the protesting students were some of the same women who earlier had organized the feminist demonstration. They were furious at the feminist students who were trying to put two of their fellow students in prison for exercising their freedom of expression. As I later described this irony:

> …the minute the kids were arrested, the minute the law was invoked, everything changed—the women [who called the cops] became the goats, the kids [who were arrested] became the heroes. One lesson that we all learned was that the least effective way of delegitimizing this kind of speech is to invoke the law; it has the opposite effect. You get all the good people on the side of the bad acts.

Several days after the arrest, we filed a civil rights action in Boston Federal Court charging District Attorney Droney with violating the rights of Stork and Hagen, as well as those of the audience members who were denied the right to attend the three scheduled showings that had to be canceled after the film was seized.

Eventually all the charges against Stork and Hagen were dismissed, after the lawsuit forced the District Attorney to admit, under oath, that he had willfully defied the judicial determination that Deep Throat was not obscene under Massachusetts Law and that his goal was to serve as a "censor," regardless of the law. The "Quincy House Two" were free and life returned to normal at Harvard.

My encounters with fundamentalists, feminists and pornographers made clear to me the important, and often underestimated, relationship between the court of law and the court of public opinion. If a visitor from Mars, our even from Europe, were to read only the Supreme Court decisions on obscenity, he would come away with a totally false picture of the law of obscenity in action—or inaction.

I once had a European student who wanted to study why there is so much censorship of erotic material in the United States. He had come to his erroneous conclusion from reading United States Supreme Court decisions. I told him that before he undertook his study, he should visit some video stores (this was several years ago) and adult-only movie theaters. He did and came

HOUSE_OVERSIGHT_017202

back to me in shock. "They don't follow the Supreme Court in the United States," he exclaimed. "Now that's a subject worthy of study," I replied.

It is important to remember that in a democracy, even a democracy in which the Supreme Court plays so central a role, that in the end the people decide. This is especially true in an area, like obscenity, where "community values" help define the law. Such values are ever-shifting and subject to influence. While the Supreme Court has insisted that the government has the power to punish (and otherwise regulate) the showing and viewing of "obscene" films in adult-only theaters (and on cable and "on demand" television), the people have voted the other way with their feet (and their remotes). The law in action today bears little resemblance to Chief Justice Berger's "categorical…disapprov[al] of [my] theory that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only…" The law in action more closely resembles the approach I advocated in my first encounter with the law of obscenity back in 1969. I promised Judge Aldrich that if we lost in the Supreme Court, I would continue, as a lawyer, to continue to urge acceptance of the argument that the government has no business telling a consenting adult what he may or may not watch in a theater (or video or TV) from which children are excluded, so long as the "externalities"—that which appears in public view outside the theater—is not obscene.

I have kept my promise, and despite the Supreme Court's continued insistence—most recently in the violent video games case—that "obscenity" is not protected by the First Amendment, porn is widely available to consenting adults who choose to watch it without thrusting it upon unwilling viewers. That's the law in action. Inevitably, the law, as articulated by the courts, will follow the law in action, lest it become irrelevantly anachronistic or patently hypocritical. Hypocrisy, it has been said, is the homage paid by vice to virtue. In the area of obscenity, hypocrisy functions to allow the courts to maintain a pretense of Puritanism in a world of prurience. A puritan, H.L. Menkin once remarked, is a person who spends his days worrying that somewhere, somehow, someone is having fun. T. B. Macaulay once observed that "The Puritan hated bear-baiting, not because it gave pain to the bear, but because it gave pleasure to the spectators." Perhaps that's why our "Puritan" former Chief Justice insisted on comparing adult films to bear-baiting. Some adults enjoy watching obscene films. Although some puritans and feminists hate this, there is no evidence that this activity causes the type of harm that government should be empowered to prevent by censorship.[40]

Most Americans seem to understand that pornography, while offensive to some, is not provably harmful to others. That's why obscenity prosecutions have a relatively low rate of success. I have been involved in dozens of obscenity cases over the years and do not recall ever losing one. In addition to litigating many obscenity cases, I have written extensively on the subject. My article "Why Pornography?" set out to determine whether there is any actual relationship between "hard-core pornography" and violence against women. It began by disputing Justice Potter Stewart's famous line that although he could never "define" hard core pornography, "I know it when I see it." That may have been true before radical feminists targeted pornography as a major cause of rape and other violence against women. Now the radical feminist definition of hard-core pornography would be unrecognizable to Justice Stewart, as well as to social scientist who seek

[40] Even if there were evidence that it harmed the viewer, that would not be a good enough reason for banning it, so long as there is no evidence it harms others. See Dershowitz, *Shouting Fire, Why Pornography?* pages ____

HOUSE_OVERSIGHT_017203

to establish a causal connection between porn and rape. Here is the definition as set out in a model statute introduced in several state legislatures by radical feminists:

> Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also include one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts—including but not limited to vaginas, breast and buttocks—are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented as, or penetrated by, objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual. (emphasis added).

The italicized words—"subordination," "dehumanized," "objects," "scenarios of degradation"—are so vague and subjective that they could apply to the writings of Shakespeare, Checkov, Roth, Hemingway, Mailer, DeSade, Miller and many others. The only element this new definition of pornography has in common with what Justice Stewart "knew" when he "saw" it is the requirement that the material be "sexually explicit." Without this element, the government would have no historical basis for banning speech. I then went on to show that there was no correlation (to say nothing of causation) between the sexual explicitness of a film and the likelihood that it will induce violence by its viewer. Indeed the available evidence suggests that there may well be a negative correlation, since rape has gone down considerably in those societies in which sexually explicit films are pervasive, while rape has certainly not gone down in those societies that persist in censoring films with explicit sex.

I argued therefore that "pornography is a red herring" and that in the absence of compelling evidence—of which there is none—that it causes actual harm beyond offending those who can choose not to see it, the government should get out of the business of censoring films and other media.

There are, however, other types of speech that pose far greater potential dangers. These communications include the divulgence of state secrets, the dissemination of classified information and the publication of news stories that compromise the national interest and endanger citizens. The problem is that the censorship of such expression may also pose far greater risks to democracy and liberty than the censorship of obscenity. Put another way, democracy could survive the censorship of hard-core pornography, despite the "slippery slope" from "porn" to politics (or from Harry Reems to Helen Hayes.) A society that banned pornography would, perhaps, be less vibrant, less tolerant, less pluralistic, less committed to choice, than one that did not. It might also be more subject to sliding down the slope toward other forms of artistic censorship at the margins. But so long as core political discourse remained free and open—as long as political dissent continued to thrive—democracy could survive. The same could not confidently be said about the widespread censorship of expression regarded by the government as state secrets, classified information and "dangerous" news stories. These go to the very heart of

HOUSE_OVERSIGHT_017204

our democratic system of checks and balances in which the ultimate check is an informed public. As James Madison cautioned nearly two centuries ago: “A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both.”

HOUSE_OVERSIGHT_017205

Chapter 7 Disclosure of Secrets: From Pentagon Papers to Wikileaks

The conflict between national security and free expression is a real one. It must be confronted and resolved by every society committed to civil liberties yet concerned for its safety. In this respect, the situation is different from the alleged conflicts that motivate the censorship of supposedly obscene material: in most obscenity cases, the "conflict" is contrived and need not exist at all. There is ample room in a diverse and free society for accommodating the desires of those who get pleasure from porn and those who feel the need to be protected from the intrusion of offensive material. The guiding principle that "your right to swing your fist ends at the tip of my nose" suggests a workable approach to the regulation of merely offensive material. But there is no simple rule for the accommodation of free expression and national security, where the expression may expose our security to real danger.

No reasonable person can dispute the reality that there are "necessary secrets," like the names of spies, the movement of troops, the contents of codes and ciphers, the location of satellites and the nature of secret weapons. Nor can any student of history doubt that there are unnecessary secrets, like old and useless information that remains classified by bureaucratic inertia. There is also information kept secret under the pretext of national security but really in order to protect the reputation or electability of government officials. And then there is the most interesting category of secrets — those that are genuinely designed to protect national security in the short run, but whose disclosure may well serve the national interest in the long run. (An example of this last category, at least with the benefit of hindsight, was the decision by The New York Times to withhold publication of the Kennedy administration's imminent intention to invade the Bay of Pigs in Cuba. Had it disclosed this information, the fiasco might have been called off, many lives saved and America's reputation less tarnished.)

The most controversial genre are secrets whose disclosure would, in the reasonable views of the government, endanger national security, but whose disclosure, in the equally reasonable view of the press, might ultimately serve the national interest. The real issue is not whether such secrets should be published, since that question will often be a close one about which well-intentioned people will disagree. The real issue, as it often is in a democracy, is <u>who</u> should be entrusted to make this real-time decision.

The other difficult issue is not <u>whether</u>, but <u>when</u> to publish. In a democracy, there should be no permanent secrets, since history and accountability are paramount. The public must ultimately know everything its government has done in its name, but sometimes it is necessary to postpone publication until an immediate danger has passed, since in the modern world, there is no way of disclosing secrets to friends without also disclosing them to enemies.

There is no "one size fits all" solution to this daunting conflict, but there are some useful guidelines in striking the proper balance. In the first place, the vast majority of *claims* that national security will be endangered by free expression are simply not true; most such claims are probably not even believed by the government officials who assert them. The talismanic phrase "national security" is often invoked as a transparent cover for convenience, for political advantage, and for protection from personal or political embarrassment. Every claim of national

HOUSE_OVERSIGHT_017206

"security"—or "corporate security" or "university security" or the security of any institution—should be subject to rigorous challenge, in an effort to separate the contrived from the authentic. But this will not eliminate all conflict. There will be some cases of real and intractable conflict between security and freedom. Our Constitution purports to resolve doubts in favor of freedom, but there are cases where even that presumption will not resolve the problem: where the authentic claims of national security will seem to outweigh the powerful presumption in favor of free expression.

In those cases we need to develop adequate mechanisms for resolving the dispute. Resolution cannot be left entirely in the hands of those responsible for security, such as the executive or the military. Our experience in delegating decision-making authority to these institutions in times of crisis is discouraging.

It has been indeed fortunate for the survival of our liberties that there have always been some Americans—often only a small group and sometimes not those directly affected—willing to challenge governmental high-handedness, even during periods of crisis. Under our constitutional system, it takes only a single person challenging the government to create a case or controversy suitable for judicial resolution.

This is not to suggest that justice should remain blind to the existence of a real emergency endangering the survival of the nation. As Justice Arthur Goldberg once wrote: "While the Constitution protects against the invasion of individual rights, it is not a suicide pact." But it is precisely during times of crisis—when the balance between momentary expediency and enduring safeguards often goes askew—that courts can perform their most critical function: to preserve or restore a sense of perspective.

In the eternal struggle between liberty and security we have come to expect the executive and legislative branches to champion the latter. The judiciary—with its lifetime tenure, its tradition of independence, and its unique stewardship over our irrepealable rights—is the institution most able to resist the passing fears and passions of a dangerous moment.

But liberty is not a commodity that can be obtained once and for all, and then passively held on to. The battle for civil liberties, as Roger Baldwin, the late founder of the ACLU, liked to say, "never stays won." (A variation on the Biblical admonition that justice must be actively pursued, because it too "never stays won.") The struggle must be endured by every new generation and in each new crisis. What Thomas Paine taught us on the eve of our own Revolution remains true today: "Those who expect to reap the blessings of freedom must. . . undergo the fatigue of supporting it."

The stakes on both sides are much higher when the government seeks to censor dangerous "leaks" than when it seeks to censor obscenity or other merely offensive or disturbing speech. The danger of publication is greater and the danger of repression is also greater. There are serious risks in <u>not</u> censoring, and there are serious risks <u>in</u> censoring. Striking the proper constitutional balance between these risks is a daunting challenge that every democracy must confront. Unfortunately it is a challenge that too few democracies—including our own—have confronted wisely and correctly.[41]

HOUSE_OVERSIGHT_017207

I was asked to help confront this challenge early in my career in several important cases pitting national security against the First Amendment.

These early cases grew out of our disastrous experience in Vietnam, and I observed at close range the ravages of war on our freedoms at home.

The first major Vietnam case was the conspiracy prosecution against Dr. Benjamin Spock, the Reverend William Sloan Coffin, and several other antiwar leaders. I played a consulting role in the defense of Dr. Spock and eventually wrote an article for the *New York Times* about the case after the convictions were reversed on appeal.

The most publicized and notorious of the Vietnam protest cases was the conspiracy prosecution against the "Chicago 7" growing out of demonstrations during the 1968 Democratic Convention. After the trial of that case, the lead defense lawyer—William Kunstler—was held in contempt of court and sentenced to four years imprisonment. I was part of the legal team assembled to prepare the appeal of that contempt order. We won.

Another major prosecution was against the Berrigan brothers and other radical leaders of the draft resistance movement. I was asked to work on the defense of that case, but was "fired" by one of the more militant defendants when he learned that I was a Zionist.

The bitterness of the Vietnam War spread rapidly over college and university campuses. What began as peaceful teach-ins and protests soon turned to confrontations and violence. In 1969, there was an anti-war protest at Harvard that led to violence and several years of continuous turmoil on that venerable campus. These events led the university to attempt to suspend or dismiss numerous students. I represented several of these students against the university. One was accused of "giving the finger" to a speaker. Another was accused of shouting "no silence in the face of death," when the speaker requested a moment of silence for soldiers killed in combat. We won both cases.

At Stanford University the leader of the antiwar group was a professor of English literature named Bruce Franklin. He was a Maoist, a Stalinist, and an advocate and practitioner of direct action, including violence. As a result of several speeches he gave and activities in which he participated, the Stanford administration decided to strip him of tenure and fire him. It was the first political firing of a tenured professor by a major university since the terrible days of McCarthyism. I took his case on behalf of the American Civil Liberties Union.

As the war was winding down and the United States was deciding to withdraw from Vietnam, the CIA was given a major role in overseeing the American evacuation. One of the highest ranking CIA agents in charge of the operation was Frank Snepp. Snepp wrote an uncensored account of his experiences—taking care, however, not to disclose any classified material. He refused to submit his manuscript for prior "approval" by the CIA, as required in his employment contract. When his book entitled *Decent Interval* was published the CIA sued him, and the case eventually

[41] See Dershowitz, *Stretch Points of Liberty*

HOUSE_OVERSIGHT_017208

was decided against him by the Supreme Court. I was one of his lawyers throughout the litigation.

The release and publication of the Pentagon Papers in 1971 was perhaps the single most important event in turning American public opinion against the Vietnam War. While the *New York Times* and the *Washington Post* were fighting in court to continue publishing portions of the Papers, Senator Mike Gravel of Alaska was taking more direct action: he convened an emergency night-time meeting of his subcommittee on Buildings and Grounds—hard to imagine a committee less relevant to the Pentagon Papers—and placed the Papers in the public record. The "Gravel Edition" of the Pentagon Papers was then published by Beacon Press of Boston. I represented Beacon Press and, subsequently, Senator Gravel in litigation that eventually went to the United States Supreme Court.

I also conferred with my teacher and dear friend Alexander Bickel, who was lead counsel for the Times in the Pentagon Papers case. Our cases shared a common constitutional approach and so we exchanged ideas and drafts.

The difficulty of defending an absolutist view was well illustrated by an exchange between Justice Potter Stewart and Professor Bickel. Stewart asked Bickel about "a hypothetical case:"

> "Let us assume that when the members of the Court go back and open up this sealed record we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a hundred young men whose only offense had been that they were nineteen years old and had low draft numbers. What should we do?"

Bickel fumbled:

> "I wish there were a statute that covered it." (p. 46)

Justice Stewart persisted:

> "You would say the Constitution requires that it be published, and that these men die, is that it?

Finally, Bickel answered his hypothetical directly.

> "No, I'm afraid that my inclinations to humanity overcome the somewhat more abstract devotion to the First Amendment in a case of that sort."

The lawyer for the government, Solicitor General Erwin Griswold (former Dean of the Harvard Law School) did not regard Justice Stewart's case as hypothetical.

> "I haven't the slightest doubt myself that the material which has already been published and the publication of the other materials affects American lives and is a thoroughly serious matter."

HOUSE_OVERSIGHT_017209

Several years after the argument, Griswold expressed a rather different view:

> "I have never seen any trace of a threat to national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat. [He, of course, had suggested just that in his oral argument]…It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience, and it may be relevant now."[42]

The First Amendment emerged victorious in the Pentagon Papers case, as it did in most of the anti-war cases of the 1970s. But this was before the age of the internet. Everything would soon be different as technology changed the sounds and sights of expression—as well as the stakes involved in the debate over disseminating massive amounts of classified material throughout the world in the blink of an eye.

Julian Assange and Wikileaks

Important as it was as a First Amendment precedent, the Pentagon Papers case was First Amendment "child play" compared with the Wikileaks case and other current threats to national security posed by modern computer technology. The Pentagon Papers, after all, were to be published by "mainstream," "responsible"[43] and "patriotic" media, such as The New York Times, The Washington Post and the Beacon Press, which would be "sensible" in what they exposed to public view. They would never publish the names of spies, informers or other people whose lives might be endangered by disclosure. (After all, they don't even publish the names of alleged rape victims, though there are good arguments for doing so, at least in some cases.)[44]

Moreover, these "established" media have permanent "addresses." They can be found and held legally accountable if they violate the law. Moreover, they are "businesses" that need public support, and are therefore unlikely to take any actions that would alienate their paying readership and advertisers. These constraints provide some assurance that such established members of "the Fourth Estate" will not pose the worst kind of dangers to our national security. They serve as an informal "check and balance" on the excesses of journalistic freedom.[45]

None of these assurances or checks are in place when it comes to the "hackers," "cyber-thieves," "anarchist" and other "outsiders"—many of whom are "anonymous"—who currently threaten to expose our deepest, most dangerous and most valuable "secrets."

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[42] Washington Post, February 15, 1989. Page A.25
[43] See Gabriel Shoenfeld, Necessary Secrets (_____ 2010)
[44] See Dershowitz [column]
[45] The checks don't always work, as evidenced by the Murdock scandals.

HOUSE_OVERSIGHT_017210

There are, of course, some historical low tech antecedents to the current high-tech dangers. During our pre-revolutionary, revolutionary and immediate post-revolutionary era, there were many "radical," "irresponsible," "anarchistic and "anonymous" "rabble-rousers" and even "whistle blowers," "eavesdroppers" and "leakers" who were believed to be endangering the "security" of the government.[46] "Secret presses" published "anonymous" or pseudononymous screeds, some of which disclosed "secrets" or other "dangerous" information.

The language of the First Amendment would seem to protect these dissidents against any abridgement of their freedom of expression—at least from the United States Government. But our history in this regard has been checkered at best, especially in the context of fear of war.

Less than a decade after the ratification of the First Amendment, Congress (the very Congress that was directed to "make no law abridging the freedom of speech) "made" the Alien and Sedition law, which expressly abridged the freedom of speech of dissidents and critics of the Adams Administration. The justification for this repressive legislation was the fear of war with France. During every war or threatened war since, there have been efforts, many quite successful, to abridge the speech of "disloyal," "unpatriotic," and "irresponsible" dissenters.

The "retail" dangers posed by individual trouble-makers (or even by groups) was, of course, rather meager compared to the "wholesale" dangers currently posed by cyber-"trouble-makers," such as Julian Assange and Wikileaks. Indeed, even Assange and Wikileaks are somewhat closer to established media than are some others who we know little or nothing about. After all, Wikileaks worked closely with established media, such as the New York Times, The Guardian and other mainstream media. There are generally several levels of vetting before anything is published. It can be argued that Wikileaks has served as a "filter" for material that might otherwise have been published directly on the internet, without any names or other such material having been removed.

There are hackers out there who regard Assange as a "sell out" for "tampering with the truth" by excising anything. They would—and do if they can—publish everything they manage to hack. That is why the first line of defense against the disclosure of secrets is to protect the most important secrets from hacking or other means of accessing them by preventive steps. As Assange once told me, "the best way to keep a secret is not to know it." The United States does a terrible job of protecting its secrets, often giving access to some of the most unstable and irresponsible individuals, while denying security clearance to perfectly loyal and cautious people. Inevitably some secrets will become known to those who have no stake in keeping them secret and an important stake in making them public. That's why the rule of law, rather than the whim of government officials, is needed to strike the appropriate balance.

I may have an opportunity to help strike that balance, because Julian Assange has asked me to consult with him and his British legal team regarding a possible indictment by the United States against him and others.

I went to London in March of 2011 to meet with Assange and the lawyers who were then representing him. He was facing the immediate prospect of extradition to Sweden on sexual

[46] See *Finding Jefferson* at pp. __ __.

HOUSE_OVERSIGHT_017211

assault charges, but he also faced the possibility of being extradited to the United States to face charges that carried far more serious consequences than those in Sweden. It was the possible American prosecution that he wished to discuss with me.

I first spent several hours with Assange and his legal team over the phone and by email. We worried about the security of our lawyer/client communications, which some might think ironic in light of Assange's penchant for disclosure of secret communications, but he had little choice but to communicate about the legal issues. We decided that a face-to-face meeting was required and we met in his lawyer's office.

I found Assange to be an earnest person, deeply devoted to the principle of maximal transparency of governmental actions. He was, however, sensitive to the need to keep some secrets—if not from him, at least from the general public, which inevitably includes some very bad people determined to do some very bad things to innocent and perhaps not so innocent people.

Assange insisted to me[47] that he was a journalist, in every relevant sense of that term. He published, and turned over to others to publish important and relevant material that others had provided to him anonymously. He and his colleagues had devised a technology for allowing "whistle blowers" to "drop" material to Wikileaks anonymously and with no possibility of it being traced to its source. This "dropbox" technology was the cyber manifestation that the best way to keep a secret is not to know it in the first place. He and his colleagues had devised a foolproof system, he believed, to keep <u>them</u> from learning <u>who</u> had "dropped" the material into "the box."

His job as a journalist was to authenticate the raw material, vet it for names and other life-threatening information which in his journalistic judgment should not be published (for example, the location of safe houses and the names of vulnerable people), and arrange for it to receive maximal reach by having it published by mainstream media outlets around the world, which would do further vetting to meet their own journalistic standards.

When he finished explaining his journalistic modus operendi, two names immediately popped into my head: Seymour Hirsh of the New Yorker, and Bob Woodward of the Washington Post. Both are solid pillars of the journalistic establishment and both have made their reputations by publishing secrets the government—or at least <u>some</u> in the government—did not want to see in print.

Hirsh specializes in publishing classified information about national security that has been provided to him by whistle blowers inside the government who disagree with particular governmental policies and want to see them exposed by someone who is believed to be sympathetic to their dissenting views. Some, if not most, of these whistleblowers are breaking the law by disclosing classified material to Hirsh. Hirsh and his publishers knew that they were publishing classified information before they published it. Yet neither he nor his publishers have been prosecuted.

It is likely, moreover, that Hirsh has encouraged at least some of his more reluctant sources to become whistle blowers or, if they came to him without any prior encouragement, to continue to

[47] I can only disclose material that is in the public record that he has given me permission to disclose.

HOUSE_OVERSIGHT_017212

provide him with classified material. I do not know this to be a fact, but I have been told by several experienced investigative reporters that this is how it is done—that without some encouragement and promises of confidentiality and positive portrayal of the source, the leaks "dry up." When I read books by these authors, I can often surmise who at least some of the sources are: they're usually the ones who are portrayed positively in other parts of the book—quid pro quo!

In other words, authors like Seymour Hirsh not only report the classified information given to them by sources, they develop, encourage, and in other ways facilitate the continuing flow of information—information which they know is classified and hence being illegally turned over to them—from their "criminal" sources. An important difference is that Hirsh has a political agenda: he publishes only information that serves that agenda. Assange, on the other hand, seems willing to publish material equally critical of all governments. For engaging in such journalism, Hirsh wins Pulitzer Prizes, gets invited to White House dinners and to lecture at schools of journalism which teach these methods.

Woodward is different in some respects and similar in others. Whereas Hirsh's sources tend to be beauracratic dissidents, Woodward relies on high ranking members of the administration who want their "spin" on the story he is publishing to a very wide audience. Some of those politicians may be authorized to disclose the material, but certainly some are not, and much of the material is classified (though it probably shouldn't be).

Both authors recognize the reality that many, if not most "state" secrets are designed not to protect the security of the nation, but rather to protect (and enhance) the reputations of the incumbent officials. In this regard, I recall a joke that made the rounds of the Soviet dissident community when I represented several of them in the 1970s. It is set during the period of the Stalin Show trials, when a dissident is arrested for calling Stalin a "fool." He wanted to defend himself by showing that Stalin was indeed a fool, but he was cut off by the judge who said: "If you were being charged with defamation, truth might be a defense.
But it is not a defense to what you are being charged with." The dissident was taken aback and asked the judge, "If I am not being charged with defaming Stalin for calling him a fool, what am I being charged with?"

The judge responded solemnly: "You are being charged with revealing a state secret!"

Many current state secrets are really secrets whose disclosure would embarrass—properly embarrass—office holders. Even the Solicitor General who argued for the Nixon Administration to prevent publication of the Pentagon Papers later acknowledged this reality. That's why selective leaking and selective withholding of classified material is so damaging to truth, accountability and historical accuracy. And that's also why it is so prevalent in every administration.

Wikileaks is different precisely because Assange is not publishing selectively in order to tell a story favorable to one group or another. He has no political agenda. His goal is transparency for the sake of accountability. With the exception of some names and addresses, Wikileaks has let

HOUSE_OVERSIGHT_017213

the leaked documents speak for themselves. He allowed the chips to fall where they may and they often fall on the head of the current office holders around the world.

Prosecuting Wikileaks or its founder for "the crime" of publishing classified information, while at the same time rewarding -- with prizes, access, interviews, and status – "reputable" journalists and newspapers for doing essentially the same thing, would constitute selective prosecution. American law, as distinguished for example from German law, generally permits selective prosecution of criminals, on the ground that resources are limited and prosecutors must have some discretion in deciding how to expend their limited resources. In order to "get the most bang for the buck", prosecutors are generally free to pick and choose among the many who violate broad, open-ended and often vague criminal statutes, such as tax, regulatory and criminal negligence laws. They are not free to exercise this discretion in a partisan manner: going after members of the opposing political party. Nor can they properly do so on the basis of race, religion or other protected categories. But they may select for prosecution the most visible or notorious offenders, since such prosecutions are likely to have the greatest deterrent effect on other potential law violators. For example, Leona Helmsley, one of the most famous women in America, was indicted for tax evasion on April 15th!

One area in which it is dangerous and wrong to permit selective prosecution is the publication of classified information by the media. If the government can pick and choose the few it decides to prosecute among the many who publish classified information, it will have far too much power over the content of what the media reports.[48] The First Amendment recognizes no distinction between the patriotic and unpatriotic, the responsible and irresponsible, the favorable or unfavorable, media. It was precisely these improper distinctions that were employed by the John Adams administration when it selectively enforced the Alien and Sedition laws against "Jeffersonians", "Jacobins", and other perceived enemies of the Federalists. It took more than a century and a half for the Supreme Court to declare that although ".. the Sedition Act was never tested in this court, the attack upon its validity has carried the day in the 'court of history', citing "a broad consensus that the act was inconsistent with the First Amendment". (I was a law clerk when that opinion was issued in 1964.)

[48] The Supreme Court has recognized, in the context of the First Amendment, that a law purporting to regulate speech or press, in order to survive the "strict scrutiny" standard of review required by the First Amendment, must not be overinclusive or underinclusive. *See Brown v. Entertainment Merchants Assn.*: "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint…And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assistant parents" that restriction of First Amendment rights requires…California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny."

HOUSE_OVERSIGHT_017214

Not only has the verdict of history condemned the words of the Sedition Act, it has also condemned the selective manner in which it was enforced against certain journalists and newspapers but not others. If there are to be any restrictions of freedom in the press, they should be applied uniformly. If the publication of classified material is to be prosecuted, then all who publish it should be prosecuted, not only the marginal, the powerless, the "irresponsible" and the unpatriotic --- in the eyes of the government . If all are prosecuted, there is the possibility of the self-correcting mechanism of democracy operating to change the law, by narrowing it to criminalize only those categories of currently classified information that truly endanger national security. If untrammeled prosecutorial discretion is permitted, then the law can be kept as broad and overinclusive as it currently is, without fear that the New York Times will be caught in its web. But if only the weak and the unpopular are selected for prosecution, the pressures for change will diminish.

Moreover, selective prosecution of only certain journalists who violate broad statutes will encourage some in the media to curry favor with the government, and the government to curry favor with certain media. This is an unhealthy and dangerous relationship in a democracy in which the press is supposed to check the government and be independent of its control.

The exercise of some discretion is necessary under the statutory scheme that currently criminalizes the publication of classified material. If all journalists who publish any classified material were to be prosecuted, there would be few left. The New York Times and its publishers, editors, and national security reporters would be convicted felons, since the current statutes are written in the broadest of terms that invite the exercise of discretion, which has always been employed to immunize the mainstream media.

In a definitive history of this problem, the author, Gabriel Schoenfeld, argues that an appropriate balance must be struck and that neither the press nor Congress can be relied on to strike that balance. Surprisingly, and wrongly in my view, he places his greatest reliance on the exercise of prosecutorial discretion and in the common sense of juries. History has not vindicated this trust, especially in times of national turmoil and fear. For me, a better democratic answer is for the courts to demand that legislatures enact clear, precise and extremely limited prohibitions on the real-time disclosure of only the most necessary of secrets. These statutes must neither be overinclusive or underinclusive (as are current laws). They should be capable of uniform and universal application that constrain the power of the government to pick and choose. Precise codification is not a perfect solution to an intractable dilemma, but it would be a significant improvement over the unacceptable current situation.

In vibrant democracies there will always be tensions between the government's need to keep secrets and the news media's need to reveal them. There will never be a perfect solution or an agreed-upon balance. This is as it should be. Constant tension between the government and the press is an essential requisite of our system of checks and balances.

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Speech Codes

It is the great danger of top-down discretion in the area of regulating speech that led me to express one of the most controversial views a free speech advocate can hold: I favor precise and narrow "speech codes" on university campuses, for much the same reason I favor precise and narrow national security codification. As I will now explain, I favor such codes not because I want to see campus speech curtailed, but rather because I want to see it freer than it is today.

My general views on free speech are well-known: I am as close to an absolutist against censorship as anyone can reasonably be. In my book *Finding Jefferson* I describe my position as "a presumptive absolutist".

> "All speech should be presumed to be protected by the Constitution, and a heavy burden should be placed on those who would censor to demonstrate with relative certainty that the speech at issue, if not censored, would lead to irremediable and immediate serious harm. No one should be allowed – in the famous but often misused words of Justice Oliver Wendell Holmes Jr. – falsely to shout fire in a crowded theater, but anyone should be allowed to hand out leaflets in front of the theater urging people not to enter because of potential fire hazards."

I am particularly critical of the censorship of speech on university campuses in the name of "political correctness". As I wrote in *Shouting Fire*:

> Though [students who seek to censor "offensive" speech] insist on being governed by the laws of the outside world when it comes to their personal lives, railing against visitor rules and curfews, they want their universities to adopt rules that restrict their First Amendment rights of free speech in order to shield them from the ugly realities of prejudice.

Yet despite my strong opposition to censorship, I have surprised both my supporters and detractors by calling for precise and narrow "speech codes" on campuses. My reasoning is simple: censorship is inevitable on all university campuses in extreme situations; if a professor used the "N" word to call on an African-American student in class – or comparable taboo words to call on a woman, a Jew, a gay or lesbian, a Latino, or an Asian-American – that teacher would be fired (or at the very least disciplined). There are other forms of expression as well that would simply not be tolerated in a university, public or private. Precisely what those are we don't know (recall Carlin's 7 dirty words) but we will probably know it when we see it. (Recall Justice Stewart on hard core pornography.) Accordingly, there already exists a speech *common-law* (or more precisely a censorship common-law) at every university. The issue, therefore, is not whether there is or should be any censorship of expression by universities. We already know the answer to that question: there is and there should be in those kinds of extreme cases. I know of no responsible person or organization that would defend the right of a teacher to use the "N" word in calling on or routinely discussing African-American students. The remaining question is

HOUSE_OVERSIGHT_017216

whether it is better to leave the decision as to which words in which contexts are prohibited to the after-the-fact discretion of an administrator, or to decide in advance on a list or category of prohibited expressions. In other words, is it more protective of freedom of expression to have a "censorship *common-law*" to be applied on an ad-hoc basis by a dean, or to have a "censorship *code"* debated and agreed upon in advance by the equivalent of the legislative branch of the university – a student or faculty senate or some other representative body.

I strongly favor a narrow code to a potentially broad common-law, because it provides advanced fair warning and an opportunity to challenge the provisions of the code before they are enforced. (That's why I also favor a narrow code criminalizing the publication of only the most dangerous state secrets).

In 2002, there was an ugly racial incident at Harvard Law School that led to a campaign by some student groups for censorship of offensive speech. The dean appointed a committee to recommend an approach to this delicate problem. He put me on the committee because of my vocal opposition to censorship and my support for a maximalist position on freedom of speech. My fellow committee members were surprised when I proposed that we try to draft a speech code.

"I thought you favored freedom of speech", one of the libertarian student members said in frustration.

"I do," I replied. "That's why I want a code. I don't trust the dean – or anyone else – to decide which speech should be prohibited."

"No speech should be prohibited," the student replied.

I then gave my examples of the professor and the "N" word.

"That's different," the student insisted.

"Then let's try to codify exactly what else may be 'different'", I responded.

The committee spent more than a year trying to come up with a code of prohibited expressions, but it could not come to any agreement. The "N" word itself could not be prohibited because a black professor had written a brilliant book entitled "*Nigger: The Strange Career of a Troublesome Word"*. We tried to define the circumstances under which the "N" word could and could not be used, but we could not come to any agreement. (One person suggested that the "N" word could be used by Blacks but not Whites. Another suggested it could be used in a book but not in oral discussion.) Nor could we agree on other disputed forms of expression, such as opinions regarding negative characteristics associated with particular groups. At the end, we reported back that we could not come up with a code. It was a useful experiment in democracy and accountability. I would have preferred us to adopt a code limited to those instances of expression – such as a teacher calling a minority student by a negative racial or other term – which everyone agrees is unacceptable in a classroom setting. This would have sent a powerful message that *no other* type of speech, regardless of how offensive it might be to some, can be

HOUSE_OVERSIGHT_017217

prohibited. If a particularly inappropriate expression that had not been included in the codification were then to be used, the committee could consider including it for *future* discipline, but it could not be the basis for imposing discipline for speech that took place *prior* to its inclusion in the codification.

The virtue of a code is that it completely occupies the area of sanctions. It leaves no room for "common law crimes" or broad decanal discretion. The vice of a code is that it is often underinclusive—it excludes conduct (or, in this case, speech) that is novel, or that was not considered by the codifiers. In the area of freedom of expression, the virtue of such a limitation trumps its vice, at least in my view. It is far better to have rules regulating speech that are underinclusive than overinclusive.

In 2007, I taught a university-wide course with Professor Steven Pinker on the issue of Taboo. The question posed by the course was whether there are any issues that are so delicate, sensitive, controversial, or disgusting that they should be treated as "taboos," even on a university campus dedicated to open dialogue and the free exchange of views. Most Americans are brought up to believe in freedom of expression, but almost everyone has at least one type of speech that he/she would suppress. In our course, we searched for a *theory* of taboo – a description or prescription of genres of expression that lay outside the presumption of discussability and are, or should be, subject to suppression, censorship or tabooization. Professor Pinker presented some evolutionary and psychological arguments for the existence and utility of some taboos, while questioning many of the taboos that currently seem to exist on university campuses. I discussed the legal and moral arguments for and against any exceptions to the general presumption of free expression. In the end, there was little agreement, except that there is and should be a difference between societal taboos, enforceable only by social sanction, and official governmental censorship, enforceable by the power of the state through the law.

We also agreed that notwithstanding the clear words of the First Amendment, Congress <u>must</u> have the power to make <u>some</u> laws banning the disclosure of <u>some</u> secrets for <u>some</u> time. Finally, we agreed that there will never be a perfect balance struck between the public's need to know and the government's need to keep our enemies from knowing certain information. The struggle to strike this delicate balance never stays won. What history seems to teach us is generally to err on the side of more disclosure rather than more censorship, even when it comes to national security.

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Chapter 8: Expressions that incite violence and disrupt speakers

Pornography consumed in private does not require a balancing of rights—as explained in Chapter 6—because no one should have the right to tell an adult what to read, view or hear in his home or in an enclosed area, like a theater, where no one is forced to go. Disclosure by the media of national security secrets requires an exquisite, if not impossible, balancing of rights and interests, as explained in Chapter 7. Expressions that incite violence or disrupt speakers—the subject of this chapter—also require a difficult balance between the rights of the speaker, and the rights of the potential victims of the incited violence and those of the disrupted speaker.

There are two basic types of expression that incite. The first is reactive—that is, the speaker so deeply upsets or offends the person (or persons) to whom he is speaking that he reacts to the speech by attacking the speaker. This comes under the legal rubric of "fighting words"—words that cause the listener to fight back. The second is pro-active—that is, the speaker urges his listener (or listeners) to commit violence and the listener complies by committing violence against a third person (or persons or institutions). This comes under the legal rubric of "clear and present danger."

Early in my career I was involved in both of those types of cases.

In the famous neo-Nazi march through Skokie, Illinois, the Nazi thugs deliberately decided to march—with anti-Semitic chants, signs and uniforms—through a Jewish community with a large number of Holocaust survivors. Their goal was to provoke a negative reaction from those they were trying to offend. The city banned the march on the ground that it would provoke a violent reaction from some survivors and others. The Nazis sued. To the surprise of many, and to the dismay of my mother, I urged the ACLU, on whose board I sat, to defend the right of the Nazis to march through Skokie and I urged the Jews to ignore them, in order not to give the Nazis the publicity they craved. I don't believe in the "fighting words" exception to the First Amendment. I believe that the answer to deeply offensive speech is not violence, and that the law should not legitimate or justify violence by recognizing this exception. Experience demonstrates that when victims respond to such offensive provocations by violence or censorship, the provocateurs win in the court of public opinion. That's what happened in Skokie.

A small rag-tag band of Nazi thugs became the focus of worldwide attention as a result of being censored by Skokie. They were interviewed by the media, their numbers and influence grew and they received a degree of legitimacy they had never previously had.

I fully understood why the Holocaust survivors would be deeply offended, even possibly traumatized, by being forced to re-experience the spectacle of brown shirted Nazi wearing Swastikas invading their neighborhood, but I worried about the implications of a judicial decision authorizing censorship. It could be used to justify the censorship of a march by the likes of Martin Luther King through a segregated community in the south; whose residents would be deeply offended by an integrated group marching through their community. It's no answer to point out that King was good or right and the Nazis are bad and wrong, because the First Amendment must always be content-neutral and not prefer good and right speech over bad and wrong speech. That's for the public to decide only after being presented with both sides without

HOUSE_OVERSIGHT_017219

government interference. That's how the marketplace of ideas is supposed to operate in a democracy. The government must protect bad, wrong and offensive speakers from those who would react violently. Speech, not violence, is protected by the First Amendment.

Moreover, if a violent reaction to speech is deemed to justify the censoring of that speech, then the threat to commit violence empowers "the victims" of provocative speech to serve as censors. This "violence veto" should not be encouraged by the law. Hard as it may be to arrest these "victims" rather than the provokers, the First Amendment requires that the government side with the "bad" speakers, rather than the "good" violence-threateners.

In the end, the Nazis "won" the encounter in Skokie because good and decent people in that community decided to try to censor, rather than ridicule or respond to them.

My experience with "clear and present danger" incitement also took place in a small community—the beautiful campus of Stanford University. Shortly after arriving at Stanford in the fall of 1970 for what I expected would be a year of scholarly research as a fellow of the Center for Advanced Studies in the Behavioral Sciences, I was asked to represent a tenured English professor named Bruce Franklin, who was being fired for inciting students. He had spoken at an anti-war rally directed against the Stanford Computation Center, which was involved in war-related research. His speech including the following: "[W]hat we're asking is for people to make that little tiny gesture to show that we're willing to inconvenience ourselves a little bit and to begin to shut down the most obvious machinery of war, such as—and I think it is a good target—that Computation Center." Following shouts of "Right on," a group of listeners marched on the Computation Center and physically shut it down, causing some damage. Franklin did not join the demonstrators himself; he watched from a safe and discreet distance. The police eventually cleared the building and ordered the demonstrators to disperse. At this point, Franklin joined the crowd and protested the order. He walked up to the police, argued with them that the dispersal order was illegal, and urged the crowd to remain. Many did, and the police used force to affect their order. Minor injuries were sustained by some demonstrators.

Later that night a rally was held on the campus at which Franklin gave the closing speech. In it he advocated "the methods of people's war." There was some dispute about whether he explained what he meant by this term. He claimed that he told the demonstrators that "people's war meant that they should go back to the dormitories, organize people into small groups, and talk with them, or play football, or whatever, as late into the night as possible." Within a few hours of Franklin's speech there was more violence and this time several people were seriously hurt.

The next day President Lyman announced that Professor Franklin would be fired from his tenured position on grounds of "substantial and manifest neglect of duty and a substantial impairment of his appropriate functions within the University community."

Franklin demanded a formal hearing, and a faculty advisory committee of seven full professors was convened to consider the charges and recommend an appropriate sanction. It was difficult to find seven professors who did not despise Franklin—and with good cause.

HOUSE_OVERSIGHT_017220

I persuaded the local ACLU chapter to become involved but I, and my research assistant Joel Klein, took the lead in defending Franklin.

Word quickly spread around the Stanford campus that I had gotten the ACLU into the case. I was criticized for my intrusion into the affairs of my host university. President Lyman went on the radio to attack me:

> It is a myth that all speech is constitutionally protected. No constitutional lawyer in the land—no, not even Mr. Dershowitz, the Harvard law professor come to Stanford to save us all from sin—not even Mr. Dershowitz could make such a sweeping claim.

I responded with my own statement in the *Stanford Daily*:

> There are important civil liberties issues at stake in the Franklin firing. If Dr. Lyman wants to challenge my view of the Constitution or civil liberties—and those of the ACLU—I invite that challenge, on its merits.

Lyman rejected my invitation to debate and continued to attack me—both personally and through his surrogates—in highly personal terms. The hostility toward me and toward the ACLU spread quickly among the established faculty. Not surprisingly, it soon reached the Faculty Committee that was considering the Franklin case.

We filed a brief on behalf of the ACLU urging Stanford, which is a private university, to apply the spirit of the First Amendment to Franklin's case. The committee agreed and said they were applying First Amendment standards, but it ruled, in a divided vote, that Franklin's speeches violated those standards. They found that he "did intentionally write and urge" students and other to "occupy the computation center illegally," to "disobey the order to disperse" and to "engage in conduct which would disrupt activities of the university and threaten injury to individuals and property."

Following the Franklin firing I gave a lecture on the implications of the case. I predicted that Franklin himself would soon be forgotten because his message would be rejected in the free marketplace of ideas. But the Committee's decision would be long remembered as a leading precedent in the jurisprudence of universities.

I concluded my lecture by pointing an accusing finger at some of the faculty who pretended that the Franklin case raised no important civil liberties issues:

> How often have I heard the absurd remark that Franklin is being fired for what he "did," not for what he "said," without a recognition that this quibble doesn't' hide the fact what he "did" was to make speeches. How often I have heard the statement that this case does not involve "academic freedom," it is simply an employer firing an employee for disloyalty—as if a requirement of loyalty and academic freedom were compatible. [T]he true test of a genuine civil libertarian is how he responds to a crisis close at hand.

HOUSE_OVERSIGHT_017221

Expressions that deliberately disrupt a speaker with whom one disagrees

The Bruce Franklin case also included this alleged exception to the First Amendment—namely, that although there is a constitutional right to heckle speakers (at least in some context), there is no such right to silence a speaker by shouting him down. When Henry Cabot Lodge came to speak at Stanford in January 1971, he was shouted down with cries of "pig" and "war criminal," and then drowned out by continuous chanting and clapping. Eventually, the program had to be canceled (just as a similar program had been canceled several years earlier at Harvard.) Franklin participated in the shouting but denied complicity in the chanting and clapping that brought the program to an untimely end.

The ACLU brief that I filed vigorously disagreed with Franklin's contention that there is a "right" to silence a speaker who is deemed to be a "war criminal":

> "[I]f the Board concludes that Professor Franklin intentionally engaged in concerted activity designed to silence Ambassador Lodge—that is, to prevent him from speaking at all—then it is the Civil Liberties Union's position that some discipline would be appropriate."

It defended, however, Franklin's right to heckle, boo, and express displeasure at the speaker of disagreement with his views. If members of the audience may cheer and applaud approval, they must also have a coextensive right to demonstrate disapproval:

> "The rule of thumb [is] that the speaker's entire address must be allowed to be heard, but it may be frequently interrupted, so long as he is permitted to continue a short time after each interruption. This rule does not make for the most comfortable or effective oratory, but the American Civil Liberties Union believes it to be the constitutionally required balance…"

The Stanford Committee followed the ACLU guidelines and concluded that Franklin had not tried to prevent Lodge from speaking.

Forty years later, I tried to get the Southern California branch of the ACLU to apply these same guidelines to another case involving the disruption of a speaker who had been invited by a university—this time the University of California at Irvine, a public university. But its leaders refused to do so, because they disapproved of the speaker and favored the politics of those who were trying to silence him. First, some background.

There is a growing international campaign to prevent pro-Israel advocates, who have been invited to speak at universities, from delivering their speeches. The method used to silence these speakers and preclude their audiences from hearing their message is exemplified by what occurred at the University of California at Irvine.

Michael Oren -- a distinguished scholar and writer, a moderate supporter of the two-state solution, and now Israel's Ambassador to the United States -- was invited to speak. The Muslim Student Union set out to prevent him from delivering his talk. Here is the way Erwin Chemerinksy, Dean of the law school, described what the students did:

HOUSE_OVERSIGHT_017222

> "The Muslim Student Union orchestrated a concerted effort to disrupt the speech. One student after another stood and shouted so that the ambassador could not be heard. Each student was taken away only to be replaced by another doing the same thing."

Chemerinsky understates what happened, as anyone can see by watching a video of the event, available online (http://www.youtube.com/watch?v=7w96UR79TBw). This was more than a "concerted effort to disrupt the speech." It was a concerted effort to stop it completely -- to censor Oren's right to speak and his audience's right to hear him. The efforts to disrupt succeeded; the effort to stop ultimately failed. Moreover, there is undisputed evidence that there was a well-planned conspiracy to censor Oren's talk.

The students were disciplined by the university for their actions, though the nature and degree of the discipline has been kept confidential. Campus sources have characterized it as a "slap on the wrist." Since the students had to be arrested to prevent the speech from being drowned out, the District Attorney, quite understandably, commenced a criminal investigation. After learning of the careful planning that went into the concerted effort to prevent Oren from speaking, the DA filed misdemeanor charges against those who were involved.

This decision resulted in an outcry by radicals, many of whom favor censorship of pro-Israel speakers. In a letter to the DA signed by many well-known anti-Israel zealots, as well as by the two leaders of the local ACLU, the incident was described as merely a protest:

> "the students non-violently and verbally protested a university-invited speaker. The students left the event peacefully …."[49]

Then, in an effort to blame the victims, the letter pointed the finger at pro-Israel students who wanted to listen to Oren speak claiming -- quite falsely -- that the Muslim Student Union censors "conducted themselves in less of a disruptive manner than some of the counter-protestors..." Sounds as if the Muslim Student Union deserved a civil liberties award, while the students who came to listen to the invited speaker—"the counter-protestors"—deserve to be condemned. In a more recent letter the ACLU leaders claim that "the students' intent was not to censor the speaker…."

The students themselves have been more honest about their intentions than the ACLU leaders. . For instance, one student leader refused to acknowledge that Mr. Oren had First Amendment rights of his own by interrupting him and shouting, "Propagating murder is not an expression of free speech!" (Shades of Bruce Franklin!) Another student was caught on video telling a crowd assembled outside the event that "we pretty much shut them down".

The fact that radical anti-Israel zealots would support censorship of a pro-Israel speaker comes as no surprise. But the fact that the letter of support was signed by two ACLU leaders should shock all civil libertarians and supporters of the ACLU. I have been a supporter of the ACLU for half a century and was a national board member. In addition to supporting the right of Nazis to march through Skokie, I have defended the right of the most virulent anti-Israel speakers to participate

[49] http://www.baitcal.com/UCIMuslimStudentUnion.html

HOUSE_OVERSIGHT_017223

in the marketplace of ideas. The ACLU policy has always been to oppose concerted efforts to prevent speakers from delivering their remarks, as evidenced by the brief filed in its name in the Franklin case. While supporting sporadic heckling and jeering that merely demonstrates opposition to the content of the remarks, the ACLU has always condemned type set of concerted efforts to silence invited speakers that occurred at Irvine.

Yet signatories of the letter -- which never once criticizes the censoring Muslim Union students while condemning those who wanted to hear the speaker -- include "Chuck Anderson," who identified himself as President ACLU Chapter, Orange County and Chair, The Peace and Freedom Party, Orange County;" (a hard left anti-Israel group), and "Hector Villagro," who identified himself as "Incoming Executive Director, ACLU of Southern California."

Dean Chemerinsky, while opposing criminal prosecution, made a point to condemn the censoring students:

> "The students' behavior was wrong and deserves punishment. There is no basis for the claim that the disruptive students were just exercising their First Amendment rights. There is no constitutional right to disrupt an event and keep a speaker from being heard. Otherwise, any speaker could be silenced by a heckler's veto. The Muslim students could have expressed their message in many other ways: picketing or handing out leaflets outside the auditorium where Ambassador Oren was speaking, making statements during the question and answer period, holding their own events on campus."

The ACLU leaders, on the other hand, seemed to justify the actions of the censoring students while limiting their condemnation to the pro-Israel students who wanted to hear the speaker.

After being criticized for supporting censorship, Villagro sought to justify his signing the letter by the following "logic:"

> "The district attorney's action will undoubtedly intimidate students in Orange County and across the state and discourage them from engaging in any controversial speech or protest for fear of criminal charges."

The opposite is true. If these students had been let off with a slap on the wrist from the University, that would encourage other students around the nation and the world to continue with the efforts to prevent pro-Israel speakers from delivering their speeches. Indeed, even after these students were disciplined, other students tried to shut down several Israeli students, who had served in the Israeli Army, from recounting their experiences. Had the school administered appropriate discipline, I could understand an argument against piling on with a misdemeanor prosecution, but the red badge of courage given to them by the college only served to encourage repetition of their censorial conduct.

HOUSE_OVERSIGHT_017224

The ACLU should be supporting a clear line between occasional heckling and outright censorship. The ACLU leaders who signed the letter are on the wrong side of that line and should not be speaking for the ACLU.

The prosecution of those who tried to censor Ambassador Oren proceeded. The prosecutors asked me to testify on their behalf as an expert witness on the issues relating to freedom of expression in the campus context. I was tempted but ultimately decided it would be better for them to use a witness with less personal involvement in the matter: I too had been shouted down by anti-Israel groups—on that very campus and on others. The jury convicted the students and they were sentenced to probation and a fine.

There were some who criticized the prosecutor for bringing these charges, but I defended him on the ground that prosecuting these student censors was his duty in protecting the First Amendment:

> It was imperative…that a public prosecutor apply the law to these students, because to do otherwise would be to tolerate, if not encourage, conduct that would undercut the constitutional rights of an invited speaker. This is especially true because the University of California is a state-run institution to which the First Amendment applies in full force. A prosecutor has the obligation to protect the First Amendment, especially if the university has imposed discipline that is inadequate to assure that censorial conduct will be deterred. Moreover, these students must be made to understand that their conduct is not only morally indefensible; it is criminal.
>
> The same would be true if Jewish students were to try to prevent an anti-Israel speaker from presenting the case against Israel. No student, no matter how strongly they feel that their view is the only correct one, has the right to prevent the open marketplace of ideas from operating on a university campus, as these ten students tried to do.
>
> The successful prosecution of the Irvine Ten will not "chill" free speech rights of hecklers. No one should or would be prosecuted for simply booing the content of a speech, leafleting a speaker, holding up signs in the back of the auditorium, conducting a counter event or demonstration. It was these young criminals who were trying to chill, indeed freeze, the constitutional rights of the speaker and those who came to hear him. They should not be treated as heroes by anyone who loves freedom and supports the First Amendment.

It was a good day for the First Amendment when the prosecutor decided to apply the law to their censorial conduct. It was another good day for the First Amendment when the jury appropriately convicted them. Sometimes it takes tough measures to enforce the First Amendment against extremists who believe they own the only "truth" and who seek to silence other views.

HOUSE_OVERSIGHT_017225

Chapter 9: The Right to Falsify History: Holocaust Denial and Academic Freedom

In some European countries, (particularly Germany, Austria and France), it is a crime to deny the Holocaust. In other countries, such as Turkey, it is a crime to claim that the Turks engaged in genocide against the Armenians, even though it is an historical fact recognized by scholars around the world.

Under our First Amendment, no one can be punished either for denying or proclaiming that an historical event occurred.

Several years ago I became embroiled in a heated controversy with Professor Noam Chomsky over the issue of Holocaust denial and the proper role of a civil libertarian in defending the right of Holocaust deniers, without defending the substance of their claims.

In the 1970s a Frenchman named Robert Faurisson, who was an obscure lecturer on French literature at the University of Lyon, began to dabble in Holocaust denial. He wrote a book—and gave talks—in which he mocked Holocaust victims and survivors as perpetrators of a hoax. The Holocaust, according to Faurisson, "never took place." The "Hitler gas chambers" never existed. "The Jews" bear "responsibility" for World War II. Hitler acted reasonably and in self-defense when he rounded up the Jews and put them in "labor camps," not death camps. The "massive lie" about genocide was a deliberate concoction begun by "American Zionists"—in context he obviously means Jews. The principal beneficiary of this hoax is "Israel," which has encouraged this "enormous political and financial fraud." The principal victims of this "fraud" have been "the German people" and the "Palestinian people." Faurisson also called the diary of Anne Frank a "forgery."

Following the publication of Faurisson's book, the lecturer received threats from irate survivors. The University of Lyon, claiming that it could not guarantee his safety, suspended him for a semester.

Chomsky sprang to Faurisson's defense, not only on the issue of free speech, but on the merits of his "scholarship" and of his "character." Chomsky signed a petition that characterized Faurisson's falsifications of history as "findings" and said that they were based on "extensive historical research."

I too defended Faurisson's right to express his views, but I also checked his "historical research" and found it to be entirely faked. He made up phony diary entries, omitted others that disproved

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[50] For example, Faurisson relies on an entry, dated October 18, 1942, from the diary of SS doctor Johann-Paul Kremer written during the three months he spent at Auschwitz in 1942. An eminent scholar checked Faurisson's use of the entry, and demonstrated that Faurisson's "research" was fraudulent. The diary entry read: "This Sunday morning in cold and humid weather I was present at the 11th special action (Dutch). Atrocious scenes with three women who begged us to let them live."

HOUSE_OVERSIGHT_017226

his "research," and distorted the historical record.[50] I exposed Faurisson's deceptions in my own writings, while continuing to defend his right to rewrite history.

Chomsky wrote an essay that he allowed to be used as a foreword to Faurisson's next book, about his career as a Holocaust denier! In this book, Faurisson again calls the gas chambers a lie and repeats his claims about the "hoax" of the Holocaust.

Faurisson concludes that this passage proves (I) that a "special action" was nothing more than the sorting out by doctors of the sick from the healthy during a typhus epidemic; (2) that the "atrocious scenes" were "executions of persons who had been condemned to death, executions for which the doctor was obliged to be present"; (3) that "among the condemned were three women who had come in a convoy since the women were shot and not gassed (emphasis added).

Faurisson, who said he had researched the trial, knew that his own source, Dr. Kremer, had testified that the gas chambers did exist. Yet he deliberately omitted that crucial item from his book, while including the fact that the women were shot. Faurisson also knew that the three women were "in good health." Yet he led his readers to believe that Dr. Kremer had said they were selected on medical grounds during an epidemic. Finally, Faurisson states that those who were shot had been "condemned to death." Yet he knew they were shot by the SS for refusing to enter the gas chambers.

A French scholar named George Wellers analyzed this diary entry and the surrounding documentation for *Le Monde*. He did *actual* historical research, checking the Auschwitz record for October 18, 1942. His research disclosed that 1,710 Dutch Jews arrived that day. Of these, 1,594 were sent immediately to the gas chambers. The remaining 116 people, all women, were brought into the camp; the three women who were the subject of the Kremer diary must have been among them. The three women were, in fact, shot—as Faurisson concludes. But that fact appears nowhere in Kremer's diary. How then did Faurisson learn it? Professor Wellers was able to find the answer with some simple research. He checked Dr. Kremer's testimony at a Polish war crimes trial. This is what Kremer said at the trial: "Three Dutch women did not want to go *into the gas chamber* and begged to have their lives spared. They were young women, <u>in good health</u>, but in spite of that their prayer was not granted and the SS who were participating in the action shot them on the spot." (emphasis added).

That is not "extensive historical research." It is not research at all. It is the fraudulent manufacturing of false antihistory. It is the kind of deception for which professors are rightly fired: not because their views are controversial, but because they are violating the most basic canons of historical scholarship. It is typical of Faurisson in particular, and of Holocaust denial "research" in general. Yet Chomsky was prepared to lend his academic legitimacy to Faurisson's "extensive historical research."

HOUSE_OVERSIGHT_017227

A few years later, after it became unmistakably clear that Faurisson was consciously lending his name to all sorts of anti-Semitic and neo-Nazi groups, Chomsky repeated his character reference:

> "I see no anti-Semitic implications in denial of the existence of gas chambers, or even denial of the Holocaust. Nor would there be anti-Semitic implications, per se, in the claim that the Holocaust (whether one believes it took place or not) is being exploited, viciously so, by apologists for Israeli repression and violence. I see no hint of anti-Semitic implications in Faurisson's work…" (emphasis added)
> [Add Mearsheimer]

When this statement was quoted in the *Boston Globe,* I wrote the following letter to the editor:

> "While some may regard Chomsky as an eminent linguist, he does not understand the most obvious meaning of words in context. To fail to see any "hint of anti-Semitic implications" in Faurisson's collective condemnation of the Jewish people as liars, is to be either a fool or a knave.
>
> …
>
> Chomsky's actions in defending the substance of Faurisson's bigoted remarks against valid charges of anti-Semitism—as distinguished from defending Fuarisson's right to publish such pernicious drivel—disqualify Chomsky from being considered an honorable defender of the "underdog." The victims of the Holocaust, not its defenders or deniers, are the underdogs."

Chomsky responded by arguing that Faurisson was an anti-Zionist rather than an anti-Semite, because he denounced "Zionist lies."

Following this exchange, I challenged Chomsky to a public debate on the issue of whether it is anti-Semitic or anti-Jewish to deny the Holocaust. This was his answer: "It is so obvious that there is no point in debating it because *nobody* believes there in an anti-Semitic connotation to the denial of the Holocaust" (emphasis added).

One is left to speculate about Chomsky's motives—political and psychological—for becoming so embroiled in the substantive defense of the writings of a neo-Nazi Holocaust denier.

The civil liberties-free speech rationale does not work for Chomsky: civil libertarians who defend the free speech of neo-Nazis do not get into bed with them by legitimating their false "findings" as having been based on "extensive historical research," and by defending them—on the merits—against well-documented charges of anti-Semitism. Moreover, providing a forward for a book is joining with the author and publisher in an effort to sell the book. It is intended not merely to leave the marketplace of ideas open. It is intended to influence the marketplace substantively in favor of the author's ideas. This is not the defense of free speech. It is the promotion of Holocaust denial.

Several years after my encounter with Chomsky, I was asked to defend a neo-Nazi Holocaust denier named Matthew Hale, who was the head of an anti-Semitic group that called itself "The

HOUSE_OVERSIGHT_017228

Church of the Creation". He had been denied admission to the Illinois Bar because of his neo-Nazi views.

Hale was invited to appear on the Today Show to be interviewed by Katie Couric. I was asked to explain why I would even consider representing such a horrible racist and anti-Semite. Couric began by asking Hale to describe his views "in a nutshell." He went on about how non-Europeans—by which he means Blacks and Jews—were destroying the "white race" and how he was going to change that if he were admitted to the bar.

Couric then asked me why I believed a man with Hale's views should be allowed to become a lawyer.

> KC: Mr. Hale should be allowed to practice law…why?
>
> AD: Well first of all I am not a supporter of Mr. Hale. You asked about his views in a nutshell. That's where his views belong, in a nutshell. They are despicable, revolting views. But what I'm concerned about is the precedential effect of giving character committees the right to determine who shall and who shall not have the right to practice law on the basis of ideology and belief. Remember character committees were invented to originally keep out Blacks, Jews, gays, women, leftists…I just don't want to see a resurrection of character committees probing into the ideology of people like Mr. Hale. If I take his case, and he's asked me to represent him, I told him this and he knows this. All the fees will be contributed to anti-racist organizations which will fight the ideology of bigots like him. I hope the American public listening to him would reject his ideas in the marketplace but not through censorship of the kind that the character committee is trying to practice.
>
> KC: But simply espousing these views, couldn't that lead to violence, by other individuals?
>
> AD: Well there is no question how our Constitution strikes that balance. Reading the work of Marx can lead to incitement. Reading the Bible can lead to incitement. But we don't draw the line at the espousal of views. We draw it at incitement or violence itself and we don't want to have a different standard for racists than we do for other people.

Couric then turned back to Hale:

> KC: Ok, you talk about your enemies, Mr. Hale, and among them are Jews. Do you see the irony that you hate Jews and yet you are calling on Mr. Dershowitz to help you?
>
> MH: Well the fact of the matter if having a "Dershowitz" in this equation has brought our church an incredible amount of publicity and as a minister in my church, it is my obligation to bring about as much publicity as possible.

…

HOUSE_OVERSIGHT_017229

KC: But you are using a Jewish lawyer when it's convenient and serves your purpose?

MH: Well certainly its serving his purposes too and the ends justify the means.

AD: My purposes are the purposes of the First Amendment. Mr. Hale, you will rue the day that you ever thought that I would give you publicity because I will not stop condemning your organization and you know that the only condition that I will accept your case is because you have given me the freedom to argue with you, to condemn you and to defeat you in the marketplace of ideas.

MH: That's fine.

AD: The only publicity you will get from me is the most negative kind of publicity because I say, your ideas belong in a nutshell because they are nutty ideas, they are reprehensible ideas…

MH: So are those of the Jews.

AD: And I have faith in the American people that they will reject your ideas in the marketplace of ideas and you should not have the benefit of censorship so that you can stand up and proclaim your views. You know, if the character committee hadn't kept him out, nobody would have heard of this despicable person. It is the character committee who has given him publicity just like the march in Skokie…you know the Nazis would have been able to march through Skokie, it would have been a one-day story, but for the censorship. Censorship creates publicity. What we are doing is hoping to give you the worst and most negative kind of publicity so people will reject your ideas.

KC: So do you still want Mr. Dershowitz to represent you?

MH: The fact of the matter is that we are confident that if people would consider our views, they will agree with them.

AD: Nobody is afraid of your views. As long as you don't violate the law your views will be defeated in the marketplace of ideas

Ultimately, I did not represent Hale because he refused to allow me to donate his legal fee to the ADL, NAACP and other organizations that seek to combat his racist views in the marketplace of ideas. He lost his case and is now in prison for trying to arrange a "hit" on the judge who ruled against him.

Following Hale's imprisonment, I received a call from the FBI advising me that Hale may have put out a hit on me as well. For several weeks, FBI agents monitored and protected me. So much for Matthew Hale merely believing in freedom of speech! This was neither the first nor the

HOUSE_OVERSIGHT_017230

last time I was physically threatened for what I believe. Free speech is anything but free in the real world of high passions and violent tempers.

It is imperative that those of us who defend the rights of bigots and others to express horrible views go out of our way to challenge these bad views in the marketplace of ideas. It is a commonplace among civil Libertarians that the appropriate answer to bad speech is good speech, not censorship. We must provide that good speech as we defend the bad speech.

I had the opportunity to do just that when the actress Vanessa Redgrave had a scheduled performance with the Boston Symphony Orchestra cancelled because of her controversial political views and activities. I defended her right to perform but challenged her to a debate about her outrageous political views. She declined because she was on the Central Committee of the Revolutionary Workers Party – a British Stalinist group – and the Party had to approve in advance everything she said in public. I then explained the hypocrisy of her complaints about being "blacklisted" for her political views and activities, while she herself, and her Party, advocated the blacklisting of others.

In 1978, Redgrave had offered a resolution demanding that the British Actors Union blacklist Israeli artists and boycott Israeli audiences. The resolution included a "demand" that "all members working in Israel terminate their contacts and refuse all work in Israel." Several years later, she justified as "entirely correct" the blacklisting of Zionist speakers at British universities. And she has praised the ultimate form of censorship: the political assassination of Israeli artists, because they "may well have been enlisted ... to do the work" of the Zionists.

Redgrave herself has used her art "to do the work" of terrorists. In 1977, she made a film calling for the destruction of the Jewish state by armed struggle. She has personally received training in terrorism at camps from which terrorist raids were staged. She advocated the assassination of Nobel Peace Prize winner Anwar Sadat. After playing her controversial role as concentration camp survivor in Arthur Miller's 1980 teledrama "Playing for Time" she traveled around the world arguing that her selection for the role constituted a propaganda victory against Israel.

In 1982, the Boston Symphony Orchestra hired Redgrave to narrate several performances of Stravinsky's opera-oratorio "Oedipus Rex". There is some dispute over whether she was hired entirely because of her unquestionable acting ability or also because of her political "courage." As soon as the decision was announced, there was outrage among some of the orchestra's musicians, subscribers and board members. Some musicians suggested that they would exercise their own freedom of association by refusing to perform with a terrorist collaborator who justified assassination of artists.

At the end, the orchestra decided – wrongly, in my view – to cancel the performances of "Oedipus Rex". They offered to pay Redgrave the money she would have received if the show had gone on. Redgrave declined the offer and sued the orchestra for breach of contract, seeking $5 million in damages. She claimed that the effect of the cancellation was that she was "blacklisted" by the Boston Symphony Orchestra and could no longer find appropriate work. The orchestra board responded that Redgrave has earned more money since the cancellation than before it, and that if anyone has refused to hire her, it is because she has used her art to serve the

HOUSE_OVERSIGHT_017231

political ends of terrorism. The board has also proved that Redgrave has turned down roles such as that of Andrei Sakharov's wife in an HBO production because she believed the film might be seen as "anti-Communist propaganda".

Redgrave's supporters threw a fundraiser for her. I prepared and distributed a leaflet that provided the facts to those attending and urged them to ask Redgrave "to explain her hypocrisy". Several members of the audience were surprised to learn of her views on blacklisting Israeli artists. Others said they knew of Redgrave's selective condemnation of blacklisting but didn't care, because – as one woman put it – "anything is fair in the war against Zionism."[51]

In the end, the case was settled and Redgrave persisted in her hypocrisy. I was comfortable in my role defending her rights while exposing her wrongs.

Not everyone understands this distinction. My own mother insisted that I was "helping" Nazis and terrorists when I supported their right to speak, even while condemning what they were saying. Far better educated people than my mother also claimed not to understand. In a debate in Canada on laws criminalizing Holocaust denial, I took my usual position in favor of freedom of speech:

> I regret to say this, but I think that Holocaust denial speech is not even a close question. There is no persuasive argument that I can think of in logic, in law, in constitutionality, in policy, or in education, which should deny [anyone] who chooses to the right to take whatever position he wants on the Holocaust. The existence of the Holocaust, its extent, its fault, its ramifications, its political use are fair subjects for debate. I think it is despicable for anybody to deny the existence of the Holocaust. But I cannot sit in judgment over the level of despicability of anybody's exercise of freedom of speech. Of course I agree that sticks and stones can break your bones, and words can harm you and maim you. That's the price we pay for living in a democracy. It's not that speech doesn't matter. If speech didn't matter, I wouldn't devote my life to defending it. Speech matters. Speech can hurt. That's not why those of us who defend free speech, particularly free speech of this kind, do it. We do it because we don't trust government.

In response, Judge Maxwell Cohen said that anyone who holds such views "ought not to be a law teacher." I disagree. Professors must defend the right of those they disagree with to express wrongheaded views, while insisting on their own right—indeed obligation—to express disagreement with such views.

When Yasser Arafat died in 2004, I was asked by Palestinian students at Harvard to represent them in the failed efforts to fly the Palestinian flag from a flagpole in the Harvard Yard. They knew my negative views of their hero—I had called Arafat's death "untimely," because if he had only died five years earlier, the Palestinian Authority might well have accepted the Clinton-Barak peace offer—but they also knew my views on freedom of speech. I agreed to represent them, as long as they understood that I would continue to criticize both Arafat and those who considered him a martyr. They agreed and we got Harvard to allow them to fly their flag.

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[51] Kevin P. Convey, Actress Redgrave defends her views, but lawyer Dershowitz steals the show. *Boston Herald. Dershowitz: Redgrave Views on Censorship Hypocritical*.

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Not everyone—even university professors—seem to understand this important distinction. I encountered this intellectual muddle-headedness in 2010 when I received an honorary doctorate from Tel Aviv University and was asked to deliver a talk on behalf of the honorees. In my talk, I defended the right of professors at the University of Tel Aviv to call for boycotts against Israeli universities. This is part of what I said:

> Israeli academics are free to challenge not only the legitimacy of the Jewish state but even, as one professor at this university has done, the authenticity of the Jewish people. Israeli academics are free to distort the truth, construct false analogies and teach their students theories akin to the earth being flat—and they do so with relish and with the shield of academic freedom. So long as these professors do not violate the rules of the academy, they have the precious right to be wrong, because we have learned the lesson of history that no one has a monopoly on truth and that the never-ending search for truth requires, to quote the title of one of Israel's founders' autobiographies, "trial and error." The answer to falsehood is not censorship; it is truth. The answer to bad ideas is not firing the teacher, but articulating better ideas which prevail in the marketplace. The academic freedom of the faculty is central to the mission of the university.

After defending their right to freedom of expression, I exercised my own right to express my own views about the merits and demerits of their ideas:

> But academic freedom is not the province of the hard left alone. Academic freedom includes the right to agree with the government, to defend the government and to work for the government. Some of the same hard leftists who demand academic freedom for themselves and their ideological colleagues were among the leaders of those seeking to deny academic freedom to a distinguished law professor who had worked for the military advocate general and whose views they disagreed with. To its credit, Tel Aviv University rejected this attempt to limit academic freedom to those who criticized the government.
>
> Rules of academic freedom for professors must be neutral, applicable equally to right and left. Free speech for me but not for thee is the beginning of the road to tyranny.

Following my talk a group of Tel Aviv professors accused me of McCarthyism and of advocating censorship. The Chronicle of Higher Education "reported" that I was pressuring the University to take action against professors who support boycotts against Israeli Universities. I responded:

> I continue to oppose any efforts by any university to punish academics for expressing anti-government views. But I insist on my right to criticize those with whom I disagree. Surely that is the true meaning of academic freedom. I urge your readers to read the full text of my controversial talk at Tel Aviv University.[52]

Another example of the confusion between defending someone's right to speak and reporting that person's views on the merits of his speech arose in the context of efforts by Norman Finkelstein, a

[52] http://www.haaretz.com/full-text-of-alan-dershowitz-s-tel-aviv-speech-1.289841

HOUSE_OVERSIGHT_017233

failed academic who had been fired from several universities, to obtain tenure at De Paul University. Finkelstein had never published any scholarship. Moreover, he had been dismissed by Brooklyn College for abusing students who disagreed with his extremist views and had engaged in sexist behavior at DePaul. Not exactly a strong record for tenure. But he had something going for him. He was so vitriolically anti-Israel, that he had many radical supporters who cared more about his politics than his scholarship. He also argued that most people who claim to be victims of the Holocaust—including Elie Wiesel—were "frauds" and "liars" and that the Holocaust itself was being exaggerated for political and financial reasons. By falsely claiming that those opposed to his tenure were motivated by his political views on Israel and the Holocaust, rather than his lack of scholarship, he hoped to bestow on himself the mantle of victimhood to a conspiracy of Zionist-McCarthyites. I exposed his tactic in the Wall Street Journal by comparing it to the ploy used by Mary McCarthy' fictionalized failed academic who, realizing he wouldn't get tenure, became a communist so that he could claim that he was being denied tenure because he was a Red rather than a lousy scholar:

> "Facing tenure denial, Mr. Finkelstein opted for a tactic that fit the times. He expressed views so ad hominem, unscholarly and extreme that he could claim the decision was being made not on the basis of his scholarship, but rather on his politics."[53]

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[53] Mr. Finkelstein is supported by hard-leftists like Noam Chomsky and Alexander Cockburn. They regard him as a scholar in a class with Ward Churchill. He's the Colorado professor who called the 9/11 victims "little Eichmanns" comparing Finkelstein to Churchill is a characterization with which I would not quarrel.

Mr. Finkelstein does not do "scholarship" in any meaningful sense. Although his writings center on Israel (which he compares to Nazi Germany) and the Holocaust, he has never visited Israel and cannot read or speak German — precluding the possibility of original scholarship.

Prof. Bartov characterized his work as an irrational Jewish "conspiracy theory." The conspirators include Steven Spielberg, NBC and Leon Uris. The film "Schindler's List," Mr. Finkelstein argues, was designed to divert attention from our Mideast policy. "Give me a better reason! . . . Who profits? Basically, there are two beneficiaries from the dogmas [of Schindler's List]: American Jews and American administration." NBC, he says, broadcast "Holocaust" to strengthen Israel's position: "In 1978, NBC produced the series Holocaust. Do you believe, it was a coincidence, 1978? Just at this time, when peace negotiations between Israel and Egypt took place in Camp David?" He argues that Leon Uris, the author of "Exodus," named his character "Ari" in order to promote Israel's "Nazi" ideology: "[B]ecause Ari is the diminutive for Aryan. It is the whole admiration for this blond haired, blue eyed type." (Ari is a traditional Hebrew name dating back to the Bible.) He has blamed Sept. 11 on the U.S., claiming that we "deserve the problem on our hands because some things Bin Laden says are true.") He says that most alleged Holocaust survivors — including Elie Wiesel — have fabricated their past.

Like other anti-Semites, Mr. Finkelstein generalizes about "the Jews"; for example: "Just as Israelis . . . courageously put unruly Palestinians in their place, so American Jews

HOUSE_OVERSIGHT_017234

> The final part of Mr. Finkelstein's quest for tenure is to blame his tenure problems on "outsiders." He claims that I intruded myself into the DePaul review process, neglecting to mention that I was specifically asked by the former chairman of DePaul's political science department to "point [him] to the clearest and most egregious instances of dishonesty on Finkelstein's part." I responded by providing hard evidence of made-up quotes and facts — a pattern that should alone disqualify him from tenure…
>
> Like the character in the "Groves of Academe," Mr. Finkelstein generated protests by students and outsiders. He has encouraged radical goons to email threatening messages; "Look forward to a visit from me," reads one. "Nazis like [you] need to be confronted directly." He has threatened to sue if he loses — while complaining about outside interference. No university should be afraid of truth — regardless of its source — especially when truth consists of Mr. Finkelstein's own words.

He did not receive tenure. I'm proud of the small role I played in helping to maintain academic standards at DePaul University by exposing Finkelstein's lack of scholarship and the sordid tactic he tried to use to capitalize on that failing. My actions in exposing Finkelstein were completely consistent with my commitment to free speech and academic freedom. Finkelstein continues to lecture at universities around the world—including some that have refused to invite me—but he no longer has the academically undeserved imprimatur of DePaul University.

Academic freedom is not limited to faculty. It extends to students as well, and no professor has the right to propagandize his captive classroom audience or to grade them down if they disagree with his political opinions. But it is sometimes difficult to distinguish between acceptable teaching and unacceptable prostheletizing. This too is an area where rights may be in conflict and a delicate balance, always skewed in favor of speech, is required.

> courageously put unruly Blacks in their place." He says "the main fomenters of anti-Semitism "are 'American Jewish elites' who need to be stopped." Normally, no one would take such claims seriously, but he boasts that he "can get away with things which nobody else can" because his parents were Holocaust survivors.
>
> And then, of course, there is me. In a recent article, "Should Alan Dershowitz Target Himself for Assassination?" Mr. Finkelstein commissioned a cartoon by a man who placed second in the Iranian Holocaust-denial cartoon contest. The Hustler-type cartoon portrayed me as masturbating in joy while viewing images of dead Lebanese on a TV set labeled "Israel peep show," with a Star of David prominently featured.
>
> Mr. Finkelstein has accused me of not having written "The Case For Israel" but when I sent his publisher my handwritten draft, they made him remove that claim. He has accused virtually every pro-Israel writer, including me, of "plagiarism." I asked Harvard to conduct an investigation of this absurd charge. Harvard rejected it, yet he persists.

HOUSE_OVERSIGHT_017235

Chapter 10: Speech that Conflicts with Reputational and Privacy Rights

Defamation: "He that filches from me my good name:"

Whenever a Holocaust denier or defamer of the Jews spews out his poison, I get calls and emails demanding that I sue them for defaming the Jewish people or committing a "blood libel." But under our First Amendment only an individual can be defamed. There is no such thing as group libel. In other words you can say all you want about "the Jews," "the Democratic Party," "the Blacks," "the Gays," and "the women"—obnoxious as these generalizations might be. An anti-Semite is constitutionally free to spread the blood libel against the Jewish people or the Jewish religion, so long as he is careful not to accuse a specific individual of killing Christian children for their blood. This is not true in other countries that do have group libel laws and other rules prohibiting racist statements. Not so under our First Amendment.

In addition to the defamatory statement being directed against a specific individual, it must also cast him in a negative light. That used to be easier to define than it is today. For example, when a newspaper in the segregated Deep South made a typographical error and described a white man as a "colored gentleman," instead of a "cultured gentleman," that error was defamatory, since describing a white person as colored clearly could damage his career and hurt his position. Today, no court would consider it defamatory to mistakenly report on someone's race. It's a little more complicated when it comes to sexual preference. If a newspaper were to characterize a heterosexual politician as gay, that might well hurt his electoral chances, but courts would be reluctant today to rule that being called "gay" is an insult. The same is true of other former words of opprobrium that have lost or decreased their negative connotations over the years.

In addition to being damaging, a defamation must also be untrue. This wasn't always the case, and Thomas Jefferson successfully fought to limit defamations to untruthful statements about an individual.[54]

If the individual defamed is a public figure, such as a politician, celebrity or anyone else who has sought the limelight, yet another hurdle must now be overcome. Since the Supreme Court's 1964 decision in New York Times v. Sullivan, a defamation action can be brought by a public figure only if the false statement was made with "actual malice—that is knowledge that it was false or with reckless disregard of whether it was false or not."

I was Justice Goldberg's law clerk when the Supreme Court rendered that precedent-shattering decision. Goldberg told me that he was concerned that the daunting requirements of the case would make it open season on public figures and would lower the standards of journalistic ethics. He himself, as a public figure, had been defamed on several occasions and it had stung him. Nonetheless, he concurred in the decision and wrote the following stirring words about the freedom to criticize:

> "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern, and may not be barred from speaking or publishing because those in control of government think that what is said or

[54] See Finding Jefferson

HOUSE_OVERSIGHT_017236

> written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel."

Since I am a public figure under the law, I have been defamed on numerous occasions, especially on the internet. The libels and slanders have been both personal and political. Although these defamations were published with actual malice, I have not sued, though I have often been tempted. (I once threatened to sue when a journalist made up a false racist and sexist quotation and attributed it to me; the newspaper investigated, agreed with me and made a contribution to my favorite charity).

Many years after New York Times v. Sullivan, I myself was charged with defamation—indeed criminal defamation—for exercising my own freedom of speech to criticize a judge for an opinion she wrote. This certainly made me appreciate our First Amendment. Here is the story:

One day in my office I opened an envelope and saw a notice that an Italian prosecutor in the city of Turin had initiated a criminal investigation against me. I had no idea what she could be referring to. The letter stated that I had committed the alleged act in the city of Turin on January 27th, 2005. I checked my calendar and discovered that I was teaching students at Harvard Law School on that day and then attending a lecture by a prominent federal judge. I could not possibly have been in Turin or engaged in any criminal act there. Yet I soon discovered that I was being charged with criminal libel for statements I had made in an interview with an Italian journalist over the telephone. The journalist was in New York. I was sitting at my desk in Cambridge. But the interview was published by the newspaper *La Stampa* in Turin on January 25th, 2005. Accordingly, the alleged criminal act had taken place in Turin, even though I had never set foot in that city. Nor had I engaged in any act other than responding to questions and expressing my heartfelt views about a judge who had written a foolish and dangerous judicial opinion that ruled that three men suspected of recruiting suicide bombers were "guerrillas" and therefore not terrorists, and not guilty.

I characterized her opinion as a "Magna Carta for terrorism," and instead of answering (or ignoring) me, she filed criminal charges with the prosecutor who decided to open an investigation.

As far as I know, the charges against me are still pending in Italy. I have every intention to fight them if it comes to that.

A variation on the theme of defamation is ridicule. Cartoons and drawings have long been used to ridicule the high and mighty. More recently photo-shopped pictures have superimposed the heads of public figures on the bodies of others to demean or insult them. In 1988, the Supreme Court ruled that the Reverend Jerry Falwell could not sue Hustler Magazine for publishing a parody of the well known Campari Liqueur ads in which a celebrity described "his first time." The ad relies on the obvious double-entendre on the first sexual and drinking experience. In the parody, Falwell is shown drinking and having sex with his mother—pretty disgusting! But as the Supreme Court rightly observed:

HOUSE_OVERSIGHT_017237

> "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them."

It ruled that parodies and caricatures, even revolting ones, were protected by the First Amendment.

Several years after this decision, a young man named David Heller called me. He had been sued by a 60 year old fellow employee, Sylvia Smith Bowman, who was running for the presidency of their local union. Here is how the court described what Heller did:

> "[W]hile the plaintiff was on an approved leave to campaign in the union election, the defendant, David Heller, an employee in the plaintiff's office who supported the incumbent president, created two distinct photocopied representations of the plaintiff by superimposing a photograph of her face and name on two different photographs of women striking lewd or masturbatory poses. The photograph of the plaintiff's face was taken from a campaign card she had distributed to union members. The photographs on which the defendant superimposed the plaintiff's face were taken by the defendant from pornographic magazines. In one of the photographs, the model is nude from the waist down, except for garters, and is posed toward the camera with her legs wide apart as she holds a banana next to her exposed breast. In the other photograph, the model is entirely naked, and appears to be engaged in masturbation. The representations were crafted by the defendant during regular office hours and reproduced on photocopiers owned by the department. The defendant then distributed his handiwork to five coworkers in the Worcester office. Subsequently, the representations were reproduced by employees other than the defendant and distributed to a wider office audience."

Heller said that he had decided to create these parodies after Bowman had made what he regarded as crude and sexist statements against men, including calling them "dickheads."

The Supreme Judicial Court of Massachusetts eventually ruled, over a strong dissent, that Bowman was not a "public figure" because the union election was not "a public controversy." The dissenting judges disagreed, arguing that "an election is the absolute paradigm of a public controversy." My own view is that the majority, especially the woman who wrote the decision,

HOUSE_OVERSIGHT_017238

was so deeply offended by the image at issue that it blinded them to the obvious public nature of a union election. It was a hard case that made bad law. Fortunately the bad law it made has not been followed in other cases involving less disturbing images.

I understand how Bowman must have felt when several years later I was victimized by a cartoon that was similar to the one at issue in her case. It was commissioned by Norman Finkelstein and used to illustrate an article he wrote calling for my assassination. It was a full-color cartoon by a South American neo-Nazi portraying me as watching the Israeli Army kill Lebanese civilians. It had me sitting in front of the television and masturbating in ecstasy over the civilian bodies strewn on the ground. Since I am clearly a public figure, and since this was plainly a parody, it was protected speech under the First Amendment. To be a First Amendment lawyer requires developing thick skin.

Privacy- The right to be left alone

The right of the media to publish purely private though truthful information was the subject, more than 100 years ago, of a classic law review article co-authored by Louis Brandeis, who eventually became one of the "founding fathers" of the 20th Century rebirth of the First Amendment. As a young lawyer, Brandeis was concerned about how local tabloids were publishing gossip about prominent people, including members of his own partner's family. He and his partner wrote "The Right to Privacy" in the Harvard Law Review (1890) in which they set out this new right to "be let alone," which they analogized , at least superficially, to the law of defamation. Remarkably, especially in light of subsequent developments, Brandeis did not seem particularly sensitive to how his new right of privacy might conflict with the old right of the press to publish scandalous material.

The conflict between privacy and publication becomes particularly sensitive when they privacy at issue relates to minors. I have been involved in several such cases. One of them pitted the right of Brook Shields to prevent the publication of nude photographs taken of her when she was 10 years old against the right of the man who "owned" the photos to publish them.

When Brooke Shields was 10, her ambitious mother Teri signed a contract with an equally ambitious photographer to photograph Brooke naked, taking a bath. Brooke was paid $450 for the photo sessions by Playboy Press, and her mother signed a release giving the photographer the unlimited right to publish the photographs anywhere and at any time.

Seven years later, as Brooke was about the enter Princeton as a freshman, the photographer decided to exploit her fame by producing a calendar featuring naked pictures of the 10 year old. Brooke was upset that any such calendar would circulate among her fellow students at Princeton and would cause her great embarrassment.

She hired a former student of mine to try to negotiate with the photographer to buy back the rights, and if that failed, to try to prevent publication of the photographs. My former student sought my advice on the matter. I told him it would be an uphill fight to try to enjoin the publication of the pictures, because they were not obscene and because prior restraint is always disfavored by the law.

HOUSE_OVERSIGHT_017239

The only theory on which I thought she could possibly succeed was that Brooke's mother had no right to surrender her daughter's privacy and that Brooke, now approaching adulthood, should have control over her own image.

Ultimately the court ruled, in a bizarre opinion, that Brooke had essentially waived her right to privacy by allowing the photographs to be published earlier, and by pursuing a career in which she has relied on her sexuality for her success. The court put it this way:

> "Much of plaintiff's recent commercial activity upon which her fame is based has been far more sexually suggestive than the photographs which have been shown to the court. These photographs are not sexually suggestive, provocative or pornographic; they do not suggest promiscuity. They are photos of a prepubescent girl in innocent poses at her bath. In contrast, defense counsel have submitted numerous samples of sex-oriented publicity concerning plaintiff. Particularly notable is her widely televised sexually suggestive advertisement for blue jeans. Recent film appearances have been sexually provocative (*e.g., "The Blue Lagoon", "Endless Love".*). Plaintiff's claim of harm is thus undermined to a substantial extent by the development of her career projecting a sexually provocative image.

This reasoning fails to distinguish between a 17 year old and a 10 year old. The earlier photographs were taken of a 10 year old kid, whose mother controlled what she would do. Her later appearances were made by a near-adult and were far more within her own control. The court simply ignored the argument by the 10 year old should not be bound by foolish decisions made by an ambitious mother when Brooke was too young to say no.

I believe that if this case were to come before a court today, in light of the new sensitivity toward child exploitation, the case would have been cited in favor of Brooke Shields. I had mixed feelings about the result because it was a victory for the First Amendment, but at a heavy cost to a young woman about to enter college. Eventually the case was settled and the calendar wasn't distributed to Brooke's Princeton classmates. Brooke Shields went on to a successful career as a multi-dimensional performer.

Another conflict arose when a blogger posted a naked photograph of a famous athlete's two year old son, and in the caption focused the viewer's attention on the size of the boy's penis. The issue I was asked to address was whether the blog met the criteria for child pornography, which is not protected by the First Amendment. This was an unusual request, since in most of my prior cases invoking charges of child pornography, I defended the person charged. In one such case, a medical student who had worked as a camp counselor had taken thousands of photographs of his campers, including several of them "skinny dipping." The focus of the photographs was not on the genitals and we argued that they were no different, as a matter of law, from nude photographs taken by recognized artists such as Robert Mapplethorpe, Sally Mann and David Hamilton that were exhibited in museums. I won that case and several others like it.

HOUSE_OVERSIGHT_017240

This situation was different; because the only purpose of publishing the child's photograph was to call attention to his penis. Moreover, his parents had not consented their child to being photographed by a paparazzi on an isolated beach, and so the family's privacy rights had been violated. Eventually, the matter was resolved by "the court of public opinion" and the "marketplace of ideas." Viewers of the blog were so outraged and the person who posted it so roundly condemned, that the post was removed.

Another area of conflict between the First Amendment and other provisions of the Bill of Rights arises in the context of criminal trials, when the media seeks to publish information—such as an excluded confession—that may prejudice a defendant's right to a fair trial. A variation on this theme is the media's refusal to publish the names of alleged rape victims, while publishing the names and mug shots of the defendant. This practice does not directly impinge on the First Amendment because the decision not to publish is made by the media, rather than the government. Indeed, the Supreme Court has struck down a statute that precluded the media from publishing the names of alleged crime victims.

I have been involved in several cases that pitted the rights of the media under the free speech rights of the First Amendment, against the fair trial rights of criminal defendants under the Sixth Amendment. I have generally been on the side of the First Amendment, while sympathizing with the situation faced by defendants who would prefer to see the press muzzled when it came to their cases.

One case in which I sided with the privacy rights of a public figure over the publication rights of the media was Chappaquiddick. I was part of the defense team organized by Senator Kennedy's staff. Part of my job was to assure the confidentiality of the testimony given at the inquest concerning the death of Mary Jo Kopenche. The witnesses who were subpoenaed to testify at this secret inquest—especially the young women who shared the house for the weekend—were not offered the right to counsel or other rights available at an open proceeding. We argued with some success, that because the inquest was secret and lacked the usual legal safeguards of public hearings, the right of the witnesses to confidentiality trumped the right of the media to immediate disclosure.

The First Amendment requires that the media and dissenters need breathing room and presumption should always be in favor of a maximalist view of free speech. But this presumption is not without significant risks to deservedly good reputations which can be damaged by defamatory or ridiculing speech. As with other potentially harmful types of expression, defamation and ridicule come with a heavy price—one we must be prepared to pay to keep the First Amendment vibrant. Not everyone is prepared to pay that price.

HOUSE_OVERSIGHT_017241

Conclusion: The Future of Freedom of Speech

Although most Americans support freedom of speech in the abstract, far fewer support speech that hurts them. Free speech for me but not for thee is a common limitation. Let me propose a test for my own readers to see whether you qualify to join "the First Amendment Club."

Do you really believe in the freedom of speech guaranteed by our First Amendment? Or do you just support the speech of those with whom you agree? Nearly two hundred years ago, the French philosopher Voltaire articulated the fundamental premise underlying true support for freedom of speech: "I disapprove of what you say, but I will defend to the death your right to say it."

Defending "to the death" may be a bit strong and "disapprove" a bit weak, but the core of Voltaire's point is crucial. It is easy, and rather self-serving, to rally 'round the flag of the First Amendment on behalf of those whose speech you admire or enjoy. But unless you are prepared to defend the freedom to speak of those whom you despise—those who make your blood boil—you cannot count yourself as a member of that rather select club of true believers in freedom of expression.

I call it a select club because most people, even most who claim adherence to the First Amendment, favor some censorship. Deep down, clearly everyone wants to censor something. I have Jewish friends who support freedom of expression for everyone—except for Nazis who want to march through Jewish neighborhoods like Skokie, Illinois. I have African-American friends who support freedom of speech for everyone—except those who would try to justify racism. I have women friends who support freedom of speech for everyone—except those who are in the business of selling sexist pornography. And the list goes on.

When I spoke at a rally of artists, museum curators, and gallery owners protesting the prosecution of the Cincinnati museum curator who had exhibited the Mappelthorpe photographs of naked children and homosexual adults, it was a very self-serving rally. Of course, artists, museum curators, and gallery owners would protest the censorship of art! Art is their business, after all.

When I represented the musical Hair, which had been "banned in Boston" back in the sixties, of course we got the support of the theater crowd. No one should be surprised that the leader of the rock band 2 Live Crew has become a First Amendment maven, since his rap lyrics have been censored. When the Palestine Liberation Organization (PLO) was prevented from opening an information office in Washington, it was predictable that Arab-American supporters of the PLO would cry "First Amendment foul." It was not as predictable that many Jewish supporters of Israel followed my lead in opposing such censorship.

And what about the classic of self-serving promotion of the Bill of Rights: The Philip Morris sponsorship of TV ads praising the First Amendment at a time when Congress was considering further limitations on cigarette advertising, or corporate support for the First Amendment right to make unlimited contributions to political campaigns. You do not have to be a supporter of freedom of speech to protest when the government tries to censor the speech of those who are goring your ox.

HOUSE_OVERSIGHT_017242

Some examples from my personal Hall of Fame of true First Amendment believers:

- Women against Pornography and Censorship is an organization that tries to educate the public about what they perceive to be the sexist evils of pornography. But at the same time, they try to educate about the evils of censorship, reminding their listeners that if the government is given the power to censor pornography today, then tomorrow it may demand the power to prohibit the publication of information about birth control and abortion.
- Action for Children's Television strongly opposed much of the daily fare to which our children are exposed on the boob tube, but they also oppose censorship of television by the Federal Communications Commission.
- Those Jews, including some Holocaust survivors, who defended the rights of the Nazis to march through Skokie and who now defend the rights of hateful Holocaust deniers to publish their garbage.
- Those pro-choice activists who refuse to call the cops when right-to-lifers picket in front of abortion clinics.

One group that is in danger of being drummed out of the First Amendment Hall of Fame is the American Civil Liberties Union (ACLU). Until recently, it was a charter member. But in recent years some of its branches have gotten soft on the First Amendment when it comes to racist, sexist and homophobic speech on college campuses. The ACLU has refused to defend the rights of the CIA to recruit on campus. It was nowhere to be seen when Dartmouth University disciplined members of the right-wing Dartmouth Review for engaging in "vexatious," "aggressive," and "confrontational" speech against an African-American professor and as mentioned earlier, some of its leaders defended the right of pro-Palestinian students to shut down a pro-Israel speaker. As of now, the ACLU is still a member, but it is getting close to being placed on probation.

If you want to join the First Amendment Club, you must attend at least one free speech rally in support of views that you thoroughly despise. I mean really hate! It is not enough to say, as some do about the Mappelthorpe photographs, "Well, that's really not my taste, but I don't see why others who enjoy that kind of thing shouldn't be free to see it." That's cheating. You must find something that really disgusts, angers, or offends you to the core. Condemn the content, but go out and defend its right to be expressed. Then come and claim your First Amendment membership card. Too few Americans qualify for the card. Until more do, the First Amendment will always be at risk, because it is always being confronted with new and unanticipated challenges.

HOUSE_OVERSIGHT_017243

The First Amendment has undergone more change in the past fifty years than it had in the first 170 years of its existence. Most of the changes have been for the better, such as the virtual elimination of offensiveness as a justification for censorship, and the severe limitations placed on defamation actions against public figures. I'm proud of the role I have played in helping bring about these positive changes.

There are several areas, however, where the First Amendment remains in grave danger. One of them is the use of threatened violence to impose self-censorship, if not governmental censorship. Although the "fighting words" doctrine has always imposed a limitation on freedom of speech, it had been considerably weakened both in theory and in practice until the recent advent of radical Islam, with its threats to kill anyone who insults their religion or their prophet. These threats have been accompanied by murders in several parts of the world. As a result, publishing houses have been reluctant to include material that might give rise to threatened violence. Following the publication by several Scandinavian newspapers of cartoons that depicted Mohammad, there were threats of death and acts of violence. This led the Yale University Press to decide not to include these cartoons in an academic book about the controversy. This act of censorship was not brought about by any governmental pressure, since the First Amendment would clearly protect the publication of the cartoons. It was brought about by the self-censorship of the publishing house growing out of fear that publication would result in violence. This phenomenon gives those who threaten violence an effective veto over what can be published in the United States.

The opposite side of the private self-censorship coin is the private circumvention of governmental censorship. Private hacking groups such as "Anonymous" will do everything in their power to thwart governmental censorship of any kind, including the use of unlawful means, even violence, to subvert or retaliate for legitimate restrictions on publication. This means that the future battles for freedom of speech are likely to be fought on private as well as governmental battlefields and may well involve violent actions on all sides.

The future battlefields will also be international, since the internet respects no national boundaries. This new phenomenon has resulted in efforts to internationalize the censorship of material deemed offensive to Islam and other religions. Various agencies of the United Nations have proposed, in the name of "multiculturalism," severe restrictions on the right to criticize controversial cultural and religious practices deemed sacred by some and offensive by others. Eternal vigilance is essential to the preservation of rights that many Americans take for granted. The struggle for freedom of speech—like the struggle for other liberties—never stays won.

On balance, the First Amendment remains relatively healthy and vibrant in America and continues to serve as a model for many emerging democracies. The same cannot be said about our criminal justice system, to which I now turn.

HOUSE_OVERSIGHT_017244

Part III: Criminal Justice: From Sherlock Holmes to Barry Scheck and CSI

Chapter 11: "Death is different"[55]: Challenging Capital Punishment

From the beginning of my academic career, I taught classes involving the criminal justice system, but I had little practical experience as a criminal lawyer. My primary exposure to the criminal justice system had come during my clerkships, which focused on the death penalty and cases involving the interface of law and science. Not surprisingly, when I decided to obtain some practical experience, I was most comfortable beginning with such cases and causes.

Cases involving death are different. I have litigated or consulted on more than three dozen cases involving the deaths or intended deaths of human beings. These cases fall into three categories: 1) Cases in which the defendant faced the death penalty; 2) cases in which the defendant was charged with killing someone; 3) cases in which the defendant was accused of attempting, intending or conspiring to kill.

Whenever a defendant is at risk of losing his liberty, the stakes are high, but when he or she is at risk of losing life—when the death penalty is on the table—the stakes are the highest. Even in murder or attempted murder cases in which the death penalty is off the table, the life and death nature of the case makes it different both in kind and degree.

I take the hardest cases, often with low prospects for success. Usually, though not always, I am called after the defendant has been convicted and is seeking an appeal or habeus corpus, where the prospects are even lower. Yet, I have won nearly all of the death cases in which I played a significant role. In no case has one of my clients been executed or died in prison.

The reason I have won so many death cases has more to do with science than with law. Most of my death cases were centered on forensics and applied science. Even before the popularity of such television shows as CSI, Bones and Dexter, I had developed an expertise in the scientific aspects of homicide cases. My academic focus has been on the interface of law and science, and so it was natural for me to employ my expertise in the courtroom. Many of my death cases, particularly those involving science, have become the basis for film, television and books.[56] Death is not only different. It is the stuff of drama.

In addition to the individual cases involving death that I have litigated, I have also played a significant role in the campaign to abolish or limit the death penalty. This began more than a half century ago when I was a law clerk responsible for drafting the first judicial opinion challenging the constitutionality of the death penalty as "cruel and unusual punishment."

My role in challenging the constitutionality of capital punishment

[55] Justice John Paul Stevens
[56] Tison brothers, Miller, Borokova, Sybers, Murphy, Claus Von Bulow, O.J. Simpson, Seigel, Connolly, Davis, MacDonald, Kennedy, Rosier. [name films of books]

HOUSE_OVERSIGHT_017245

As I previously mentioned, my initial assignment as Justice Goldberg's law clerk was to write a memorandum on the possible unconstitutionality of the death penalty. Here is how [find author]_____ , in his book _____, describes the origins of this lifelong collaborative effort.

> [Justice Goldberg] called his law clerk Alan Dershowitz into his office and advanced the decidedly immodest idea of using the Constitution to end the death penalty in America.
>
> "The Eighth Amendment prohibits cruel and unusual punishment," Goldberg told Dershowitz. "What could be more cruel than the deliberate decision by the state to take a human life?"
>
> Alan Dershowitz immediately understood the impudence of Goldberg's proposal. It was Dershowitz's very first day on the job and the young clerk, already brimming with energy and enthusiasm, was elated by the Justice's proposed agenda.
>
> When Goldberg sat down with Dershowitz in the summer of 1963, not even the American Civil Liberties Union believed that capital punishment posed a potential violation of constitutional rights. Dershowitz made this point to Goldberg. "At the time the Eighth Amendment was enacted, the colonists were executing people all over the place. Certainly the framers of the Constitution did not regard the death penalty as unconstitutional."
>
> "Therein lies the beauty of our Bill of Rights," Goldberg said. "It's an evolving document. It means something different today than it meant in 1792."
>
> In Alan Dershowitz, Goldberg found a kindred spirit and a life story that was in many ways the New York parallel of his own Chicago childhood…Dershowitz had an aversion to capital punishment, which traced back to his childhood. Dershowitz argued against capital punishment as a member of his high school debating team. [I still have a handwritten card from my first high school debate in which I advocate the "abolision of C.P." because "most murderers are products of invironment."] In law school, he wrote a letter to the Prime Minister of Israel…arguing that the death penalty was inappropriate even for Adolf Eichmann.
>
> Goldberg's choice of Dershowitz to write his capital punishment opinion was no coincidence. Goldberg passed on the issue during his first year on the bench in part because he did not feel that he had the right clerks. He inherited his first set of clerks from Felix Frankfurter. Though he had high regard for the retiring justice's selections, he didn't feel they were right for the job.
>
> They worked together through scholarship and advocacy against the death penalty for the remainder of Goldberg's life. It is difficult to imagine that Goldberg could have found a more willing and able confederate than Alan Dershowitz.

HOUSE_OVERSIGHT_017246

I set to work on the capital punishment project but found no suggestion in the case law that any court had ever considered the death penalty to be of questionable constitutionality. Just five years earlier, Chief Justice Earl Warren had written in Trop v. Dulles (1958) that "whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted it cannot be said to violate the constitutional concept of cruelty."

I duly reported this to Justice Goldberg, suggesting that if even the liberal chief justice believed that the death penalty was constitutional, what chance did he have of getting a serious hearing for his view that the cruel and unusual punishment clause should now be construed to prohibit the imposition of capital punishment? Justice Goldberg asked me to talk to Justice Brennan and see what his views were. Unless Justice Brennan agreed to join, the entire project would be scuttled, since Justice Goldberg, the Court's rookie, did not want to "be out there alone," against the chief justice and the rest of the Court.

I had previously met Justice Brennan several times over the preceding few years, since his son, Bill, was my classmate and moot-court partner at Yale Law School. I had also had lunch several times with the justice and his friend Judge David Bazelon. But none of our discussions had been substantive, and I nervously anticipated the task of discussing an important issue with one of my judicial heroes.

I brought a rough draft of the memorandum I was working on to the meeting, but Justice Brennan did not want to look at it then. He asked me to describe the results of my research to him, promising to read the memorandum later. I stated the nascent constitutional case against the death penalty as best I could. I told him that *Weems v. United States* could be read as recognizing the following tests for whether punishment was "cruel and unusual": (I) giving full weight to reasonable legislative findings, a punishment is cruel and unusual if a less severe one can as effectively achieve the permissible ends of punishment (that is, deterrence, isolation, rehabilitation, or whatever the contemporary society considers the permissible objectives of punishment); (2) regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if it offends the contemporary sense of decency (for example, torture); (3) regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if the evil it produces is disproportionally higher than the harm it seeks to prevent (for example, the death penalty for economic crimes).

In addition to these abstract formulations, I also told Justice Brennan that my research had disclosed a widespread pattern of unequal application of the death penalty on racial grounds. I cited national prison statistics showing that between 1937 and 1951, 233 Blacks were executed for rape in the United States, while only 26 whites were executed for that crime, though Whites committed many more rapes than Blacks.

Justice Brennan encouraged me to continue my research, without making any promise that he would join any action by Justice Goldberg. Several weeks later, Justice Goldberg told me that

HOUSE_OVERSIGHT_017247

Justice Brennan had agreed to join a short dissent from the denial of certiorari in *Rudolph v. Alabama* (1963)—a case involving imposition of the death penalty on a black man who was convicted of raping a white woman. Justice William O. Douglas signed on as well. The dissenters invited the bar to address the following questions, which they deemed "relevant and worthy of argument and consideration":

> 1. In light of the trend both in the country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of [our] maturing society," or "standards of decency more or less universally accepted"?
>
> 2. Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive…severity are greatly disproportional to the offenses charged"?
>
> 3. Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e.g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?

As soon as the dissent was published, there was an immediate reaction. Conservative journalists had a field day lambasting the very notion that a court could strike down as unconstitutional a long-standing punishment that is explicitly referred to in the Constitution.

One extreme criticism appeared in the *New Hampshire Union Leader* under the banner headline "U.S. Supreme Court Trio Encourages Rape":

> In a decision handed down last week three U.S. Supreme Court justices, Goldberg, Brennan, Douglas, raised the question of whether it was proper to condemn a man to death for the crime of rape if there has been no endangering of the life of the victim. This incredible opinion, of course, can serve only to encourage would-be rapists. These fiends, freed from the fear of the death penalty for their foul deed, . . .will be inclined to take a chance.
>
> Thus, not content with forbidding our schoolchildren to pray in school, not content with banishing Bible reading from our schools, and not content letting every type of filthy book be published, at least three members of the Supreme Court are now out to encourage rape.

The editorial did not mention that New Hampshire had abolished the death penalty for rape generations ago and had one of the lowest rates of rape in the country—far lower than states that still executed convicted rapists.

HOUSE_OVERSIGHT_017248

Several state courts, where rape by black men against white women were routinely punished by death, went out of their way to announce their rejection of the principal inherent in the dissenting opinion. This is what the Georgia Supreme Court said:

> With all due respect to the dissenting Justices we would question the judicial right of any American judge to construe the American Constitution contrary to its apparent meaning, the American history of the clause, and its construction by American courts, simply because the numerous nations and States have abandoned capital punishment for rape. First we believe the history of no nation will show the high values of woman's virtue and purity that America has shown. We would regret to see the day when this freedom loving country would lower our respect for womanhood or lessen her legal protection for no better reason than that many or even all other countries have done so. She is entitled to every legal protection of her body, her decency, her purity and good name.

The decision did not mention that Georgia, at that time, had one of the worst records in the nation with regard to women's rights.

There was scholarly criticism as well. In the Harvard Law Review, Professor Herbert Packer of Stanford wrote:

> If one may venture a guess, what Justice Goldberg may really be troubled about is not the death penalty for rape but the death penalty. The problem may not be one of proportionality but of mode of punishment, the problem that concerned the framers of the eighth amendment and to which its provisions still seem most relevant. The Supreme Court is obviously not about to declare that the death penalty simpliciter is so cruel and unusual as to be constitutionally intolerable. Other social forces will have to work us closer than we are now to the point at which a judicial coup de grace becomes more than mere fiat. Meanwhile, there may well be legitimate devices for judicial control of the administration of the death penalty…[but] the device proposed by Justice Goldberg is not one of them.

These were the short-term reactions. Far more important, however, was the long-term reaction of the bar, especially the American Civil Liberties Union and the NAACP, which combined forces to establish a death-penalty litigation project designed to take up the challenge of the dissenting opinion in Rudolph. The history of this project has been recounted brilliantly by Professor Michael Meltsner in his book Cruel and Unusual, and I could not possibly improve upon it here. But the results achieved were dramatic. Meltsner and the other members of the Legal Defense Fund, a group that included a number of talented and committed lawyers, litigated hundreds of cases on behalf of defendants sentenced to death and, in many of these cases, succeeded in holding the executioner at bay until the Supreme Court was ready to consider the constitutionality of the death penalty. I consulted on a number of these case, lending insights from my experience as the law clerk who had drafted the Rudolph opinion.

HOUSE_OVERSIGHT_017249

The strategy was simple in outline: The Supreme Court should not be allowed the luxury of deciding the issue of capital punishment as an abstraction; instead, it must be confronted with the concrete responsibility of determining the immediate fates of many hundreds of condemned persons at the same time. In this way, the Court could not evade the issue, or lightly refuse to decide it if the Court's refusal would result in the specter of mass executions of hundreds of convicts. However, the Court could decline to decide the ultimate issue — the constitutionality of capital punishment — if in doing so it could find some other way of keeping alive those on death row. And the legal team always provided the Court with this other way — a narrower issue, usually in the form of an irregularity in the procedure by which the death penalty was imposed or administered.

Pursuant to this strategy, the Supreme Court decided a number of cases involving the administration of the death penalty; in each of these cases the Court declined to consider the ultimate issue, but it always ruled in favor of the doomed, thereby sparing their lives — at least for the moment. With the passage of each year, the number of those on death row increased and the stakes grew higher and higher.

Then in 1971 the Court took its first turn toward the noose: In *Mc-Gautha v. California*, it held that a condemned person's constitutional rights were not violated "by permitting the jury to impose the death penalty without any governing standards" or by permitting the imposition of the death penalty in "the same proceeding and verdict as determined the issue of guilt." At that point it looked like the string might have been played out: there were no more "narrow" procedural grounds. The Court would have to confront the ultimate issue. But it was not the same Court that had been sitting when the strategy was originally devised; there were four new Nixon appointees, and it was clear that at least some of them believed the death penalty to be constitutional. The umpires — if not the rules — had been changed after the strategy of the game had been worked out and irretrievably put into action. Now there was no pulling back.

The drama intensified. The Court let it be known that finally it was ready to decide the ultimate issue. Knowledgeable lawyers—counting noses on the Court—were predicting that the death penalty would be sustained by a narrow majority. Some thought that it might be struck down for rape but sustained for murder. Some predicted that the Court would once again find—or contrive—a reason for avoiding the ultimate issue. A few, of optimistic bent, kept the faith and expressed the belief that the Court—even this Court—would simply not send hundreds to their death.

And then a major and unanticipated break. The California Supreme Court — perhaps the most influential state court in the nation —ruled that its constitution (which had substantially similar wordings as the federal Constitution) forbade the death penalty. Then, on the last day of the United States Supreme Court's 1971 term, the decision was rendered in a case called *Furman v. Georgia.* The death penalty, as administered in this country, was unconstitutional. The argument proposed by Justice Goldberg on my first day as his law clerk had now been accepted by a majority of the Justices. Goldberg called me in joy, offering mutual congratulations and crediting me with implementing his idea. I was thrilled.

HOUSE_OVERSIGHT_017250

This would not, unfortunately, be the High Court's last word on the subject. Chief Justice Berger, in his dissenting opinion, provided the states with a roadmap as to how to draft death penalty statutes that might pass constitutional muster with a majority of the justices. What ensued was a constitutional ping pong match between proponents of capital punishment and abolitionists; the proponents would draft new statutes, and the abolitionist lawyers would challenge them in court. Justice Goldberg, now in private practice, and I continued to play a role in this back-and-forth life and death conflict by writing joint articles for newspapers and law reviews. Then I was given and opportunity to participate directly in the court battle, in a dramatic and controversial case called Tison v. Arizona, whose story I will now tell.

HOUSE_OVERSIGHT_017251

Chapter 12: The death penalty for those who don't kill: Ricky and Raymond Tison

The story of the Tison case was the stuff of films and television dramas. It involved two families. The family of the killer consisted of the father, mother and three sons. The family of the victims consisted of a father, mother, baby and niece. They would meet, with horrendous consequences, on a dark, isolated road in Arizona.

Beyond the tragic facts of the case was the important legal issue they presented, since neither Ricky nor his brother Raymond Tison actually killed anyone. Nor did they intend anyone to die when they helped their father Gary and his cellmate Randy Greenawalt escape from prison. But at least four innocent people—including a baby and a 15 year old girl—were brutally murdered by the prisoners whom the Tison brothers helped escape.[57] And for playing that role Ricky and Raymond Tison, who were teenagers, were sentenced to die in the Arizona gas chamber.

As part of the overall challenge to the death penalty, abolitionists were focusing on the significant number of death row inmates who had neither killed nor intended to kill. Most of these non-triggermen had been convicted of murder on the basis of two legal fictions. The first was the law of conspiracy under which each member of a conspiracy is deemed to have committed every crime actually committed by any co-conspirator[58] (Remember Harry Reems.) The second legal fiction was the law of felony-murder under which anyone who intentionally commits a serious felony, such as breaking someone out of prison, is deemed to have "intended" any death that results from the felony, even if he actually intended that no one should die. The combined effect of these fictions was to deem Ricky and Raymond as guilty of intentional murder as Gary Tison and Randy Greenawalt who actually pulled the trigger and intended to kill the victims.

The Tison case thus starkly presented an issue that had not clearly been resolved by the Supreme Court since the Furman case: Can conspirators who helped murderers escape from prison be sentenced to death for intentional murders committed by their co-conspirators, if the conspirators themselves neither killed nor intended to kill.

I was first approached to help the Tison brothers by a journalist who was working on a book and film project about the case (eventually a film, called A Killer In the Family, was made starring Robert Mitchum as the father and James Spader—in his first cinemographic role—as one of the brothers.) I was asked to appeal their death sentence. Since they had no money, I agreed to prepare and argue the appeal without a fee.

I know the appeal would be tough because the facts of the murders were horrible and the personnel on the Supreme Court was changing in a rightward direction. The strongest point in our favor were the facts of the case as they related directly to the brothers Tison. Their story was compelling.

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[57] Maybe also a honeymoon couple.
[58] _____ Pinkerton

HOUSE_OVERSIGHT_017252

The brothers had never had a "home father." They referred to Gary as their "prison father," since he had spent most of his adult life behind bars, having been convicted of armed robbery and other predatory crimes.

On the way back to prison from a court appearance, Gary had overpowered the guard, killed him, took his gun and escaped. He was soon recaptured, sentenced to life imprisonment and soon began to plan his next escape—this time across the border to Mexico, which was only a two hour drive from the prison.

Before he could escape, Gary had to get himself removed from the "escape risk" list and maximum security—to establish a sense of trust in him by the prison officials. When some young prisoners acted up, Gary worked with the prison officials and helped to control them. He worked on the newspaper, television, and entertainment committee, earning him the right to have visits with his family in the outdoor recreation area. Gary used his time with his family to persuade them to help him escape. After much prodding, the boys agreed.

On a summer visiting day in July of 1978, the three Tison brothers arrived at the Florence State Prison with their perennial picnic basket. Beneath the fried chicken were pistols and shotguns.

The boys had arranged for a car to be parked in the lot of the local hospital. They knew there could be shooting. But Gary promised them that nobody would get hurt. "The more firepower you have," he instructed them, "the less likely you'll have to use it."

"We told Dad," Raymond later said, "we'll do this on one condition—that no one gets hurt."

Gary assured the boys, "We'll make it out without firing a shot or being fired at. And once outside, it will be clear sailing. I know how it works. I've been there before." He had been there before, but it hadn't worked. He had killed a guard and been recaptured.
To the three boys, their father wasn't a killer. A guard had been accidentally shot in a scuffle. It was not in cold blood. Their father was incapable of that. Gary told them that his criminal conduct had been a result of secret training he had received in the "Service." It was "top secret." They believed this fantasy like they believed everything else their father told them. "Nobody was going to get shot," their father assured them.

Gary's prediction proved to be correct about the escape. Raymond went to meet his father in the picnic area. His brothers Ricky and Donny went into the waiting room with their picnic basket. A friend of Gary's, Randy Greenawalt—also a convicted murderer—was in an adjoining control room. When the other visitors had left, the boys pulled out their shotguns and held the guards at bay. Raymond and Gary joined them.

When additional guards appeared they were first ordered to lie down and then herded into a storage room. The door was locked and the power turned off. Then the five simply walked out the front door. Not a shot had been fired.

HOUSE_OVERSIGHT_017253

Within minutes, the alarm was sounded and the manhunt was on. But the escapees were keeping to back roads in the old white Lincoln supplied by their Uncle Joe, a marijuana dealer. A tire went flat the next day and was replaced with a spare. Later that night, another went flat. There was no spare.

At about the same time, a young marine named John Lyons was driving his family on a vacation. About an hour into their road trip, John saw a young man standing on the side of the road next to a white Lincoln waving his arms for assistance. At first John passed; then he stopped, backed up, and pulled next to the Lincoln. Four more men appeared out of the shadows with their guns drawn. One of them ordered the Lyonses out of the car and motioned them into the back seat of the Lincoln. Two of the men got in the car with them, and the others got into the Mazda.

The Lincoln bumped along for several miles down the rocky dirt road, with the Mazda following behind. Gary stopped and the Lyonses were ordered out of the Lincoln while the men cleaned out the Mazda, put their guns in it, and loaded the Lyones' suitcases into the Lincoln.

Then Gary and Randy got into the Lincoln and drove it seventy yards farther into the desert. They shot some holes into the engine to disable it and told the boys to put the Lyones into the Lincoln. After the Lyoneses were transferred, Gary turned to Ricky and said, "You boys go back into the Mazda and get the water jug." Raymond and Ricky were relieved that the Lyoneses would be left with enough water to survive until help arrived.

Donny, Ricky and Ray retrieved the water jug from the Lyones' Mazda and were on their way back when they heard the shotguns fire. They could see flashes of fire through the darkness. They stood transfixed. It seemed to last forever. Then it was quiet.

As the boys came closer they could see the carnage their father and Randy had left behind.

Their father had murdered an entire family—father, mother, baby and niece—for no apparent reason. They sat immobilized by horror as Randy Greenawalt drove them away in the orange Mazda.

Soon thereafter the Arizona police found the Lyons family. Mother, baby and John were in or near the white Lincoln, shot to death. The niece was missing, raising the fear that she had been kidnapped by the Tisons. Several days later she was found: she had been shot once in the hip and had managed to drag herself toward the main road before bleeding to death. The family dog lay dead from dehydration a few feet away from her.

The disclosure of this mass murder shocked the public, which had followed the news of the manhunt with a mixture of fear and admiration for the daring prison escape. Now revulsion replaced admiration. The crimes were characterized by the media as a "mad-dog murder spree," and a "death orgy," and a "ritualistic execution." The killers were described as "crazed" and "desperate." Some people refused to drive at night until the Tisons and Greenawalt were caught. Among the mothers who feared for their families was Sandra Day O'Connor, who was then serving as a Maricopa County Trial Judge.

HOUSE_OVERSIGHT_017254

The largest manhunt in Arizona history was under way, involving patrol cars, helicopters, search dogs, roadblocks, and a sophisticated communications system.

The Tisons were exhausted, and low on money. Gary decided that they had to make a run for the Mexican border, risky as that was.

At 2:58 in the morning of August 11, a van approached a police roadblock. Suddenly shots rang out, putting two holes in one of the police cars. The van crashed through the roadblock. The police chased the van, traveling at close to a hundred miles an hour.

They called in helicopters. They knew, but the Tison's didn't, that there was a second roadblock on the other side of the pass. For a moment, Gary, who was manning the gun out the rear window, thought they had made it. But Donny, the oldest brother who was driving, saw the second roadblock. He crashed through it, but not before several shots from the waiting police cars struck him in the head. The van swerved off the road and came to rest in the desert sand. Gary yelled, "Every man for himself," and ran. Ricky, Ray and Randy threw themselves to the ground. Gary kept going.

The police found Donny, slumped in the driver's seat, unconscious from his head wounds. They handcuffed him, called an ambulance, and left him there after removing the guns from the back of the van. At 3:40, the ambulance arrived at the scene of the roadblock with lights flashing and sirens blaring. But the driver and medics were made to wait at the roadblock for over five hours. When they were finally allowed to go to Donny at 9:10, he was dead.

The police then shoved a shotgun against the back of Ricky's head and pistol barrel into his mouth. They cut his clothes off his body. He was pulled by his hair into a police car surrounded by three officers and interrogated—naked and shivering—for five hours. When he expressed reluctance to talk, he was asked, "Do you want to see your dying brother?" He believed he would be shot and left to die if he did not confess.

"I don't want to make a statement," he said. The police continued the interrogation. Donny, bleeding and unconscious, would receive no medical attention until his brothers confessed. Finally, the two brothers confessed to their roles in the events following the breakout.

For over a week no trace was found of Gary. Armed vigilantes combed every inch of desert near the scene of the shootout. A SWAT team was lowered into abandoned mines and caves. Police dogs were used. Rumors circulated about Gary's whereabouts. He was reported in dozens of locations ranging from the Grand Canyon to southern Mexico.

Several days later, a Papago Indian smelled something foul in the underbrush. It was a decomposing body. The remains were identified as Gary Tison. He had been hiding out in the desert, just a mile north of the roadblock. The August heat proved too much for him. His end came in the Papago Indian Reservation, lying amongst the brush with a sock full of cactus berries squeezed dry near his head. Underneath him, half buried in the sand, was John Lyons' gun.

HOUSE_OVERSIGHT_017255

Now that two of the culprits were dead, public outrage was focused on those who were still alive. The media presented the recurrent vision of the murdered toddler and expressed the view that "if they hadn't gotten Gary Tison and Greenawalt out, none of this would have happened." The press demanded the gas chamber. One editorial expressed chagrin that anyone had been captured alive.

The two surviving brothers were tried and convicted of the murders, based on the account they had given the authorities. Under the laws of felony murder and conspiracy, they were as guilty of murdering the Lyons' family as were the men who pulled the triggers. The judge employed the same legal fictions in sentencing them both to die in Arizona's gas chamber. My job was to try to save their lives, since the evidence of their guilt—under the long established felony murder and conspiracy theories—could not reasonably be contested.

After several unsuccessful appeals in the Arizona state courts, we decided to seek review in the Supreme Court. This decision was itself controversial within the anti-capital punishment legal community. The legal landscape had changed since the Supreme Court decided Furman and several other cases imposing restrictions on the use of the death penalty. In 1982, the justices had decided the case of Enmund v. Florida, reversing the death penalty of a defendant who drove the "getaway" car in an armed robbery of a home in which Enmund's accomplices killed the elderly couple they had robbed. The vote was 5 to 4. The majority reasoned that:

> "We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act."

It then went on to say that:

> "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."

The Enmund decision seemed to apply to the facts of the Tison case. The problem was that there had been an important change of personnel in the High Court between the time Enmund was decided and the filing of our petition for review. Justice Antonin Scalia had joined the court and soon became its most outspoken critic of the campaign to abolish the death penalty. William Rehnquist, also a strong supporter of capital punishment and an Arizona resident who was aware of the Tison rampage was now the court's Chief Justice. Finally, Justice Byron White, who had written the majority opinion in Enmund, seemed to be backtracking a bit in subsequent cases.

HOUSE_OVERSIGHT_017256

Before we filed our petition, I had received several phone calls from anti-capital punishment lawyers imploring me not to file a petition for certiorari in the Tison case. "Count the noses," one of them warned. "You may not have five any more." He urged me to leave well enough alone: "We have Enmund. Most courts will follow Enmund and reverse felony-murder death sentences. But if the Supremes take your case and reverse or limit Enmund, people will die because of you. You have to go by the numbers."

I understood his reference to "the numbers" as meaning two different things: First the numbers on the Supreme Court, which now might be 5-4 against us. And the large number of condemned inmates who faced execution on a theory similar to that which had lead the sentencing judge in Arizona to sentence the Tison brothers to die even though they had not killed the Lyons family or intended their death.

I respected the insights and judgments of the callers, but I had two clients on death row. I was their lawyer, not the lawyer for the many other death row inmates whose fates could be adversely determined by a negative ruling in our case. I cared deeply about the other inmates. I cared deeply about every inmate facing the death penalty. I cared deeply about the issue itself. But I could not allow these strong feelings to influence my decision regarding my clients. I was the only person between them and the canisters of death that stood ready to end their young lives. At that moment in time, I was not a "capital punishment lawyer" or a "cause" lawyer of any kind. I was Ricky and Raymond Tison's lawyer. I had to put case before cause, client before campaign, the Tison brothers before the others on death row. It was an excruciating conflict, but not a difficult legal or ethical decision.

I decided to file a petition for certiorari to the Supreme Court. Our hope was that the justices would not want to hear full argument on an issue they had so recently considered: namely the constitutionality of the death penalty for defendants—like Enmund—who had not been the actual triggerman in a crime that had resulted in the death of the victim. We hoped the justices would simply "remand the case for reconsideration in light of Enmund." In other words, that they would send the case back to the Arizona courts so that those judges could apply the Enmund precedent to the facts of the Tison case. That would have been the best of all possible worlds. The Court would have reaffirmed Enmund as the binding precedent and sent a strong message to the state courts to be sure to follow that precedent. And it would have saved the lives of Ricky and Raymond. But it was not to be. To our disappointment and worry, the justices granted review and set the case down for full briefing and argument.

Generally, lawyers are ecstatic when the High Court grants review of one of their cases. It means that they will have the privilege of arguing before the Supreme Court—a rare honor that few lawyers ever experience. It also means they will have an opportunity to influence the development of constitutional law—a knife that cuts both ways, since the influence may be positive or negative.

In this case, I was far from ecstatic, since the granting of review so soon after the divided decision in Enmund signaled a desire on the part of at least some of the justices to reconsider and perhaps reverse or limit Enmund. The last thing I wanted to be was the vehicle by which the justices

HOUSE_OVERSIGHT_017257

would shift the existing trend in favor of contracting the death penalty to a trend in favor of expanding it. I know that the stakes were enormous, both for the Tison brothers and for the many other death row inmates who had not been triggermen—as well as for the campaign against capital punishment, as I prepared my brief and argument for the case that was scheduled to be heard on November 3, 1986.

I began my argument with a simple statement that I thought would be beyond any dispute:

> "The State of Arizona seeks to execute two young men who it acknowledges lacked the specific intent to kill, and did not, in fact, kill."

I was immediately interrupted by Justice White, the author of the Enmund majority opinion on which I was relying:

> "Did you say the state concedes what?"

I repeated my point:

> "The state concedes that there was no specific intent to kill, and that there was no killing."

Justice White pressed me:

> "What do you mean by that?"

I explained that no one has ever suggested that the brother specifically intended to kill the Lyons' family. Indeed, it was clear from the record that they specifically intended not to kill and that Gary and Randy had to trick the brothers into going for water before opening fire. I also pointed to a finding by the Arizona Supreme Court that the murder of the Lyons' family was not part of the original plan and was utterly "unnecessary" to the escape. I told the court that, "There is no evidence to support a finding for specific intent."

The justices immediately shot back, "Well, if that's true, of course, that's the end of the case."

I agreed with that assessment and was pleased by it:

> "That's the end of the case. Your Honor, we think that's the end of the case."

But it was far from the end of the case, at least in the minds of some of the justices. The recently appointed Antonin Scalia came after me with a hypothetical case, an exercise I was thoroughly

HOUSE_OVERSIGHT_017258

familiar with, since it is the weapon of choice for law professors, of which Scalia had been one before ascending the bench.

Scalia asked me what my position would be if one bank robber had a gun and the other one doesn't and the one with the gun "throw[s] the gun to the trigger man, as the policeman's approaching him, he says, 'I need a gun,' and I throw the gun to him…I don't care whether he kills the policeman or not."

I had prepared for every likely question I might be asked by the justices, but the idea of a gun being throw by one robber to another had never occurred to me. I had to think quickly. In the classroom, a poor answer to a professor's bizarre "hypo" might reduce a grade, but in the courtroom it could be a matter of life or death. I quickly recalled the facts of the Enmund case and reminded the justices that Enmund too had provided a gun to his co-conspirators who then killed the couple, and that there was no difference between "throwing" a gun, as in Scalia's hypothetical, and "providing" the gun, as in the real facts of Enmund: "There is no difference between this case and Enmund, except that this case is far more compelling."

Scalia repeated his hypothetical:

> "Please, please.
>
> I don't understand your response to the second hypothetical I put to you.
>
> Never mind the trigger man.
>
> The person who tosses the gun to the trigger man.
>
> There is no way in which he has an intent to kill within the Constitutional rule; is that right?...he doesn't care whether the policeman lives or dies.

Scalia persisted:

> But the triggerman asks for a gun.
>
> "Toss me a gun."
>
> He tosses him the gun.

He says:

> "There is a policeman coming."
>
> "Throw me a gun quick."
>
> That wouldn't be enough?

HOUSE_OVERSIGHT_017259

I was reminded of Chief Justice Berger's bear baiting hypothetical in the I Am Curious Yellow case, but this time the stakes were much higher. I answered the Justice's question:

> No. That wouldn't be enough.
>
> And that is not this case in any event.
>
> This case is handing guns over, under an agreement that no shooting would take place.
>
> In Enmund the guns were provided.
>
> What Your Honor, Justice Scalia, is asking for, in a sense, is a return to the felony murder rule where guns are provided.

Justice Scalia didn't seem satisfied with my answer, so I threw a hypothetical back to him—law professor to law professor:

> And to throw a hypothetical back, which I'm not entitled to do, but I'll throw it back to myself…what if there were a statute saying, anyone who provides guns to an armed robber in the course of an armed robbery, whereby death results, is guilty of first-degree capital murder?
>
> That would be clearly within Enmund.
>
> That's what Enmund decided.
>
> Because the facts of Enmund were exactly that.

The dialogue continued:

Justice:

> In Enmund, had he provided the gun?

Mr. Dershowitz:

> The state certainly argued that he had provided the gun in Enmund.
>
> The gun had belonged to his common law wife.
>
> He then disposed of the gun.
>
> Certainly, a reasonable judge and jury could conclude that he had provided the gun.
>
> It was an armed robbery.

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> He was the one who planned the robbery.
>
> In this case, these young boys were brought into the robbery at the last minute.
>
> One of the codefendants, Greenawalt, directed what went on in the penitentiary.
>
> Their father directed what went on thereafter.
>
> There was never a time when they could have left their father's side, when the father left any of them alone, the three of them, so that they could leave.
>
> These are young kids under the control of their father.

I concluded my opening argument by acknowledging the responsibility of the brothers for the prison escape, but insisting that they could not be executed for the unanticipated murders:

> Nobody is denying their responsibility for these serious crimes of kidnapping, breakout of prison.
>
> But then after the crime was completed, after the car was taken, the father then, without any necessity... as the courts found; no necessity at all; could have easily have left them there... the father and the other defendant, on their own, after sending the boys away, made a shocking and surprising decision to kill this family in cold blood.
>
> There are findings by the Arizona Supreme Court that it was not necessary, that it was spontaneous, it was not part of the original plan.
>
> This is just like Enmund.
>
> In Enmund there was spontaneity.
>
> It was not part of the original plan.
>
> After Enmund left the person to go into the house, something unexpected happened.
>
> In this case it was the father who did something unexpected.
>
> In the other case it was the gunman.
>
> A family was tragically killed in both cases.
>
> This Arizona case is an attempt to relitigate Enmund.
>
> And we will hear relitigation after relitigation in every state if this Court allows every state to redefine intent the way it chooses to redefine it.

HOUSE_OVERSIGHT_017261

I sat down, satisfied that I had made the best possible argument for my clients. Now it was the State of Arizona's time to argue. The Attorney General was hardly interrupted as he delivered his argument. After a while, he too was asked a hypothetical, but one much closer to the facts of this case:

> …supposing right after they stopped the car with the family in it, the two boys instead of following along as they did, had just gone on a hike, walked away half a mile, and then the father…killed the family?

The Attorney General acknowledged that this "would be different," and that the brothers "presence at the scene" is "essential," but he insisted that they were "present," even if not right next to the car in which the shootings occurred. He also conceded that "I can't stand here today and tell you that [the brothers] knew…that at that time that the trigger would be pulled."

I had just a few minutes for my rebuttal. In light of the Attorney General's concessions, I decided to point the Court to the record evidence that the brothers were not at the scene of the crime and did not foresee that their father and Randy would kill the Lyons' family:

> First, there is a specific finding on page 336 that it was not essential to the defendants' continued evasion of arrest that these persons be murdered.
>
> Second, …there is not a single statement in this record by Ricky in which he does not consistently say that the boys, all three of them, were sent away to get water.
>
> …
>
> The state concedes that it is essential to this case that they be present at the scene of the crime.
>
> Why is presence essential?
>
> Generally, presence is essential because it is evidentially relevant to the intent of the defendants.

I then pointed out that the evidence in this case led overwhelmingly to the conclusion that they were not present and that they had deliberately been sent away to get water—been tricked into believing they would be kept alive—precisely because their father knew that they did not want anyone to die.

I was satisfied that I had done the best I could with the facts and the law. If the court were to reaffirm the principles of Enmund, we would win. The justices seemed to acknowledge that if there was no evidence that Ricky and Raymond had the "specific intent" to kill the Lyons' family "that's the end of the case." I was confident that when the justices reviewed the entire record of the case, they would find that there was no such evidence.

And I was right—at least about that!

HOUSE_OVERSIGHT_017262

The majority opinion began its analysis with the following acknowledgment:

> Petitioners argue strenuously that they did not "intend to kill" as that concept has been generally understood in the common law. We accept this as true. Traditionally, "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."... As petitioners point out, there is no evidence that either Ricky or Raymond Tison took any act which he desired to, or was substantially certain would, cause death.[59]

When I read these words, I thought that we had surely won. That was precisely what I had argued. The Court had accepted my argument in full. It should have followed from this acceptance that, in the words of one of the justices, "that's the end of the case." But it was only the beginning.

Justice Sandra Day O'Connor, who had dissented in Enmund but was now writing the majority opinion in the Tison case, then expressed dissatisfaction with the rule that had been established in Enmund:

> A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all — those who act in self defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty — those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all — the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

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[59] The court then elaborated on its reasoning: The Arizona Supreme Court did not attempt to argue that the facts of this case supported an inference of "intent" in the traditional sense. Instead, the Arizona Supreme Court attempted to reformulate "intent to kill" as a species of foreseeability. The Arizona Supreme Court wrote:

> "Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."

This definition of intent is broader than that described by the Enmund Court. Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the "intent to kill" category of felony murderers for which Enmund explicitly finds the death penalty permissible under the Eighth Amendment.

HOUSE_OVERSIGHT_017263

She then went on to create a new category of crime that warranted execution even in the absence of a specific intent to kill:

> We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

This new category—killings by a triggerman that reflected a "reckless disregard" for life by the non triggerman—had not been the basis for the Arizona Courts' decision. Nor had it been argued by the Arizona Attorney General. Neither had we been given an opportunity to argue against it, because the justices seemed to agree that if there was no intent to kill—which they now ruled there was not—that would be "the end of the case." The majority had simply concocted a new rule out of whole cloth. They seemed determined to overrule Enmund, without appearing to be doing so. It was "judicial activism" to the extreme.

But the court could not simply apply this new rule to the old facts of the Tison case, since the Arizona courts had not found that the condemned brothers had shown a "reckless disregard for human life."[60] The majority therefore, "vacated" the death penalty against my clients and remanded the case back to the Arizona courts "for determination" whether the Tison brothers met this new criteria. Had they "affirmed" the judgment—the death sentence—the case would have been over. But by "vacating" it, the justices gave us a new beginning.

We were still alive, as so were Ricky and Raymond. Their fates would now be in the hands of the Arizona courts, which would have to make a finding that these boys had shown "reckless indifference" or "disregard" for human life. It was a bad day for the campaign against capital punishment, but a hopeful one for my clients Ricky and Raymond, who were no longer under sentence of death—at least for the moment.

The state of Arizona continued to seek the death penalty and asked the trial court to find that the Tison brothers possessed a "reckless indifference to human life." Without even conducting an evidentiary hearing, the trial court reimposed death sentences, concluding that the trial record itself demonstrated reckless indifference. He refused to allow us to introduce any evidence that might contradict this finding.

We immediately appealed to the Arizona Supreme Court, which had affirmed the original death sentence. This time the court unanimously reversed the trial judge, vacated the death sentences and remanded it back to the trial judge, ordering him to give us an opportunity to introduce "additional evidence" relating to whether the boys were recklessly indifferent to human life. We relished the opportunity, confident that a full exploration of the facts would lead to the inescapable conclusion that Ricky and Raymond were anything but indifferent to the fate of the Lyons' family. They wanted them to live.

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[60] The majority sloppily used two different formulations: "reckless disregard" and "reckless indifference."

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Eventually, after a long and torturous road through the Arizona courts, the death penalties against Ricky, and Raymond Tison were reversed. They would not be executed, despite the Supreme Courts green light. Once again, as with the issue of obscenity, the Highest Court did not get the last word. We refused to give up, and in the end we prevailed. Ricky and Raymond are now eligible for parole and may soon be free. Greenwalt, who was represented by other lawyers, was executed.

Following the reversal of their death penalties, one of the brothers wrote me a letter saying that his minister had told him that Jews can't go to heaven. My client pleaded with me to convert to Christianity so that we could spend eternity in the same place. I wrote him a nice letter back saying that Jews believe that they can go to heaven. He wrote back telling me that he had decided to become a Jew, because he wanted to be sure he would be in the same heaven that I was in. I replied assuring him that I had checked, and that Jews and Christians go to the same heaven, so that he didn't have to convert.[61]

[61] Another one of my clients, a far more sophisticated one, did convert to Judaism – on a weekly basis. He discovered that all the Jews in a particular federal prison were taken out every Friday night to have Shabbat dinner in the homes of local Jews where they were treated to wonderful home-cooked meals. He told me that since he had become a Jew, he had gotten to love "those balls made out of fish and the other balls that they put in the chicken soup." I reminded him that he had always been a very religious Catholic, and he said, "Oh I'm still a religious catholic. My priest has given me permission to be a Jew on Friday night as long as I go back to being a Catholic for Sunday morning."

HOUSE_OVERSIGHT_017265

Chapter 13: Using Science, Law, Logic and Experience to Disprove Murder

Introduction

In 18__, Oliver Wendell Holmes, Jr. taught us that the life of the law has not been logic—it has been experience.[62] Recent experience has dramatically changed the way murders are prosecuted and defended. I have been part of that change, having been involved in some of the most significant homicide cases over the past half-century.

The crime of murder is as old as human nature. Virtually every important work of fiction and non-fiction includes accounts of murder, or murder trials and of unsolved homicides. The Bible recounts the murder of Abel by Cain. That crime was solved by God questioning Cain: "Where is your brother Abel?" Cain's evasive answer—"Am I my brother's keeper?"—convinced God, and the reader, of Cain's guilt. Shakespeare's "perfect" murder is committed by Hamlet's uncle pouring poison into the ear of the king. That crime too is solved by provoking the killer into demonstrating his guilty conscience. Both the Bible and Shakespeare also recount cases in which innocent people are framed by planted evidence: Potaphor's wife frames Joseph; and Iago frames Desdemona. Dostoevsky creates an interrogator so subtle that **Raskolnikov** needs to confess. Sherlock Holmes solves murders through observation, deduction and primitive science. In 19th Century America, sheriffs would tell uneducated suspects that if the corpse bled in their presence, it proved their guilt.[63] Then came the lie detector, ballistics testing, fingerprint matching, and other techniques that purported to be based on science. Throughout history, there has been extensive reliance on eyewitnesses, informers and accessories. Now we have DNA.

DNA and other recent scientific developments have cast doubt upon all the previous techniques of solving homicide cases. Defendants who had been convicted on the basis of confessions, eye witness testimony, ballistics, fiber, hair, fingerprint, voice analysis, accomplice testimony and other "reliable" indicia of guilt have been exonerated by DNA and other recent scientific breakthroughs. Some who were not even suspected have now been convicted on the basis of this new science.

The pervasive presence of surveillance cameras and other means of recording events has also contributed to the increasing accuracy of detecting homicides and other serious crimes, as has more sophisticated forensic testing and better crime laboratories, though problems with the latter persist.

Every technique for solving homicides can also be used to defend against false charges of homicide. Every prosecutorial sword can become a shield in the hands of an astute criminal defense lawyer.

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[62] Whether he knew it or not, Holmes was echoing the views of the 15th Century Jewish sage Isaac Abravanal who observed that "experience is more forceful than logic."
[63] Porgy and Bess

HOUSE_OVERSIGHT_017266

This chapter tells the story of some of the many murder and attempted murder cases I have litigated over the past 50 years. In many of them, I use science not only as a shield to protect my client, but also as a sword to prove misconduct on the part of the prosecution, police or laboratory technicians. Some of the cases are well known. Many are not. All of them are intriguing.

Most of my cases have been appeals from convictions. I've done a few trials and I wish I could have done more, since I love developing evidence and arguing to juries, but my teaching commitments are far more conducive to arguing hour-long appeals than month-long trials.

My emphasis on evidence, particularly scientific evidence, led me, early in my career to realize the traditional way of arguing appeals did not maximize the chances of success. The rules for an appeal provide that only errors made at trial and preserved as part of the trial record may be raised and argued on appeal. All other issues, such as newly discovered evidence, ineffective assistance of counsel, prosecutorial misconduct discovered after trial, must be raised on what is called "collateral attack"—by a writ of habeus corpus or other such procedures. I quickly came to realize that appellate judges, like all human beings, care more about whether a defendant is guilty or innocent than whether there was a technical mistake at the trial. This perception was solidified by the approach many judges, such as the well respected Henry Friendly, espoused: namely that innocence or guilt should play a greater role in reviewing convictions than what they called "technicalities."

Accordingly, I developed a technique, which has now been adopted by some other lawyers, under which I tried to combine the appeal and habeus corpus aspects of the case into one challenge to the conviction. As soon as I was retained to do an appeal, I gathered together a legal team that included investigators, law students and experts in other disciplines, such as medicine and forensics. I asked them to investigate the case from scratch. If the investigation then turned up new information suggestive of innocence, I would quickly file a habeus corpus petition and not wait for the outcome of the appeal. If the petition were denied, as they often were by the trial judge, I would then try to combine them into the appeal so that the appellate court would have a fuller view of the actual situation. I did this quite successfully in the Claus Von Bulow case. The court reversed that conviction not only because of errors made at trial, but because of new evidence of innocence that we had discovered after the trial. I have used this approach, often quite successfully, in many of my appeals, especially those involving homicides, where new evidence frequently emerges.

I suspect that some of my clients, including some whose cases I have won, have been guilty. I believe that some have been innocent. As to the majority, I am not certain. There is a myth that criminal defense lawyers always know whether their clients are guilty or not guilty, because guilty clients confess their guilt in confidence. This has certainly not been my experience. Of all the homicide cases in which I have been involved, only one client has confessed his guilt to me. I won that case on the basis of constitutional issues. I have never had a case in which I have helped to free a guilty client who then killed again. I tell my clients that under no circumstances will I ever represent them a second time.[64]

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[64] In one case a client who was acquitted of murder was subsequently convicted of an entirely different type of crime. I did not represent him the second time. He was convicted.

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OJ Simpson and Claus Von Bulow

My two most famous—infamous?—cases involved homicide: the OJ Simpson double murder prosecution; and the Claus Von Bulow assault with intent to kill (or attempted murder) prosecution. I have written books about both the Von Bulow and Simpson case, detailing how science was used to challenge the prosecution's case.[65] I will not repeat what I wrote in those books, except to highlight how important it is for lawyers, especially those involved in complex homicide cases, to master the science, to be able to question the other side's scientific conclusions, and to accept nothing on face value.

I agreed to join the OJ Simpson defense team, despite my earlier public statements that the evidence pointed to him as the killer. Among the reasons I took the case was that Simpson was facing the death penalty, and I have a policy of generally accepting capital cases.

Eventually the District Attorney decided not to seek the death penalty. This was surprising, because if Simpson did, in fact, murder his wife and the man she was with, the death penalty would seem appropriate under the usual criteria for imposing it. The killings seemed to be in cold blood, especially brutal and there were two victims. The fact that the District Attorney opted against it, demonstrated, once again, the entirely arbitrary nature of decision-making as it relates to who is and who is not subjected to capital punishment.[66]

In any event, having agreed to join the team, I couldn't abandon my client even though the death penalty was now off the table. Simpson still faced two sentences of life imprisonment without the possibility of parole—for some a fate worse than death.

My special role in the case would be to prepare and argue complex legal motions and to help formulate the scientific, or forensic, defense. I would also argue the appeal in the event of a conviction. I recommended that Barry Scheck and Peter Neufeld, who were experts in the relatively new science of DNA, be added to the team.

After extensive investigation, we were able to demonstrate, by means of sophisticated scientific evidence, that the police had planted O.J. Simpson's blood, along with the blood of his alleged victims, on a sock found in Simpson's bedroom after the crime. The blood on the sock had high levels of a chemical that are not found in human blood, but that are added to vials of blood to prevent it from coagulating. The bloodstains on the sock also proved that the blood had been dripped on it while it was lying flat, rather than splattered on it while it was being worn. There

[65] *Reversal of Fortune* and *Reasonable Doubts*.

[66] Sometimes the prosecutor seeks the death penalty simply to gain a tactical advantage at the guilt or innocence phase of the trial. This advantage derives from the fact that in death penalty cases, the prosecutor is entitled to a "death qualified" jury consisting of 12 people who have no conscientious objection to capital punishment and would be willing to sentence someone to death. Such jurors, according to jury experts, tend to be pro-prosecution in general and more likely to vote guilty at the trial. Prosecutors know this and ask for the death penalty even in cases not warranting it, simply to improve the chances of securing a conviction. Once they get their pro-prosecution jury, they sometimes decline to seek the death penalty. Early in my career, I was retained by F. Lee Bailey to prepare a petition for certiorari to the Supreme Court challenging this practice in the case of Miller v. California. The Supreme Court granted my petition for review, but then after oral argument by Bailey, the justices denied the review over a strong dissent.

HOUSE_OVERSIGHT_017269

were mirror image round stains on all four surfaces, which means that the blood flowed through the flattened sock while it was not being worn. Had it been splattered while being worn, there would have been mirror image stains only on two surfaces—the outside and the inside of the part that was splattered, but not on the two other surfaces which would have been blocked by the wearer's leg. The jurors were convinced by this and other evidence that the police had dripped the blood from vials onto the sock to make it appear that the sock Simpson was wearing during the murders had been splattered with blood at the crime scene. This led the jurors to believe that the police were trying to frame Simpson for a murder they honestly believed he had committed, and that the veracity of their testimony and other evidence could not be trusted. They acquitted Simpson of killings for which a subsequent civil jury (with different lawyers) found him financially liable.

My expertise in the science of disproving murder had been at the center of my earlier famous case involving Claus Von Bulow. Von Bulow's original trial lawyers were not able effectively to challenge the prosecution's evidence that Sonny Von Bulow's coma was caused by an injection of insulin, that high levels of insulin were found in Sonny's blood, that traces of insulin were found on a needle in a bag that belonged to her husband Claus, and that a vial of injectable insulin had been found in Claus' bag by Sonny's maid. On appeal, and in a motion for new trial based on newly discovered evidence, we disproved each of these pillars of the prosecution case. We demonstrated through our own experts that Sonny's coma was caused by the oral ingestion of barbiturates, rather than by an injection of insulin; that there were no high levels of insulin in Sonny's blood; that the alleged traces of insulin on the needle was the result of a false positive reading; and that the maid could not have seen a vial of insulin in Claus' bag. The Rhode Island Supreme Court reversed the conviction and ordered a new trial at which the jury, after hearing the new scientific evidence, quickly acquitted Claus Von Bulow.

The book and film Reversal of Fortune had brought the issue of scientific defenses to a wide public audience, and I had become the "go to" lawyer in such cases. This reputation brought me several new cases, one of which bore an eerie resemblance to the Von Bulow case.

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"My father didn't kill my mother": the case of Dr. William Sybers

The call came from a young woman pleading with me to take her father's appeal. Her father had been convicted of killing her mother by injecting her with a drug that stops the heart from working. He was sentenced to life imprisonment. "It's just like the Von Bulow case," the daughter insisted. "My father didn't kill my mother. He didn't inject anything into her. She died of natural causes." (No one seeking my help ever tells me their case is "just like" O.J. Simpson's!)

When the daughter of an alleged murder victim is so certain the defendant is innocent, even when the defendant is her father, the case is certainly worthy of a hard second look. I agreed to provide that look and to argue the appeal—and a possible new trial motion—if I concluded there had been a possible injustice.

My initial review of the evidence was not encouraging. There were needle marks on the victim's arm that were consistent with an injection. Moreover, a subsequent lab test had revealed traces of the metabolite of a drug called succinylcholine—a paralytic agent capable of stopping the heart. Finally, the defendant was having an affair, and he was a medical doctor—indeed the medical examiner of his Florida county—and thus had the motive and knowledge necessary to stop his wife's heart. All the classic components for homicide—motive, opportunity, means and scientific evidence—were present, and they pointed in the direction of guilt. I could easily understand why a jury could convict. In these respects, it was like the Von Bulow and Simpson cases, but in the Von Bulow case, the evidence, upon reexamination, pointed to innocence, and in the Simpson case, a major item of evidence—the bloody sock—had been planted by the police. There seemed to be no such elements of doubt here. At least not yet.

The Sybers case had begun more than a decade before I was called. Kay Sybers had died suddenly in her sleep—or so it appeared—on May 30, 1991. She was 52 years old and in generally good health, though she had suffered from allergies for which she took medication. An autopsy was performed but no cause of death could be determined. One of the investigators did, however, think she saw a needle mark. The original death certificate read: "sudden unexpected death due to undetermined natural causes."

Rumors immediately began to circulate that Dr. Sybers was having an affair with a lab technician, and an investigation was begun. An investigator was dispatched to the Sybers home and the grieving husband was asked to describe his wife's last night. Dr. Sybers told the investigator that at about 4AM his wife awoke with chest pains. She had taken some medication, so Dr. Sybers decided to draw some blood to give to her doctor the next day. He did not succeed in drawing the blood and he threw the syringe into the garbage. The syringe could not be found because the trash had already been collected. This all seemed very suspicious and so the investigation continued. After more than a year-long investigation, the State Attorney reported that he had found "no prosecutable case," and that there was no physical evidence that Dr. Sybers had killed his wife. The case was closed—or so it seemed.

But nearly two years after Kay's death, and a year after the case against Bill was closed, their 27 year old son Tim killed himself on his mother's birthday. Shortly before he shot himself, Tim was

HOUSE_OVERSIGHT_017271

apparently talking on the phone with a friend about his mother's death and the suspicions that his father may have killed her. Tim's suicide resulted in a reopening of the investigation. The case was now on "the front burner." It was also on the front pages of local newspapers.

Investigators began to focus on the drug potassium, which in large enough doses can kill and which is difficult to detect in the dead body. It was a perfect murder weapon, especially for a sophisticated medical examiner with extensive experience in causes of death.

Boning to pressure from the media, the Governor of Florida appointed a lawyer named Harry Shorstein—who was then the State Attorney in Jacksonville—to be a special prosecutor. He had only one job: to prove that Dr. William Sybers had murdered his wife. With the single-minded determination of an inspector Javert, Shorstein set out to get Dr. Sybers.

On February 18, 1997, Shorstein had Sybers indicted for capital murder. The indictment alleged that he had murdered her with an "unknown substance." There was no hard evidence of any such substance, but Shorstein was confident he could find it. It was an example of "indict first—and then search for the evidence."

Shorstein was convinced that Dr. Sybers had injected his wife with potassium and that a thorough analysis of her tissues, preserved from the autopsy, would prove that theory. The problem was Shorstein's theory was based on "junk" science, not real evidence. A "test" that purported to show high concentrations of potassium in the tissues preserved from Kay's autopsy was not scientifically valid. It could not be replicated by other scientists and the methodology had never been peer-approved. Accordingly, one court denied Shorstein's petition for exhumation of Kay's body, and another court ruled that the potassium evidence could not be presented to the jury. The theory that Dr. Sybers had used potassium as the murder weapon was now dead.

Shorstein was left with a capital indictment, but no theory, no evidence and no weapon. So he set out to find a new murder weapon. He turned his attention to the drug "succinylcholine." The paralytic drug itself quickly disappears from the human body, but a scientist assured him that a by-product of the drug—succinylmonocholine; or "SMC," could be detected in tissues even years later by a sophisticated test. That test purportedly found traces of SMC. This time the test results could be replicated by the famous FBI lab, although with slight variations. Shorstein had his smoking gun—his murder weapon. And it had been certified by no less an authority than the Federal Bureau of Investigation.

The same judge who had excluded the potassium theory as "junk science," now concluded, after an extensive hearing, that the succinylcholine theory was based on real science and could be presented to the jury.

Shorstein not only now had science on his side, he also had a sex motive that would surely grab the jury's attention, even if it were to become bored by the highly technical scientific evidence.

The state's scientific case gave rise to the usual clash of experts. The two primary witnesses for the prosecution were Dr. Kevin Ballard, the scientist who had conducted the test, and Dr. Marc LeBeau, the FBI chemist who had replicated the test. The defense introduced experts who

HOUSE_OVERSIGHT_017272

opined that since the body had been embalmed before autopsy, any chemical analysis could be contaminated by the embalming fluid. They also criticized Dr. Ballard for "sloppy" practices in his lab that could add to the contamination.

The jury, after only a few minutes of deliberation, unanimously convicted Dr. Sybers of first degree murder. He could have been condemned to die, but instead he was sentenced to life imprisonment. His only hope of ever experiencing freedom was an appeal, or a new trial motion, which my brother and I were retained to prepare and argue.

My brother Nathan, three and half years my junior, has long been my secret weapon. After graduating from NYU law school, he served as an appeals lawyer in the New York Legal Aid Society where he argued hundreds of criminal appeals. Then he worked in a large law firm and at the American Jewish Congress before starting his own boutique appellate law firm. His firm includes two other excellent appellate lawyers who are his partners, as well as several associates. I work on many of my most difficult cases with the firm—Dershowitz, Eiger and Adelson. Their work proved invaluable in the Sybers case, as it did in many others.

We began by reviewing the scientific evidence, as we had in the Von Bulow and Simpson cases. Although appellate lawyers are supposed to focus only on the trial record, I have never followed that practice. I start over from scratch and revisit all the scientific and other evidence. The result is not only an appellate brief focusing on errors committed at the trial, but a motion for a new trial based on newly discovered evidence, which we almost always find. In this case we discovered massive incompetence and sloppiness on the part of the private lab that had "found" traces of SMC, and serious problems in the FBI lab as well.

We were fortunate that among the three judges assigned to hear our appeal, one had had a degree in chemistry. He understood the principle, articulated by the courts over the years, that "novel scientific evidence" can be admitted at a criminal trial only if it is "sufficiently established to have gained general acceptance" by the scientific community. As he later put it: "a courtroom is not a laboratory, and as such is not the place to conduct scientific experiments," and that "doubts as to admissibility" of such evidence should be resolved "in a manner that reduces the chance of a wrongful conviction."

With these salutary principles in mind, we set out to convince the appellate court that the "science" on which Sybers was convicted was not science at all, but was the result of an unscientific effort by an overzealous prosecutor to discover, or if necessary manufacture, "evidence" that would confirm his vendetta against Dr. Sybers. We were convinced, based on our research, that the "finding" of SMC in Kay's tissues was the result of a classic false positive, based on contamination. We produced our new evidence of massive contamination in Dr. Ballard's lab and of problems in the FBI lab. We presented this new evidence, along with the old evidence from the trial, to the appellate court.

I argued the appeal. It turned into a seminar on the scientific method. I began as the "teacher" but soon became the "student" when I realized that the presiding judge knew at least as much about the science as I did. A few months later, the court published the decision reversing Sybers

HOUSE_OVERSIGHT_017273

conviction, on the ground that the prosecution had failed to prove the scientific validity of its theory.

We later learned that Harry Shorstein—who argued that appeal—had information that should have led him to know or at least suspect that the test results he had presented to the jury were at best highly questionable and at worst flat out false. Yet he never disclosed this information to the court or to the defense. We filed a complaint with the appropriate authorities, since such conduct on the part of the prosecutor raises grave ethical issues. Shorstein then filed a counter-complaint alleging—quite absurdly—that the very act of filing a complaint against him constituted misconduct. Shorstein's tactic is only one of the ways overly aggressive prosecutors discourage lawyers from complaining about their ethical violations.[67] Nothing came of either complaint, but when President Obama was considering appointing Shorstein to become a United States Attorney in Florida, we notified the White House and the Senate Judiciary Committee of Shorstein's ethical lapses and he was passed over for the job.

Dr. Sybers and his wife of __ years now live in ____.

[67] Other tactics that I have experienced include:_____

HOUSE_OVERSIGHT_017274

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The Binion case: murder or drug overdose?

The classic "thriller" case is a "whodunit." The fact of a murder is clear, as it was in the OJ Simpson case. The only question is who committed it. (Remember the "one armed killer" in The Fugitive!)

Many of my homicide cases have not been who-dunits, but rather, was anything criminal done at all. Was the dead (or comatose) body the result of a criminal act, or the result of natural causes, self-induced harm, or accident?

That was the issue in the Von Bulow and Sybers cases. It was also the question presented when Ted Binion, the owner of the famous Binion Casino in Las Vegas—the home of the World Series of Poker—was found dead in his home on September 17, 1998.

Binion's live-in fiancé, Sandra Murphy—a young, sometimes exotic dancer—and her equally young lover, Richard Tabish, were accused of murdering him, by an unusual means harking back to the days of Sherlock Holmes. Dr. Michael Baden, one of the world's leading forensic pathologists (and a friend of mine) had concluded that Binion had been "burked" to death.

The term "burke" derives from two notorious 19th Century Scottish murderers, who killed their victims in order to provide fresh cadavers to doctors and medical students for research. The case was so notorious that it became the subject of a short story, "The Body Snatchers" by Robert Louis Stevenson, and of several films including one by the same name that starred Borris Karloff and Bela Lugosi. Burke and colleague Hare, compressed the chest of their victims, thereby smothering them to death, without leaving any bruises on the body.

Dr. Baden surmised that Sandra Murphy and her lover had done the same thing to Binion, so as to leave no trace of murder. And her diabolical plan—if there was such a plan—worked—at least for a while. Since it was well known that the high-living Ted Binion was a heroin addict, and since there was evidence that his regular drug supplier had delivered a large quantity of black tar heroin just before his body was found, the police concluded that this was just another Las Vegas drug overdose, albeit by one of the city's most famous celebrities. Since no crime (other than those relating to the drugs) was suspected, the home was not declared a "crime scene," but an autopsy the next day noted various marks on the body and the examiner photographed them. It was these marks that led Dr. Baden to conclude that Binion had been murdered—burked to death—and had not died of an overdose. Other medical experts also concluded that Binion had been murdered, but not by "burking." Their theory was that he had been forced to swallow a deadly mixture of heroin, xanax and valium—a cocktail of death.

In addition to the scientific evidence, there was testimony by Binion's estate lawyer that on the day before his death, Binion had said to him: "Take Sandy [Sandra Murphy] out of the will if she doesn't kill me tonight. If I'm dead, you'll know what happened."

The prosecution thus had evidence of motive, means and opportunity and they charged Murphy and her lover with "murder by suffocation and/or poisoning." At trial, they presented what I later characterized as a "multiple choice" prosecution: the jury could choose either suffocation or

HOUSE_OVERSIGHT_017275

poisoning; they did not have to agree on the means used to murder Binion, as long as they all agreed that "his death was caused by a criminal agency," that is by a murderous act attributable to the defendants.

The jury deliberated for 8 days and found the defendants guilty. My brother and I were retained to prepare and argue the appeal and to file a motion for a new trial based on newly discovered evidence.

We began our investigation by focusing on the burking theory. Since the jury could have convicted based on that theory alone, if we could undercut it, Murphy would have to be given a new trial.[68] We would turn the prosecution's "multiple choice" offense into an appellate defense.

One important pillar of the burking theory was a "bruise" on Binion's chest that had been photographed. Since Dr. Baden hadn't examined Binion's body, he had to rely on the photograph alone. He concluded that the bruise—which appeared consistent with the shape and size of Binion's shirt button—had been caused by Binion being burked. We had the photograph enlarged and enhanced by the most sophisticated technology. We then showed it to one of the world's most distinguished dermatologists who examined it, using every more sophisticated technology. His conclusion dealt a powerful blow to the burking theory: the mark on Binion's body was not a bruise he could have gotten from being burked; instead, the structure of the blood vessels in the "bruise" proved that it was a benign skin tumor he had for years before his death.

Additional field research further discredited both the burking and cocktail theories. We were now confident that if Murphy were to receive a new trial, a jury would acquit her. The prosecution's "multiple choice" theory had become a "no choice" near certainty.

Now all we needed was an opportunity to obtain a new trial. Our best chance of securing a second trial was to win the appeal, and the best issue on appeal—the safest and neatest—was the judge's decision to allow Binion's lawyer to testify that Binion had told him the day before his death that if he were found dead, Murphy would be his killer. This was a smoking gun that must have influenced the jury, since it was, in effect, testimony from the grave. The ghost of the dead man, as in Shakespeare's Hamlet, was pointing to his killer.

We did not believe that the conversation had ever occurred. Murphy told us that the lawyer, who hated her, had simply made it up after the fact to assure her conviction. But the jury had believed the lawyer, and we could not challenge his credibility on appeal, since credibility issues—who is telling the truth and who is lying—are for the jury to decide. But we could try to raise doubts about the credibility of the dead man—the man whose words were quoted by the lawyer. How could the jurors assess Binion's credibility, since he was not in court to be cross-examined. His "testimony" from the grave was classic hearsay, and his unavailability denied Murphy the constitutional right to confront her accuser.

[68] The same was true with regard to the "cocktail of death" theory, since no one could know which theory formed the basis for the conviction, or if some jurors found the first, while others found the second. If either theory failed, there would have to be a new trial.

HOUSE_OVERSIGHT_017276

The prosecution responded that the only reason he wasn't in court was because my client had murdered him. Our argument, they claimed, paralleled the classic definition of "Chutzpah": the young man who murders his parents and then demands mercy from the court on the ground that he is an orphan. But the conclusions that Murphy had, in fact, murdered Binion, of course, begged the question to be decided by the jury: did Murphy, in fact, murder him?

Although hearsay statements—that is, in-court testimony by one person as to out-of-court statements made by another person—are generally not admitted at trial, there are numerous exceptions to this rule of exclusion. One of them is the "chutzpah" exception: a defendant can't kill a witness and then seek to exclude testimony about what he would have said if he were alive. This exception has been created by the courts to discourage defendants from murdering witnesses. But to invoke that exception, it has to be clear that the defendant did, in fact, kill the witness. The prosecution could not meet that burden in this case without a full trial in which it relied on the very statement at issue.

Another exception relates to "deathbed" confessions—statements made by a man who knows he's dying and speaks in anticipation of his imminent death. The "science" behind this exception is the empirical assumption that no person will lie if he knows he is about to meet his maker. But this too is junk science, since there is no real evidence to support the assumption. Moreover, there was no evidence (aside from the challenged statement itself) that Binion actually anticipated death or that he was a religious man who feared meeting his maker with a recent lie on his lips.

The final relevant exception is that an otherwise hearsay statement is admissible if it is relevant to the "then existing state of mind" of the dead person. For example, if Binion had told his lawyer that he was feeling depressed and was considering suicide, that statement could be heard by the jurors to help then decide whether his subsequent death was caused by suicide or some other means, such as murder. The prosecution argued that Binion's "fear" of being murdered was evidence of his state of mind. It was also evidence that his death was not caused by suicide. The problem with this argument is that Binion's statement was also evidence of Murphy's allegedly murderous state of mind, and the jurors would not be able to limit its consideration of this explosive statement only to Binion's state of mind. This was especially true since the judge had failed to give the jury what is called "limiting instruction," namely that "you can consider the statement <u>only</u> to prove what <u>Binion</u> was thinking and <u>not</u> what <u>Murphy</u> was thinking."

Because of this serious and prejudicial error (as well as others), the Nevada Supreme Court reversed the murder convictions and ordered a new trial.[69]

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[69] This is what the court ruled:

> "Assuming that the statement was relevant to rebut the defense theories, we conclude that the district court abused its discretion under Shults in admitting the statement without an appropriate limiting instruction. The prejudicial impact was great: the statement strongly implied Murphy killed Binion. Moreover, the relevance of the statement was equivocal,

HOUSE_OVERSIGHT_017277

The jury at the second trial, having heard our new scientific evidence, acquitted Murphy of murder. They believed neither the burking nor the cocktail theory. The more like cause of death, they concluded, was a self-administered overdose of heroin. Murphy now lives in California, where she runs an art gallery.

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even though there was little other evidence of Binion's state of mind before his death. But if the statement was relevant to show Binion's state of mind at the time he made the statement, the exception still does not allow the statement to be used as evidence of the intent or conduct of anyone else-in this case, Murphy. The district court did not give a limiting instruction advising the jury that the statement was only admissible for the limited purpose of showing Binion's state of mind."

HOUSE_OVERSIGHT_017278

Assisting Mercy Suicide

Another highly emotional case in which science was used to establish the immediate cause of death involved the mercy killing by a doctor of his cancer-ridden wife.

Although the media characterized Patricia Rosier's death as a "mercy killing," it is more aptly described as a "mercy suicide," because she alone made the decision to end her life. A mercy suicide, when committed by an adult of sound mind, is not a crime.

Mercy killing—the taking of the life of another person who is suffering and usually no longer sentient—is different from mercy suicide in the eyes of the law. The letter of the law simply does not recognize mercy as a defense to murder: it regards all deliberate killings as murder, whether done in the name of love or hate. But suicide is not a crime, though in some religions, it is regarded as a sin.

The line between mercy suicide and mercy killing is not always clear. Sometimes it is simply a function of timing or happenstance. When what was originally intended as an unassisted mercy suicide cannot be completed without the help of others, it becomes, in the eyes of a prosecutor, a criminal mercy killing.[70]

What began as a clear case of mercy suicide by Patricia Rosier ended up with the trial of her husband, Peter, for first-degree murder, conspiracy to murder, and attempted murder. The prosecutor sought the death penalty, analogizing the crime to "a serialized gang murder."

The basic facts were not in dispute, but the legal consequences of those facts gave rise to one of the most contentious and emotional cases in Florida legal history.

After being told she had incurable cancer and had only weeks to live in excruciating pain, Patricia made the fateful decision to pick the time and circumstances of her death, not wanting to leave it to the unpredictable clock of the cancer. When she told her husband of her decision, Peter said

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[70] There is a third category that combines mercy killings with mercy suicides. In another one of my cases, a mother engaged in the combined act of trying to kill her autistic and sexually abused son and trying to kill herself. She succeeded in the former and failed in the latter. She reasonably believed that the child's biological father was repeatedly abusing the 8 year old autistic boy and that her former husband was planning to kill her, which would leave the child in the hands of his father.

This phenomenon too has a name: altruistic filicide-suicide. At bottom it is a genre of mercy killing, although one with possible legal defenses of necessity (choice of evils) and justification (killing to protect her son). That case is pending as I write these words.

HOUSE_OVERSIGHT_017279

that he would end his life with her. When the children learned of this, they pleaded with their father not to take his life. Peter relented. No one tried to talk Patricia out of her decision to commit suicide, for two reasons: first, she had made up her mind; second, it wasn't really suicide, since her act would only hasten her imminent and painful demise by a few weeks.

Patricia selected the day and time of her death and planned a formal farewell dinner for her family. Among those in attendance, in addition to her husband and children, were her stepfather and her two half brothers.

There was wine and toasts. Patricia wore an elegant dress and had her nails polished. After dinner they watched the movie Harold and Maude, about an elderly woman who commits suicide to prevent herself from "growing old." When it was over, Peter Rosier and his wife retired to the bedroom and made love. After bidding farewell to family members, Patricia Rosier took twenty pills that she had selected for her suicide. She quickly fell into a coma, from which she expected never to wake. Had her suicide succeeded, there would have been no case.

But soon the coma began to lighten. Peter didn't know what to do or what to think. Would she awaken or remain comatose? Would there be brain damage? Pain? Emotional turmoil? All Peter knew was that his wife did not want to awaken. What was his obligation to his comatose wife? Would he be breaking his final promise to her if he did not assist her in achieving her goal: a painless and dignified death? He could not ask her advice. The decision was his to make, but it was her decision—she had already made it and acted on it, albeit incompletely.
Peter administered morphine, but it was not enough. While Peter was outside the house, pacing and crying, Patricia's stepfather decided to end her life by suffocating her. He placed his hands over her nose and mouth. She died in her sleep.

The stepfather and brothers simply informed Peter that Patricia had died, without providing any further details. For nearly a year, the circumstances surrounding Patricia's death remained a family secret. Then Peter decided to do something foolhardy: he wrote a book about his late wife's courage and gave an interview to a local television reporter in which he related what he believed were the circumstances of his wife's death, still unaware that her stepfather had administered the coup de grace.
As soon as the interview was aired, the local prosecutor began a murder investigation. They wanted to interview Patricia's stepfather, but he demanded total immunity from prosecution for himself and his sons as a condition of being interviewed. That should have tipped off the authorities that he might have something to hide. But instead of asking for a "proffer"—a truthful outline of the facts—before deciding whether to grant immunity, the prosecutor simple agreed to his condition.

The stepfather then disclosed for the first time that it was he who had caused Patricia's death. The prosecutors had committed a blunder feared by every law-enforcement official: they gave the wrong person immunity. But they could not back out of their deal. Now the only possible target was Peter Rosier.

Despite the certainty that Peter had not actually killed his wife, and that she wanted to take her own life, the prosecutor treated the loving husband as if he were indeed the triggerman in a

HOUSE_OVERSIGHT_017280

serialized gang murder. Peter Rosier was indicted on charges of first-degree murder and conspiracy to murder. The prosecution's theory was that the stepfather's ultimate act was merely the final stage in a family conspiracy of which Peter was the architect and participant.

Suddenly Peter Rosier found himself in jail, facing a possible death sentence in a state that has one of the highest execution rates in the country. Right wing commentators, such as Patrick Buchanan, compared what Peter did to what the Nazis had done under Hitler.[71] Rosier called me from prison on the day of his arrest and asked me to help him. I worked with his local lawyer to get him out on bail and to formulate a trial strategy. In the event of his conviction, I was to be his appellate lawyer.

First we had to establish through scientific evidence that suffocation, rather than morphine, was the immediate cause of death, since Rosier did not suffocate Patricia. (Cancer was, of course, the "but for" cause of death.) Second, we had to make the jurors wonder what they would have done under such excruciating circumstances and to conclude that the criminal law should not sit in judgment over loving family members who had to make a tragic choice between keeping a promise to a comatose loved one or abandoning her in a moment of crisis.

Peter's trial lawyer, Stanley Rosenblatt of Miami, did an excellent job persuading the jury that the murder statutes were put on the books not for loving husbands like Peter Rosier but for brutal killers like Charles Manson and Ted Bundy. He tried the case with emotion and empathy, inviting the jurors to put themselves in the unenviable situation Peter faced on that terrible night. The prosecutor, on the defensive for having given Patricia's stepfather immunity before he knew the facts, played the avenging angel. He demanded that the jurors simply apply the law to the facts and not distinguish among murders on the basis of motive.

The jury understood—even if the prosecutors and Pat Buchanan did not—the differences between love and hate, between a self-willed voluntary death and a death involuntarily imposed by others. After weeks of trial, it took the jury only a few hours to acquit Peter Rosier of all criminal liability. The prosecution had lost all credibility by asking the jury to treat Dr. Rosier as if he were the functional equivalent of a gangland killer. Had the prosecution charged Dr. Rosier with assisting the suicide of another—which is a crime under Florida law—it might have had a better shot at a conviction. But by *overcharging* him with first-degree murder, it made it difficult for the jury to take its case as anything but a vendetta.

One important role the jury plays in our system of justice is to serve as the moral conscience of the community and as the common sense moderator of harsh general statutes. This Florida jury, which included several older people who themselves had living wills, decided that what Peter Rosier did, was not murder, even if the strict letter of the law did not authorize him to help his wife choose the time and manner of her imminent death.

[71] A strange analogy for Buchanan who has expressed admiration for Hitler and doubt that the Nazis gassed Jews during the Holocaust.

HOUSE_OVERSIGHT_017281

The Suppression of Science: The Case of Jeffrey MacDonald

A case in which science has not yet produced a victory—or, in my view, justice—is the 40 year old "whodunit" involving the murder of the family of Jeffrey MacDonald. Science could perhaps provide a definitive answer to this highly publicized case, but so far the doors of the courtroom have been shut to newly discovered scientific and other evidence that was suppressed by the prosecution. The courts in this case have placed the alleged need for "finality" above the search for truth. But history and science knows no finality. Nor should finality trump the desire for closure in a court of law, as long as a possibly innocent defendant remains convicted of a crime that science can prove he may not have committed.

I had followed the Jeffrey MacDonald case in the media from its grisly inception on February 17, 1970, when the wounded Green Beret doctor told authorities that his pregnant wife, Colette, and his daughters, Kimberly, five, and Kristen, two, had been murdered by drug-crazed intruders. Like most Americans, I had my doubts about his story. It seemed so conveniently modeled on the notorious Manson murders that had occurred just __ years earlier. I knew that the statistics showed that wives are more likely to be killed by husbands than by strangers. I wondered why there was no hard evidence—no fibers, hairs, or fingerprints—left by the alleged intruders. My doubts were confirmed by reading Joe McGinniss's best-seller Fatal Vision, which concluded that MacDonald was indeed guilty, or by seeing the TV movie, which was even more persuasive of his guilt.

Several times during the course of the lengthy legal proceedings, Jeffrey MacDonald had written and called me, pleading with me to help him. Each time I declined. But then, in 19__, I went to Terminal Island Federal Prison in California to visit another inmate, and as I left the room in which lawyers confer with prisoners, a graying man quietly introduced himself. He was Jeffrey MacDonald, and he asked if he could have five minutes of my time to show me some documents. I agreed. What I learned that day—and afterward—convinced me that I had to try to help him.

In one of the most dramatic scenes in the TV movie Fatal Vision, investigators dig up the graves of Colette, Kimberly, and Kristen MacDonald. The government's chief lawyer (played by Andy Griffith) explains to the grieving Freddie Kassab (played by Karl Maiden) why the bodies of his stepdaughter and grandchildren must be exhumed:

> We've got to know if the hair found in Colette's hand was her own, Jeff's, the kids' . . .
>
> [Freddie Kassab interjects] . . . or someone with a floppy hat.

In the actual trial conducted in 1979, the prosecution's case against Jeffrey MacDonald relied heavily on this evidence: blonde hair found in the murdered Colette MacDonald's hand. It had already been found not to match Jeffrey MacDonald's hair. Thus, if it <u>did not match</u> Colette's own hair or the hair of the children, that finding would lend support to MacDonald's claim that there had been intruders - - including a woman with long, blonde hair who was wearing a floppy hat and boots - - in his home on the night of the attack. It would also indicate that at least one of these intruders had come in contact with Colette.

HOUSE_OVERSIGHT_017282

By the time the victims' bodies were exhumed, a woman named Helena Stoeckley had told police and others that she and three friends had been in the MacDonald house on the night of the murders and that her friends had committed the crimes. Though Stoeckley's word alone may not have been worth very much—she was known to be a drug addict—she provided some details, which tended to corroborate her story and the story Jeffrey MacDonald had told the police.

For example, she described a broken rocking horse like one found in Kristen's bedroom. At the time of the crime, she had owned a floppy hat, black clothing, boots, and a long blonde wig, all of which corresponded with MacDonald's description. And a woman fitting that description had been seen by a military policeman near the MacDonald home shortly after the crime.

But the single hair in Colette's hand turned out to have come from her own head. The government investigators reported that they had found no other physical evidence—no hairs, no fibers, no skin, no blood—that could not be traced to the inhabitants of the MacDonald house.

The prosecution could therefore argue to the jury that Jeffrey MacDonald was lying - - because if there had been intruders, they surely would have left some evidence behind: The absence of such evidence was evidence of the absence of intruders.

Moreover, at the trial Helena Stoeckley claimed to have amnesia as to her whereabouts on the night of the murders. The defense was surprised by Stoeckley's sudden inability to remember what she had previously described in such detail, but they could not effectively challenge her claim of amnesia, because they had no basis for suggesting that she had been pressured to forget what she actually remembered having done—namely participating in the murder of the MacDonald family.

Now, however, in a shocking turn of events, Jeffrey MacDonald's legal team has discovered that, before the trial, the government had in its possession handwritten lab notes indicating that investigators had discovered long, blonde wig hairs at the scene of the crime that did not match anything in the MacDonald household. This evidence was already in the government's secret files before the graves of the victims were disturbed.

Nor was this all the prosecution had in its secret files. The handwritten lab notes confirmed the presence of black wool fibers on the murder weapon used against Colette, and around her mouth. These fibers did not match any clothing belonging to Jeffrey MacDonald or to anyone else in the MacDonald household. (Helena Stoeckley, however, had said she often wore black clothing.)

In addition, in the bedclothes of each victim—Colette, Kimberly, and Kristen—the government experts found other unmatched human hairs, which did not belong to any of the victims, or to Jeffrey MacDonald. But these hairs were never tested against Stoeckley or any members of her group.

These lab notes were powerful evidence that an intruder wearing a long, blonde wig and black wool clothing was at the murder scene on the night of February 17, 1970. But Jeffrey MacDonald's lawyers were not aware of the notes' contents. Had they been, the entire trial would undoubtedly have unfolded differently.

HOUSE_OVERSIGHT_017283

For example, Helena Stoeckley testified to the jury that she could not remember where she had been on the night of the murders. MacDonald's attorneys tried to introduce the testimony of six witnesses - - including a police officer - - to whom she had previously admitted that she was in the MacDonald house with her friends that night. Since testimony about Stoeckley's prior ad-missions would technically constitute "hearsay" - - that is, testimony by one witness about what another witness had said outside the courtroom - - the judge ruled that the jury could hear about Stoeckley's hearsay admissions only if [corroborating evidence showed] that they [were] 'trustworthy.' "

The judge—who was also unaware of the handwritten lab notes—ruled that there was no "physical evidence" that corroborated Stoeckley's admissions; therefore, her admissions were not trustworthy. Had he been aware of this corroborating evidence, he would have been obligated to allow the hearsay admissions into evidence.

Thus, the jury never learned that there was hard, scientific evidence of intruders in the house-or that a woman matching MacDonald's description of one of the intruders had actually admitted to six different people that she and her friends, not Jeffrey MacDonald, were the killers. Moreover, in 2005, the former Deputy Marshall, Jim Britt, who was in charge of escorting Helena Stoeckley to the courtroom came forward and told MacDonald's lawyer the following:

> Jim Britt avers that he personally witnessed Helena Stoeckley state to James Blackburn [the prosecutor] that she and others were present in the MacDonald home on the night of the MacDonald murders and that they had gone there to acquire drugs; Jim Britt further avers that he witnessed and heard James Blackburn, upon hearing this, directly threaten Helena Stoeckley, telling her that if she so testified in court he would indict her for first degree murder. This threat caused her to change her testimony, as the next day, when called to the witness stand by the defense, Stoeckley claimed to have amnesia as to her whereabouts from midnight until 5 a.m. the night of the MacDonald murders -- the precise time-frame during which the crimes occurred. James Blackburn never disclosed to the court or defense counsel what Helena Stoeckley admitted to him in Jim Britt's presence. On the contrary, Blackburn, at a critical juncture in the trial, advised the court that Stoeckley, when he interviewed her, denied having any knowledge of the MacDonald family, the MacDonald home, or involvement in the MacDonald murders. Blackburn even went so far as to elicit from Stoeckley, through leading questions before the jury, testimony that was contrary to what she had told him during his interview of her the day before in the presence of Jim Britt.

Finally new DNA and forensic testing has revealed three specimens that did not match any of the people in the house, as well as unidentified hairs under the fingernails of the victims. This new and suppressed evidence corroborates Stoeckley's original account that she remembers being in the house and participating in the murders. Had the trial judge known about this corroboration, he would surely have allowed Stoeckley's earlier statements to be heard by the jury.

HOUSE_OVERSIGHT_017284

These dramatic revelations finally came to light because of Dr. Jeffrey MacDonald's search for evidence of his own innocence, which he has protested since the beginning of his case. Over many years, he and his lawyers filed requests under the Freedom of Information Act, seeking access to the government documents on the case—the documents that contained the facts that were not revealed during the trial. Slowly, they pieced together the amazing scientific and evidentiary story that the jury never heard.

It is a story that raises the following disturbing questions;

Why would the government suppress such critical evidence? It is impossible to know the mind-set of the chief government lawyer in the case: Brian Murtagh, whose responsibility it was to see that the defense received any evidence in the government's file, which could help the defense. We do, however, know that he was aware of the contents of the lab notes. Since he wrote a memo to a legal assistant asking him whether "the detailed data of a lab report; as distinguished from the conclusions of the report, (must) be disclosed (to the defense)." This question is significant, because the "detailed data" refers to the blonde wig hair, the black wool, and the human hairs, which were described in the handwritten lab notes but somehow not mentioned in the lab's final typed report.

Murtagh has refused comment, except for a cryptic statement that "if there were fibers useful to the defense, MacDonald's original trial lawyers should have found them" among the crates of raw evidence to which they had access. Talk about needles in haystacks!

How much more exculpatory evidence may be hidden in some government file—or may have been destroyed or lost—we will probably never know. For example, a fragment of human skin was found under one of Colette MacDonald's fingernails. Yet, unbelievable as it sounds, the government claims that it lost this singularly important item of evidence. Prosecutors in several other cases in which I've been involved have mysteriously "lost" evidence that could prove innocence. If that skin fragment were now available, it could prove conclusively—through DNA matching—whether or not Jeffrey MacDonald was the killer. Even without DNA testing (which was not available at the time of the original investigation) it could have cleared MacDonald.

Will the new evidence finally get Jeffrey MacDonald the new trial he has been seeking since he was convicted in 1979? If the government suppressed the lab notes and other evidence--and if this evidence was material to the issue of MacDonald's guilt or innocence—a new trial should certainly be granted.

But several problems remain: First, most Americans who have read the book or seen the TV movie of Fatal Vision already "know" that Jeffrey MacDonald is guilty. They know it because the Jeffrey MacDonald portrayed in those one-sided presentations was guilty. On TV, the actor, Gary Cole, *played* him guilty. The evidence shown to the audience—like the evidence presented to the real-life jury—did not include the physical evidence that corroborates the Stoeckley confessions. Nor did it include the evidence that the prosecutor pressured Stoeckly to lie about her memory.

HOUSE_OVERSIGHT_017285

The second problem is that current law makes it nearly impossible to reopen a closed case on a second or third writ of habeus corpus. The "great writ" has been severely restricted by Congress, and even compelling evidence of innocence does not guarantee a new trial. In fact, when I argued an appeal from the denial of a second petition for habeus corpus—my only courtroom involvement to date in this long case—one of the judges warned me not to bring any further petitions. I told him I would be obliged to bring a further petition, if the evidence warranted it.

Such new evidence has now been found, and the Court of Appeals recently ordered the district court to consider all the new "evidence as a whole." So the case is far from over. I continue to confer on the case with Harvey Silverglate, who was MacDonald's classmate at Princeton and who was my co-counsel in the earlier Habeus Corpus appeal.

Whatever happens, I believe that Jeffrey MacDonald has not yet received a fair trial. I believe he deserves one - - and the American people deserve to know the full story, not the abbreviated one presented at the trial or the biased on presented in the book and TV movie. [update]

HOUSE_OVERSIGHT_017286

The science of eliciting false confessions: the case of Jonathan Doody

Another murder case that never seems to end involves a man named Jonathan Doody, the son of a Thai mother and an American soldier, who was accused of the mass murder of nine Buddhist Monks and nuns in Arizona back in 1991. They were placed on the floor in a circle and systematically shot in the head, apparently by a group of armed robbers. Originally, a motorcycle gang was suspected of the crime. After a lengthy interrogation, four of them confessed, but it soon became clear to the police that they had been pressured into making false confessions and they were freed.

Doody, who was 1_ at the time, was then arrested and subjected to a similarly pressured 12 hour interrogation. The police began by giving him his Miranda warnings: you have the right to counsel; you have the right to remain silent; and anything you say can and will be used against you in the court. They then proceeded, gradually, to "demirandize" him, by taking back everything they had originally said! You have a right to an attorney "if you were involved in [the murders]"; anything you "tell us" is "gonna stay right here" and not be used "in court;" and "you just have to open up"—that is confess—and we will keep you here until you do. Finally, the exhausted __ year old confessed to being involved with the motorcycle gang—which the police knew was untrue—and to participating in the killings. Based largely on this questionable confession, he was convicted and sentenced to life imprisonment.

When I first became involved in the case, I decided to do my own investigation. The murder scene was near a United States Airbase and I learned that Russia was selling some of the Soviet Union's old satellite photographs of the United States. I bought the photographs for the day and location of the murder in the hope that perhaps they might show evidence that people other than Doody were responsible for the crime. Unfortunately, the sky was overcast that day and the photographs were useless. We would have to limit ourselves to making arguments based on the record of the trial, with an emphasis on how the police had elicited the confession from Doody. I did extensive research on the "science"—or "art"—of eliciting confessions from reluctant suspects. I learned how the interrogators place objects from the crime scene in view of the suspect, how they suggest answers, how they create an atmosphere of intimidation and omniscience, and how they contrive to turn the Miranda warnings to their own advantage.

I argued the initial appeal, along my brother Nathan's office in 19__. The Arizona Supreme Court affirmed the conviction. My brother's partner, Victoria Eiger, then took prime responsibility for preparing a federal writ of habeus corpus. My brother and I worked closely with her. The matter simply sat before the federal judge for ___ years, before she rendered a ___ page decision denying relief. We then appealed the denial to a panel of the United States Court of Appeals for the 9th Circuit, which reversed Doody's conviction in a 2-1 decision that ruled his confession involuntary and ordered him to be freed, unless the state granted him a new trial. The state then appealed the reversal to the entire 9th Circuit, which set the case down for argument before 11 judges. They also ruled in Doody's favor by a vote of 9-3. Still the case was not over. The state sought a writ of certiorari from the Supreme Court which remanded the case back to the 9th Circuit for reconsideration in light of a recent Supreme Court decision. The 9th Circuit reconsidered and once again threw out Doody's conviction on the ground that the confession was

HOUSE_OVERSIGHT_017287

involuntary. Again the state sought review by the Supreme Court. This time their petition was denied, and Doody's conviction was finally and definitively reversed.

The state of Arizona is now planning to retry him without using his false confession. Bail has been set at $5million, which his, of course, impossible for the Doody family, which has no money, to raise.

If justice delayed is justice denied, then Jonathan Doody has surely been denied justice. The thorough decisions of the United States Court of Appeals have all been in his favor, but he remains in jail for a crime of which he is now presumed innocent and which he may not have committed.

HOUSE_OVERSIGHT_017288

4.2.12
WC: 191694

Make believe murder: the case of the falling helicopter

Another case that we won on the basis of science grew out of the making a major motion picture directed by Steven Spielberg and John Landis. The film was *The Twilight Zone*, based on the television series by that name. There were three segments to the film, each directed by a different person. John Landis, already famous for directing *Animal House*, _____ and other mega-hits, was directing a segment involving the Vietnam War. The star of that segment was the veteran actor Vic Morrow. The scene at issue called for Morrow's character to be running through a rice patty, in pitch darkness, carrying two children as helicopters fired at them.

Landis wanted to make the scene as realistic as possible, so he filmed it at night, with extensive pyrotechnics and a real helicopter flying low to the ground. Tragically, the helicopter crashed into Morrow and the children, killing them instantly. Landis was charged with involuntary manslaughter, and he retained me to consult with his trial lawyer and to prepare an appeal, if necessary. He was the first film director in history to be criminally charged with causing the death of an actor.

The major issue at the trial was whether the accident should have been foreseeable. If it was foreseeable to a reasonably prudent director that a helicopter, placed in the circumstances in which this one had been placed, might crash, then the directorial decision to have the helicopter fly close to the pyrotechnics could satisfy the legal criteria for involuntary manslaughter. But if the crash could not reasonably have been anticipated, then it would have to be regarded as an accident, giving rise, perhaps, to civil liability, but not to a criminal charge carrying the prospect of imprisonment.

The prosecutor called 71 witnesses, many of whom offered scientific testimony about the cause of the crash and why it should have been anticipated. The defense summoned scientific witnesses who testified that an accident of this kind—the heat from pyrotechnics causing the tail rotor of the helicopter to become delaminated—had never before occurred and could not therefore have been anticipated. In fact, when the helicopter crashed it came very close to killing Landis.

The jury deliberated for nine days before finding Landis (and his co-defendants) not guilty.

Several years later, it appeared as if another director might be in trouble for the death of an actor while filming a motion picture called "The Crow". The actor was Brandon Lee, the son of Bruce Lee, the famous Kung Fu actor, who himself died while filming "The Game of Death." Brandon Lee was killed by a metal projectile that was accidentally shot from a gun firing blanks during the filming.

A criminal investigation was opened and I was asked to consult with the lawyers for the production team. Eventually, the lawyers persuaded the authorities not to indict anyone for the tragic accident.

The end result in both the Landis and Lee cases was that greater care is now being exercised during filming of sequences that pose significant risks to participants. Sometimes it takes tragedies to improve safety.

HOUSE_OVERSIGHT_017289

4.2.12
WC: 191694

Attempted Murders: Killing a Corpse and the "Abraham Defense"

A case that involved both science and logic arose in the context of the attempted murder prosecution of a young man who had shot a corpse, believing that it was still alive. The case presented a series of perplexing scientific and logical riddles: When is a person who has been mortally wounded actually dead? Can you kill a man who is already dead? If not, can you attempt to kill a man who is already dead if you believe he is still alive.

My client had watched one acquaintance, who was having a disagreement with another acquaintance, shoot him in the heart. The shooter then asked my client to shoot the victim in the head, which he did. On the first appeal, which I argued in Brooklyn, the court reversed the murder conviction on the basis of scientific evidence that it was impossible to know whether the victim was alive or dead at the moment my client shot him in the head, since someone else had shot him in the heart just moments earlier. It ruled that the prosecution had not satisfied its burden of proving he was still alive when my client's bullet shattered his brain. The court also ruled that my client could not be convicted of attempted murder, on the ground that since it is factually impossible to murder a corpse; it is also legally impossible to attempt to do that which it is factually impossible to do. On the second appeal, which I argued in Albany, the court agreed that my client could not be convicted of murder because "man dies but once," but it concluded that he should be convicted of attempted murder. I then brought a federal Habeus Corpus petition, and the federal court threw out the attempted murder conviction as well. My client went free. This intriguing case, which I wrote about in more detail *The Best Defense,* is taught today in many law schools as part of the standard course on criminal law. The issue of whether it is legally possible to attempt to do what is factually impossible—namely to kill a dead person—continues to confound new generations of law students.

Another attempted murder case presented a problem right out of the Bible. My client was accused of attempting to kill his sister's former boyfriend. The boyfriend was suspected of burning down the sister's house and burning her severely. She ultimately died of her painful burns, but while she was still alive, my client went to her former boyfriend's home, held a knife over his chest and said he would kill him unless he admitted his role in the fire. The police burst into the apartment and disarmed my client before he could stab the former boyfriend. My client was convicted of attempting to kill the former boyfriend, and I was retained to argue the appeal.

I analogized the situation to the one described in the Book of Genesis when God told Abraham to sacrifice Isaac, and Abraham stood, knife in hand, ready to inflict the fatal wound when God's angel came down and stopped him. I argued that we can never really know whether my client would actually have killed the boyfriend had the police not intervened, just as we can never know for sure whether Abraham would actually have complied with God's command. There were other issues in the case as well and we won the appeal. The state declined to re-prosecute and this client too went free.

HOUSE_OVERSIGHT_017290

Anatoly Sharansky: Death For Spying For the United States

Other potential death cases raised issues not of science, but of politics, diplomacy and economics. The case that combined these elements also involved the client with whom I most closely identified personally. He was a Soviet Jew who I never even met during the years I was fighting to save his life. His name (at the time) was Anatoly Sharansky (now Natan Sharansky).

Sharansky was a prominent and vocal defender of human rights, not only of his fellow Soviet Jews but of all victims of Soviet oppression. He worked closely with Andrei Saklarov, the father of the Soviet nuclear weapons program who had become the leading voice for human rights in the Soviet Union.

Sharansky was arrested by the Soviet KGB in 2003 [check] on charges of spying for the United States—a charge that carried the death penalty. I had previously represented two Jewish Refusenicks who had tried to steal a small airplane in which to escape to Israel, via Sweden. They had been sentenced to death, so I knew that the threat of capital punishment against Sharansky was real. Their death sentences against were later reversed and they were eventually allowed to emigrate to Israel. But there was no assurance that similar efforts would help Sharansky, who faced the more serious charge of spying for an enemy.

I had been asked, along with Canadian law professor Irwin Cotler, to represent Sharanksy. The request came from his wife, who was in Israel, and his mother, who lived in Moscow. They had no money to pay for a lawyer. We agreed to do what we could to save his life and, hopefully, secure his freedom.

Our first job was to try to get the espionage charge dropped, since that was the one that carried the death sentence. Because Sharanksy was accused of spying for the United States, I decided to go directly to the White House to try to persuade President Carter to issue a statement expressly denying the Soviet charge that Sharansky had been a CIA operative. We faced great pressure from the CIA to continue the longstanding American policy of never affirming or denying anyone's alleged association with the agency. But after several requests, President Carter did issue the following statement:

> I have inquired deeply within the State Department and within the CIA, as to whether or not Mr. Sharanksy has ever had any known relationship in a subversive way, or otherwise, with the CIA. The answer is "no." We have double-checked this, and I have been hesitant to make that public announcement, but now I am completely convinced.

Shortly after President Carter made his unprecedented statement, the Soviet prosecutors dropped the espionage charge and took the death penalty off the table. But they were still determined to see Sharansky die in prison. The Soviets called it "special regime" imprisonment, consisting of a diet that no one could long survive. The prisoners called it "death on the installment plan."

Sharansky's wife pleaded with me to get him out of prison before he starved to death and before she was too old to have children. We had saved him from execution; now we had to save him from starvation. We had our work cut out for us.

HOUSE_OVERSIGHT_017291

We decided that the best way to keep him alive was to personalize him to the world. If the world got to know Anatoly as a human being, rather than merely as another prisoner of conscience, it would become more costly, in terms of international reactions, to the Soviet Union if he were to die in the Gulag. With this in mind, we set out to plaster his smiling face on every possible magazine cover, newspaper front page and television show. We enlisted his very beautiful, very photogenic, but very shy wife (Natasha, now Avital) in our campaign. Before long, his name became a household word and his image became familiar around the world. His wife's pleas to release him in time to father their children fell on receptive ears—at least outside of the Soviet Union.

At the same time, we filed legal briefs, lobbied for legislative action and convened academic conferences.

Ultimately, after 9 years of unremitting efforts, we were able to arrange a prisoner exchange that resulted in the release of an East German spy, who I had been asked to represent in Boston, and Sharansky. Because Sharansky was not a spy, but a human rights activist, he refused to participate in a "spy swap." The compromise we reached resulted in Sharanksy walking alone, and not as part of any exchange, across the Glienicke Bridge in Berlin, his book of Psalms in his hand.

Sharanksy did get out in time to father two beautiful daughters, who I enjoy meeting every time I visit Natan and his wife in their home in Jerusalem. There, but for Grace of God and the luck of having grandparents and great grandparents with the foresight to leave Eastern Europe, go I. If Sharanksy's grandparents had come to America and mine had remained in Europe, our roles could easily have been reversed. That's why helping to save Sharansky's life was the case with which I had the closest personal identification. It was also the case that required the widest array of weapons—law, politics, diplomacy, media, economics, persistence and luck—to win.

Several years later, I was asked by a television talk show host, "In which case did you earn your biggest fee?" Without a moment's hesitation, I replied, "Sharanksy." The host was surprised. "I didn't know Sharansky had any money," he exclaimed. "He didn't," I replied. "I worked on his case without any fee or expenses for 9 years, but when I saw him walk across the Glienicke Bridge, my eyes filled with tears of joy, and when he whispered in my ear the Hebrew words "Baruch matir assumrim" ("Blessed are those who free the imprisoned"), that was the biggest fee I will ever earn."

HOUSE_OVERSIGHT_017292

4.2.12
WC: 191694

My most ungrateful homicide client: Angela Davis

Clients whose cases I have helped to win generally respond in one of two ways: some express great, sometimes excessive, gratitude. They offer to do anything in exchange for you having saved their lives. Others behave as if the case had never happened and you don't exist. I have seen former clients purposely cross the street to avoid even "seeing" me. They don't want to be reminded of the dark period in their lives during which they required a criminal lawyer. In only one case did a former client show absolute ungratefulness for my role in helping her avoid a murder conviction.

During the year that I was a visiting scholar at the Center For Advanced Studies and Behavioral Science at Stanford, I was asked to consult on several aspects of the Angela Davis murder case. Davis, who was one of the leaders of the American Communist Party, was accused of murder in connection with a shootout that had occurred at the Marran County Courthouse as part of an attempted escape of radical prisoners. Davis was accused of purchasing and providing the shotgun that was used in the crime. She was also suspected of having engineered the attempt to take hostages is order to barter them for the release of a prisoner she loved.

I worked on jury selection as well as on some constitutional issues. Davis was claiming that she could not get a fair trial in any American court because she was black, female and a Communist. Part of the reason I took the case was to help assure that she did get a fair trial. After several grueling months, she was acquitted and set free. I don't know whether she now believes she received a fair trial. I do know that shortly thereafter I read that she was hired to become a professor at the University of California in Santa Cruz.

Shortly thereafter, I read that she was going to Moscow to receive the Lenin human rights prize from the Soviet Union. She said that she was pleased to receive the prize and that she would spend the rest of her life helping to free political prisoners around the world. I called her office and gave them a list of prisoners of conscience in the Soviet Union—mostly Jews who had been imprisoned because they wanted to emigrate to Israel or to learn about their heritage. (Sharansky was not yet among these prisoners, but he would soon join them.) I asked if she would be willing to speak up on behalf of these political prisoners. Several days later, I received a call back from Ms. Davis's secretary informing me that Davis had looked into the people on my list and none of them were political prisoners. "They are all Zionist fascists opponents of socialism." Davis refused to speak up on behalf of the Soviet dissidents.

Recently, I ran into an older and somewhat more reserved Angela Davis on the porch of the Chilmark Store on Martha's Vineyard. She was wearing a bicycle outfit and was cycling around the island with some mutual friends, including her trial lawyer in the murder case. It was a strange scene in this bastion of bourgeois affluence to see these former radicals enjoying the comforts of capitalism in so relaxed a way. I reminded Davis of my participation in her case and she expressed appreciation. I also reminded her of her refusal to speak up on behalf of Soviet dissidents. In her mellow response, she said, "well so many other people were speaking up for them, that I didn't think it was necessary for me to add my voice." It's interesting how time changes people's memories. I did not press her as to whether she would today speak up on behalf

HOUSE_OVERSIGHT_017293

of Cuban dissidents, Chinese dissidents or other heroic people who stand up against what remains of Communist oppression.

Angela Davis remains the best proof that in America, as distinguished from the countries she so admires, it is possible for a Black, Communist woman to receive a fair trial. The key, of course, is for the trial to have the kind of high visibility and media attention hers received. There are still far too many obscure defendants, of all races, who do not receive fair trials or fair sentences. The struggle to achieve universal fairness and equal treatment is an ongoing one.

HOUSE_OVERSIGHT_017294

Hare Krishna Murder

The most bizarre murder case I ever litigated involved a Hare Krishna leader in West Virginia, who was charged with a wide assortment of crimes, ranging from murder—to copyright infringement!

My clients real name was Keith Gordon Ham, but he called himself Kirtanananda Swami, or just Swami, when he founded a Hare Krishna community in West Virginia, which he called New Vrindaban. He became the absolute ruler of this cultish community, whose members testified that he exercised total control over all aspects of community life. Vrindaban became a magnet for people who wanted to lose their identity beneath the saffron robes and changed names, including several members with criminal records and violent backgrounds. The community expanded to 3,000 acres with 500 "devotees" and profits from solicitations that reached $10-12 million. Much of this money was allegedly obtained by selling counterfeit copywrited images of sports teams and popular cartoon characters. Hence the copyright charge.

The events that precipitated the murder prosecution were described by the court as follows:

> The…incident involved the murder of devotee and community member Charles St. Denis on June 10, 1983. When community member Daniel Reid learned that St. Denis had raped Reid's wife, Reid decided to kill St. Denis. Before attempting to murder St. Denis, Reid consulted Swami. Swami instructed Reid that the killing was acceptable under Krishna scriptures, but that such action violated secular laws and that Reid might be caught and punished. Swami then directed Reid to talk to Thomas A. Drescher, a fellow devotee. When Reid approached Drescher and told him what Swami had said, Drescher testified he felt duty bound to help Reid kill St. Denis. The two then enticed St. Denis to Reid's house one night, shot and stabbed him several times, and then buried him in a pre-dug grave before he was dead.
>
> [Another] incident likewise involved the murder of a devotee. In 1985, Steven Bryant, a former New Vrindaban devotee, began publishing statements accusing Swami of engaging in homosexual activity and permitting sexual molestation of children in the community. Around April of 1986, members of the Krishna community in Los Angeles notified Drescher that Bryant was in Los Angeles. Drescher received $2,500 from the New Vrindaban community, authorized by Swami, and flew to Los Angeles. He located Bryant and shot him twice in the head.

Swami and several of his lieutenants were convicted and sentenced to long terms of imprisonment. I was asked to appeal Swami's conviction. I read the transcript of the trial and found it to be filled with prejudicial evidence that was irrelevant to whether Swami was responsible for the crimes of his followers. I took this case not because I approved of anything about Swami, but because I believe that if the most reviled defendants are not afforded a fair trial, there is grave risk to all defendants. Greta Van Susteren, then a lawyer now a TV commentator, was retained by one of the lutenants.

HOUSE_OVERSIGHT_017295

I argued that the prosecutors had deliberately "thrown a skunk into the jury box" when they introduced irrelevant evidence that Swami had engaged in a homosexual relationship with a follower. To a West Virginia jury back then, this could be massively prejudicial.

In addition, the prosecution introduced evidence that teachers at the community school had molested children and that Swami was aware of this but did nothing. Finally, they introduced:

> "a videotape segment from the television program *West 57th Street* (a "news" exposé program). The videotape showed a child of the New Vrindaban community stating that he prayed "to" Swami, a statement generally offensive to the religious sensitivities of typical jurors. More inflammatory was a statement by Swami comparing women to dogs and condoning lightly slapping one's wife for disciplinary reasons."

I argued the appeal before a panel of the U.S. Court of Appeals for the Fourth Circuit consisting of three elderly conservative judges in Charleston, South Carolina. I could not imagine a group that would be less sympathetic to a Hare Krishna guru accused of the horrendous crimes of which my client stood convicted. But my wife's older cousin, Morris Rosen, an experienced lawyer from Charleston, cautioned me not to give up. "These old-line Southerners care about justice, and they don't have ambitions beyond their current job. They'll give your client a fair shake as long as you don't overstate your case. Be straight with them and they'll be straight with you."

My cousin, who was himself "a good ol' boy," was absolutely on target. I argued in a low key manner, focusing on precedents from the court, and especially from the three judges. In their decision, they followed the law, concluding as follows:

> "We accept without need of extensive argument that implications of child molestation, homosexuality, and abuse of women unfairly prejudice a defendant. Indeed, no evidence could be more inflammatory or more prejudicial than allegations of child molestation. When evidence of a defendant's involvement in several of these activities is presented to the jury, the risk of unfair prejudice is compounded. In such a case, we fear that jurors will convict a defendant based on the jurors' disdain or their belief that the defendant's prior bad acts make guilt more likely. Furthermore, we are especially sensitive to prejudice in a trial where defendants are members of an unpopular religion."

The court in a 2-1 decision reversed the convictions. The rule of law prevailed over the prejudices of men and women.

HOUSE_OVERSIGHT_017296

4.2.12
WC: 191694

The Case I still can't talk about: Chappaquiddick

There is one homicide case that I still can't say very much about, even though all the principles are dead and the case is more than 40 years old. I was one of the lawyers involved in the Chappaquiddick case—the investigation of Senator Edward Kennedy for driving his car off a bridge on the Island (or peninsula of) Chappaquiddick, resulting in the drowning death of Mary Jo Kopechne.

1969 was an eventful summer. My family and I were on Fire Island anticipating watching a man walk on the moon. I had no idea how much more exciting the summer would become.

I received a call from one of Senator Kennedy's aides, telling me that the Senator had been involved in a fatal automobile accident and asking me to make my way to Martha's Vineyard—a place I had never visited. I was asked to become part of the legal team being assembled in anticipation of the upcoming criminal investigation. My job was to prepare a brief concerning the rights of the young women (they were referred to as the "boiler room girls", because they had worked on Kennedy campaigns from an office that had once served as a boiler room) who had been vacationing on Chappaquiddick along with Senator Kennedy and several of his friends. The women who had shared a house with Mary Jo Kopeche were being subpoenaed to testify at an "inquest" regarding the tragedy.

There was very little law on the rights of witnesses or potential defendants at this sort of hybrid hearing which is neither a trial nor a grand jury proceeding. One important issue was whether or when their testimony, which might require them to divulge personal matters, would be made available to the media, which was seeking every possible tidbit of information—or gossip—about the events surrounding the tragedy. I worked with my colleague, Professor Charles Fried, and we produced a brief that succeeded in keeping the testimony of the women confidential during the course of the criminal investigation.

I also consulted with the lawyers responsible for trying to prevent Senator Kennedy from being charged with vehicular homicide or some other serious crime. We succeeded, and the Senator ultimately pleaded guilty to a relatively minor offense.

I remained close to Senator Kennedy until his death, consulting with him on numerous projects involving criminal law, constitutional law, judicial appointments, and human rights. Ken Feinberg, who served as his chief-of-staff and in many other capacities, recently told me that before anything involving these issues left his office, Senator Kennedy would tell his staff members, "check it with Alan." It was high honor and privilege to assist so great a senator on so many occasions. The last time I was him was just months before his death when he invited me to sit next to him for several innings during the opening game of the Red Sox season at Fenway Park on April ___, 2010.

HOUSE_OVERSIGHT_017297

Defending Soldiers

I have a policy of representing, without fee, soldiers who risk their lives for our liberties and are charged with killings growing out of their military service. I have helped to defend several soldiers, most prominently Colonel Michael Steele, the real life hero of the tragic events in Mogadishu that gave rise to the film "Blackhawk Down." I have also helped to defend ordinary enlisted men accused of unlawful killings of non-combatants.

Several of Colonel Steele's enlisted men had killed Iraqi civilians following a deadly attack by Iraqi militants against U.S. soldiers. Colonel Steele was being investigated for instructions regarding the rules of engagement that he had given to his men prior to the killings. Some higher-ups believed that his speech had incited the killings, or at the very least had created an atmosphere in which such killings would be seen as acceptable. Colonel Steele adamantly denied any such responsibility and asked me to help his military lawyers prepare a defense to any such charge.

The rules of engagement for terrorist groups are confusing at best. The directive Colonel Steele had received granted him the authority to target "groups, cells and facilities belonging to terrorist groups." How to distinguish such groups from non-combatants in the fog of asymmetric warfare, in which terrorists blend into the civilian population, is one of the most daunting challenges of modern combat. After conducting extensive research on the applicable law and on what Colonel Steele had actually told his men, I was convinced that he had complied both with the letter and spirit of the laws of war, and that the soldiers who had killed civilians were not following his lawful directives. We prepared a brief arguing against any charges been brought against the Colonel.

In the end Colonel Steele was not charged with any crime but his career was harmed by the allegation. In appreciation for my work on his case, the Colonel sent me an American flag that had been "flown for 9 minutes and 11 seconds over the 3rd Brigade Combat Team Head Quarters, Tikrit, Iraq" near a flag that was "hanging inside of Building #7 on the morning of 11 September 2011." In his letter accompanying the flag, Colonel Steel explained that a policeman, ran into Building Seven right after the attack to help get everyone out. On his way out, he saw the flag in the atrium and took it down. "The building came down about ten minutes later." The policeman gave the Colonel the flag to take with him into combat. Colonel Steel ended his letter with the following words: "My sincerest thanks, Alan, for all you have done for me and for the men of the Rakkasans." The flag stands in a place of honor in my home office, as a reminder of those who have given their lives to defend our liberties.

The complex issues surrounding the war against terrorists plays out not only on the battlefields of Iraq and Afghanistan, but in Israel and Gaza as well. I stand ready to defend Israeli soldiers and commanders who have been falsely accused of killing Palestinian civilians in their efforts to protect Israeli civilians from terrorist rocket attacks. In 2011, I traveled to the Hague in an effort to persuade the prosecutor of the International Criminal Court not to bring charges based on the deeply flawed "Goldstone Report," whose conclusions Richard Goldstone himself subsequently repudiated. I have represented the Mossad in its efforts to prevent prosecution of its agents by

HOUSE_OVERSIGHT_017298

foreign governments. In 1999, I received a letter of thanks from the head of that shadowy organization, which included the following:

> "I remember the energy you showed when we came to you seeking both advice and action. You threw yourself into the fray and showed every possible willingness to give us both your time and renowned counsel.
>
> As you know, there is no greater "Mitzva" in Judaism than "Pidyon Shevuyim"—prisoner release. And nevertheless, not every person would be prepared to be associated with "one of us." So be it you, for your part, acted in the best and nobles of our traditions.
>
> We wish you well; we thank you for what you did and what you were willing to do. May we all live to see the day when a profession such as mine gives way to more pleasant occupations. There is still some way to go before this comes about."

Tragically, the world is still far from a time when those brave men and women who serve in the United States and Israeli armed forces and intelligence services can pursue "more pleasant occupations." Until that day arrives, I will always remain available to lend my time and counsel in support of their noble efforts to combat evil.

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4.2.12
WC: 191694

Helping the prosecution keep an FBI murderer in prison

I'm a defense lawyer. Unlike many current defense lawyers, I never served as a prosecutor (though I advise my students who want to become defense attorneys to work in a good prosecutor's office for a few years.) Also unlike some defense attorneys, I admire good prosecutors, who do their jobs ethically and professionally. The adversarial system of justice requires zealous prosecution as well as zealous defense. Good prosecutors are the "gatekeepers" of justice: they decide which of the many cases that come before them to prosecute, which not to prosecute, what charges to seek, when to plea bargain and how high a sentence to recommend. Bad prosecutors—those who base such critical decisions on political, personal, financial or other corrupt considerations—can do enormous harm to our system of justice. I've been privileged over my career to know some extraordinary prosecutors. I've also been privileged to help expose some corrupt prosecutors, policemen and FBI agents.

The case of John Connolly was an example of both. In that highly-charged case, which was the subject of the semi-functional, but mostly fact-based, film "The Departed," I helped an excellent prosecutor keep a corrupt FBI agent in prison. The prosecutor who asked for my help is the State Attorney of Dade County Florida, which covers the City of Miami and several smaller cities. Katherine Fernandez Rundle replaced Janet Reno in 19__, when President Clinton appointed Reno to serve as Attorney General of the United States. She has been repeatedly reelected and served with distinction since.

John Connolly was a high ranking FBI agent in Boston, who had grown up in the "Southie" neighborhood of Boston along with the notorious "Whitey" Bulger, who was responsible for dozens, perhaps hundreds, of cold-blooded murders, and his corrupt younger brother William "Billy" Bulger who served as President of the Massachusetts Senate and then President of the University of Massachusetts, before he was forced out of office by Governor Mitt Romney.

During the reign of the Bulger brothers, Billy served as the Godfather and Whitey as the enforcer of a systematically corrupt political, economic and legal system. Nothing got done—no large buildings were constructed, no important jobs secured, no political appointments made—without "tribute" being paid to the Godfather. If anyone crossed Billy, he had to worry about being literally killed by Whitey. If anyone crossed Whitey, he had to worry about suffering political or economic death at the hands of Billy. For example, when a state trooper stopped and searched Whitey at Logan Airport, finding a large bag filled with cash, the trooper found himself demoted, disgraced and ultimately driven to suicide. And when Whitey was about to be indicted, Billy's protégé, John Connolly, tipped the gangster off, allowing him to escape and become a fugitive for __ years. Connolly also tipped off Billy to the details of an investigation that targeted him for extorting a half-million dollar bribe from a Boston builder.

But these were not the only tip-offs John Connolly provided the Bulgers. He also gave Whitey the names of "stool pigeons" who were about to inform or testify against him—in other words who had to be "silenced" to protect Whitey and his colleagues.

Several murders were plainly attributable to this leaking of information from the FBI to gangland killers and hit men. One such murder was committed in the Miami area and John Connolly was

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successfully prosecuted for it by the State Attorney's Office. The problem was that several years had passed between the murder and the prosecution and Connolly had a plausible statute of limitations argument on appeal.

I was asked by State Attorney Rundle to consult with her appellate lawyers and to prepare them for what they expected would be a grueling oral argument. I agreed and worked with them, and with federal prosecutors in Boston, on the appellate brief. I also conducted a "moot court" in which I played judge and asked the hardest questions I could come up with. The "moot court," as it turned out, was more grueling than the actual argument, and the prosecution won the appeal. It was the first time I recall cheering when I heard that the prosecution had won an appeal.

There is nothing more corrosive to the administration of justice than corrupt law enforcement officials (except, perhaps, corrupt judges, several of whom Billy Bulger had appointed to "his" bench). The Bulger gang is now history. Whitey and Connolly are in prison, probably for the rest of their lives. Billy is "retired" from politics, but still widely admired by some in Boston, who ought to know better.

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Defending a man who admitted his guilt

The myth that guilty clients, even those who have committed murder will confide their guilt to their trusted lawyer, is widespread in literature and reflected in legal rules that encourage a relationship of trust between lawyer and client. The reality is that guilty (as well as some innocent clients) don't trust their lawyers with their deep, dark secrets. Most believe that their lawyer will work harder for innocent defendants than for guilty ones, so they lie through their teeth.

They claim, especially at the beginning of their relationship with their lawyer, that they are the totally innocent victims of a horrible injustice. They admit nothing. In order to get some sense of what actually happened, I ask them the following question:

> "If your worst enemy, the person behind this horrible injustice, were to testify against you, what lies would he testify to? What would he say you did?"

The answer they give often comes close to what really happened. In this way, I obtain a working knowledge—always subject to reevaluation based on new evidence—of what may have occurred, without directly accusing my new client of being a liar.

Only one client who was accused of a killing has admitted to me that he was guilty. He really had no choice, since the very fact of his guilt was an essential element of his defense. The case was a strange one from beginning to end. Not only was my client guilty of having participated in a crime that resulted in the death of a young woman, he also—it turned out—was a government informant who was providing information to the police as to what he and his group were doing.

I have related this story in detail in *The Best Defense* and will not repeat it here, except to describe how it feels to win a case on behalf of an admittedly guilty defendant. Not only did he go free as the result of our legal arguments, but all of his co-conspirators—the ones who actually planted the smoke bomb that suffocated the woman—went free as well. (My client, who was an engineer, had constructed the smoke bomb, knowing that it was going to be placed in a crowded area.)

When I first undertook the pro bono representation of Sheldon Siegel, he faced a possible death sentence. I had no idea that he was informing against his colleagues in the Jewish Defense League at the same time that he was making bombs for them. Informers are a peculiar lot, often undecided about which side they are on—other than their own side. Siegel was committed to the ideology of the JDL, including their sometime use of violence to make their point. But he was also desirous of protecting his own head and he knew he was vulnerable to prosecution for the bombs he had constructed that had been used against Soviet targets in the United States. He hoped to avoid prosecution by providing the government with selective information about his JDL colleagues and their plans. He also hoped the JDL would never find out that he was playing both sides against the middle.

One of their plans—to plant a smoke bomb in the office of Sol Hurok, a Jewish impresario who brought musicians to the United States from the Soviet Union—went awry and a young Jewish woman named Iris Kones died from inhaling smoke from a bomb that was intended to disrupt but

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not to kill. Because the bomb was inherently dangerous and caused death, the perpetrators were indicted for capital murder.

In the end, I was able to capitalize on Siegel's status as an informer, the fact that he was first discovered by the use of an unlawful wiretap, and the promises that were made to him in order to secure his cooperation. We obtained a legal ruling from the United States Court of Appeals that ordered the trial judge to set all the defendants free.

As the trial judge implemented that decision, my client and his co-defendants started to leave the courtroom, congratulating each other and laughing. The judge turned to them in anger and said, "Do you know who isn't in court today? Iris Kones." As my thoughts turned to the innocent victim of the Hurok bombing, I heard the judge's voice grow louder and angrier: "Someone has committed a dastardly, vicious, unforgettable crime; someone is frustrating the administration of justice in a case that, in my mind, involves murder. People who deliberately do so will learn the power of the law even if there are those who have literally gotten away with murder." While enunciating these final words, the judge averted his eyes from the young defendants and focused them directly at me, almost as if to say, "And you are responsible."

His words went through me like a knife. Never had I been so uncomfortable as I was then, with the case over and my client entirely victorious. He was right. In one sense I was responsible: I had devised the novel legal strategy that resulted in the release of guilty defendants whose crime had caused the death of an innocent young woman.

I sat in court for a full hour after everyone else had left. I wanted no part of the victory celebration. I could not forget Iris Kones. I've thought of her often and of other victims of my clients who have gone free because of my legal arguments and my investigative work. I think especially of Iris Kones because she is the only homicide victim who I know was killed by defendants who I know were guilty and went free. I suspect there were others as well, but I can't be absolutely sure of any but Iris Kones, because my client in that case told me, and the world, that he was guilty.

I also think of Iris Kones because her family—who are active in both Jewish causes and Harvard University—constantly remind me, and all of our mutual friends and associates, of my role in freeing the murderers of their relative.

Although I don't believe in divine justice, it is true that Sheldon Seigel died at a very young age after an unsuccessful heart transplant. His premature death didn't make me feel any less responsible for the unjust, but legally proper, result I helped produce on his case.

HOUSE_OVERSIGHT_017303

4.2.12
WC: 191694

The killing of John Lennon

Another death for which I have long felt some responsibility was the murder of John Lennon by Mark Chapman in 1980. Lennon was in the United States on that fateful day because I helped him avoid deportation back to England in 197_. Had our legal team not been successful in stopping the Nixon Administration's efforts to deport Lennon on trumped up allegations relating to his use of marijuana in England, Lennon would have been deported and banned from the United States. It is highly unlikely (though not impossible) that Chapman would have stalked and shot him on the streets of London or Liverpool, as he did on Central Park West in New York.

I was retained by an excellent deportation lawyer named Len Wildes to write a legal memorandum on the impropriety of the deportation request. (My fee was to be a record album signed by John Lennon: Lennon signed it; Wildes lost it; and my children nearly killed me!) We won the case and Lennon continued to live in Dakoda for the ___ years before he was killed.

His killer, Mark Chapman, had no money to hire a lawyer and so the court appointed a former student of mine and friend Jonathan Marks, to represent him. Marks is a brilliant and innovative lawyer who wanted to raise a defense based on Chapman's mental state. He asked me to consult with him on the case, but I didn't feel comfortable helping a defendant who had killed my former client. So I declined.

Several years after Chapman was convicted, I happened to run into Yoko Ono at an art auction. I told her how sad I was that we had won the deportation case, because if we had lost, John would still be alive. She became angry at what I had said: "Don't ever think that," she admonished. "Those ___ years were the happiest in his life and mine. He gave me John Ono. You did a good thing." She reached over, kissed me and thanked me. I still feel somewhat responsible for what happened on that awful day in front of the Dakoda.

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4.2.12
WC: 191694

Dealing with the family of homicide victims—then experiencing it

Whenever I defend an accused killer, I'm asked how it feels to be up against the family of the victim. It's a hard question, even when asked in the abstract. In one case I was confronted directly by the mother of the victim, who thrust a photograph of her murdered son in my face.

My client was a woman who had admittedly shot and killed her husband. She claimed that she had killed him in self defense after he tried to kill her. The problem was that the evidence showed that after she emptied her gun into his head, she reloaded and emptied it again into his body. She was found guilty of premeditated murder and asked me to try to get the conviction reversed or reduced to manslaughter.

I argued the appeal in the Maryland Court of Appeals. I was satisfied that I had done the best I could with a difficult fact pattern. As I was leaving the courtroom feeling pretty good about myself, an elderly woman approached me. "You did a fine job, sir," she began. I thanked her and started to walk away. "The man she murdered was my son," she politely continued, "and I want you to know that my son never tried to kill her." She looked me straight in the eye and persisted: "He would never do such a thing. He was a fine young man. She was just trying to get rid of him. I want you to know the truth regardless of how the court decides the case." She showed me his picture: "Look at him. Look at his eyes and tell me whether you think he could try to kill her."

I looked at the picture and simply said "I'm sorry for your loss." The woman began to cry as she walked away.

I couldn't sleep for several days as the picture of the sobbing mother holding her dead son's photograph kept popping into my head. Maybe he hadn't tried to kill her. Maybe my client made up the story to justify a cold-blooded murder. Maybe not. Nice looking people often do unnice things. You can't tell a killer by his eyes—or by his mother. I could never know. All I could go on was the evidence that had been presented at the trial.

I will never forget this encounter with the victim's mother. It still haunts me, as do all the other possible victims of what my clients may have done. Nobody ever said it would be easy to be a criminal defense lawyer, and it hasn't been. Any defense lawyer who says he doesn't lose sleep over the moral ambiguity and complexity of his role is either lying or is unworthy of the responsibility of representing the possibly guilty in order to prevent the conviction of the possibly innocent.

The Rubin case itself was convoluted in the extreme. It actually involved several cases. Rubin claimed to have evidence that her estranged husband, who she admittedly shot, had tried to poison her previous lover who had tried to beat her up. She then developed a personal relationship with one of her investigators and an unusual relationship with several of her lawyers. Eventually, after years and years of litigation, her conviction was reversed on the ground that several of her trial lawyers were guilty of a conflict of interest that denied her the effective

HOUSE_OVERSIGHT_017305

assistance of counsel under the Sixth Amendment. I still have no idea whether the victim's mother was correct in her assessment of her dead son. The situation seems a bit more complex, but that's often the case when you drill down to the real story behind the killing.

In July of 2011, my own family learned what it felt like to become the victim of a possible homicide. My brother's beloved wife, Marilyn, was killed while riding her bicycle on a New York City street. Marilyn was a brilliant lawyer who had just retired from being a judicial referee in the New York Matrimonial Court. Her sudden death was devastating to my brother, their children and our entire family. She had been run down by a United States postal truck and rushed to the hospital where a team of doctors worked feverishly to cut off her bike helmet and try to save her life. They couldn't help her and she died.

Because New York City, like many large urban areas, has security cameras on nearly every block, my nephew (who is an engineer) and I were able to view video footage of the event from several different angles. What we saw was a mail truck and an unidentified van barreling down a narrow street in what appeared to be a game of "chicken." Neither would give the right of way to the other, so they both decided to drive down the narrow street in tandem. The mail truck struck my sister-in-law. It then stopped, appeared to look back, and proceeded to drive away. It stopped again and then made a sharp left turn into the basement of the mail building.

Upon viewing the video and talking to witnesses, we came to believe that Marilyn had been the victim of two crimes: negligent vehicular homicide and leaving the scene of an accident. Suddenly our family became the victims seeking justice from a reluctant prosecutor. It was a painful shifting of roles, as my brother demanded a thorough investigation and prosecution of the offending driver or drivers (the driver of the van was never identified or caught). We were now using technology and engineering science to try to prove criminal guilt on the part of the mail truck driver. In the end, the prosecutor charged the mail truck driver with leaving the scene of an accident, but not with causing Marilyn's death. This horrible tragedy made me better understand what it feels like to be the family of a homicide victim.

HOUSE_OVERSIGHT_017306

4.2.12
WC: 191694

Defending the Former President of the Ukraine Against Murder Charges

In T.S. Eliot's famous play *Murder In The Cathedral*—which is loosely based on historical events—King Henry II is anxious to be rid of Thomas Becket, the Archbishop of Canterbury. Unwilling to bloody his own hands, the King hints of his wishes to several loyal knights by issuing a rhetorical challenge: "Will no one rid me of this turbulent priest?" The knights, believing they are following the King's command, then murder the Archbishop in the Cathedral.

Lawyers and historians have long debated whether the King was legally, morally or historically guilty of Becket's murder. In 2011, I was asked to become involved in what prosecutors believed was a modern-day, real-life variation on murder in the Cathedral.

My client was the former President of the Ukraine, Leonid Kuchma. Ukrainian prosecutors were investigating him for ordering the murder of a journalist who was critical of the government. The journalist was murdered during President Kuchma's term in office, and the resulting scandal contributed to the ending of Kuchma's political career.

Over the next several years, there were investigations but they all exculpated the former president. But now, a decade later, the prosecutors claimed they had a smoking gun: a surreptitiously recorded conversation involving President Kuchma in his "oval office" making statements about the murdered journalist akin to those made by King Henry II about the Archbishop.

The conversations were allegedly recorded on a small Toshiba digital recorder that had been secreted beneath a couch in the president's office. The voice on the recording was unmistakably that of President Kuchma and the words—if he had indeed uttered them—were damning and incriminating.

My brother and I were retained by a former student of mine, Doug Schoen, a brilliant political strategist who was counseling the President's family. Our job was to advise the Ukrainian lawyers with regard to the recording and other legal and factual issues.

I flew to Kiev to meet my client. It was an emotionally wrenching trip for me, since my family—including many who were murdered during the Holocaust—came from areas not too far from Kiev. I wanted to visit Babi Yar, the site of one of the worst mass slaughters of Jewish residents of the area. I had been told that some members of my mother's family were almost certainly among the tens of thousands of victims of the Babi Yar massacres. I asked to visit the memorial as soon as I got to Kiev. I was shocked to see that there was hardly any memorial to the murdered Jews. A current resident of Kiev who visited the area, which is just outside the center of town, wouldn't even know that the Jewish residents of Kiev were gathered in the area and systematically shot and thrown into pits. The tiny memorial has a faded plaque that is extremely vague about what had happened. I knew that under the Soviet regime, there had been denial and silence. I knew that from the famous poem by the Soviet dissent poet Yevgeny Yevtushenko,

HOUSE_OVERSIGHT_017307

which begins:

> "No monument stands over Babi Yar
> A steep cliff only, like the rudist headstone
> I am afraid."

Now there is a monument, but it is unworthy of that term, and it is not as if the city of Kiev doesn't know how to build giant monuments, if it chooses to. In the center of Kiev stands a monumental statue to Bohdan Khmelnitsky, who had conducted pogroms in the 17th Century that had slaughtered tens of thousands of Ukrainian Jews. To this day, Khmelnitsky's picture adorns Ukrainian currency.

It was not an easy visit either for me, for my wife or for my brother (who made a separate visit with his wife). It was especially difficult for his late wife Marilyn, whose father's entire family had lived in the Ukraine, where almost all of them were murdered during the Holocaust. The difficulty was exacerbated when one of the Ukrainian lawyers with whom I was working was found dead in his bed just hours after we completed an evening work session and hours before we were to resume our work in the morning. The official cause of death was ruled a heart attack, but the KGB—whose role in the case we were investigating—is an expert on giving enemies "heart attacks." We were there to save the life and liberty of a Ukrainian political leader and we got down to work.

President Kuchma immediately told me that although it was his voice on the smoking gun recording, it was not his words, as least not in the sequence that appeared in the transcript. I listened to the recording but could not tell very much because the words were Russian and they were difficult to hear.

I told my client that I too had been the victim of a doctored recording in which my voice and words had been edited and re-sequenced to make it sound as if I had said the exact opposite of what I had actually said.[72] This fake recording had been made by a man named David Marriot, who had offered to be a witness in the Claus Von Bulow case. He had asked me for money and I told him it would be improper to pay him for his testimony and we wouldn't do it. He surreptitiously recorded our conversation on a tape and then simply cut and spliced the tape to make my refusal to pay him sound like a willingness to pay him. His splicing job was so amateur—he used scotch tape—that our expert was able to demonstrate it without any question.

But times had changed, and the recording at issue in the Kuchma case had been digital. Changes on a digital recording are much more difficult to detect than on a tape recording. It was our job to demonstrate that the Kuchma recording, like mine, had been tampered with to change the meaning of his words. It would be a challenging scientific task in this new age of recording technology, but my team was up for it. We retained the most sophisticated audio-scientists in the world, who were able to demonstrate that words could be digitally re-sequenced to alter the meaning of a conversation without the change being detectable.

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[72] In another situation, a television ad by the organization J Street showed a video of my lips moving and a voice—not mine—saying words that I didn't say.

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We also established that the recording device and the recording had been repeatedly removed from the chain of custody, thereby enabling the tampering to be accomplished. Finally, we proved that under Ukrainian law, the recordings had been made and handled unlawfully. The end result was that the court ruled that the recordings could not be used against President Kuchma in any criminal case and the prosecution was dropped.

HOUSE_OVERSIGHT_017309

Murder Cases I Didn't Take

For every client whose case I agree to take, I must, regretfully, turn down many. Every week, I receive dozens, sometimes hundreds, of calls, emails and letters asking me to review cases. Many of them involve homicides, because some of my most highly publicized cases have involved clients accused of murder. Because I am a full time professor, my time for litigation is limited. So I must choose only a handful each year among the many worthy cases. I have several criteria for choosing which cases I will accept. I rarely turn down cases in which defendants face the prospect of the death penalty by an American court, and when I do, I try to get another lawyer, often a former student, to take the case. (The same is true for cases involving freedom of speech or other First Amendment protections.)

I never turn down a homicide case because it is too hard or because I am too unlikely to win. When I took the Von Bulow case, nearly everyone thought we had no chance of winning. *New York Magazine*, in an article about my involvement in the case, quoted "one of the country's leading criminal lawyers" predicting that I would lose the appeal: "He'll add something useful and do a brilliant analysis of the record. He isn't going to make it. Of some guys you can say "That's a patient he isn't going to save. He can only make him more comfortable."

Esquire magazine had commented that the Von Bulow appeal "looked like another ritualistic exercise in civil libertarian dogma" that "would churn through the courts simply because there was money available and a set of arguments that could be made, rather than because [I] had any real sense that justice in some way had gone astray."

And one commentator snidely observed that Von Bulow's "recruitment of Harvard Law Professor Alan Dershowitz shortly after his conviction would tend to reinforce" the view that Claus Von Bulow "was no longer protecting his innocence, merely the methods used to catch him…Dershowitz enjoys a wide reputation as a last resort for convicted criminals, being especially keep at finding legal loopholes that render his clients' convictions unconstitutional."

Similar predictions were made about the O.J. Simpson case and others that I subsequently won. I actually prefer difficult and challenging cases which the pundits claim are unwinnable. I also never decline clients because they are too unpopular, too controversial or too guilty.

Why do I defend people who I know are guilty? Because that's the job of a criminal defense lawyer and I have chosen that noble profession. But why did I choose a profession in which my job would be to defend guilty, as well as innocent, defendants? Because unless the guilty are vigorously defended, the innocent will be at greater risk of being prosecuted, convicted and executed. The reality is that the vast majority of people who are charged with serious crimes are factually guilty—that is, they did it! Thank goodness for that. Would anyone want to live in a country where the majority of people charged with crime were innocent? That may be true in Iran, China and Belarus, but it is not true of the United States, England, Israel and other countries with a zealous defense bar. And in order to keep it that way, everyone accused of crime, whether innocent or guilty, must be vigorously defended within the rules of law and ethics. I'm proud to

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be a leader of the criminal defense bar and to have successfully defended many accused criminals, some innocent, some guilty.

There are, however, certain categories of clients I will almost never accept. These include professional criminals who are in the business of doing illegal things and will almost certainly go back to that business if I get them off: drug dealers, Mafioso, terrorists, gang leaders. These professional criminals are entitled to counsel, but I do not want to become a "consiglieri" to a crime family (remember Tom Hagen in the Godfather) or an advisor to those who are in the business of committing crimes.

I also do not generally represent fugitives from justice while they are still "on the lam." A lawyer's job does not include helping a client illegally evade or escape from justice.

I try to take interesting cases that will have an impact on law, cases in which an injustice has been done or seems likely to be done, and cases involving my personal areas of expertise (science, constitutional law, psychology). I take about half of my cases on a pro bono basis and the other half on a fee basis. I use the fees to support the expenses of my pro bono cases.

Among the most interesting cases I declined have been accusations of murder committed outside the United States and involving foreign leaders. As an American lawyer, I have less of an obligation to take foreign cases than I do to take American ones.

Perhaps the most difficult case for me to have turned down involved the Israeli student, Igal Amir, who was accused of assassinating the late Yitchaz Rabin, the then Prime Minister of Israel. Several days after the crime that rocked the world, the family of the man accused of committing it asked me to become his lawyer. I met with them and they told me that he had in fact pulled the trigger, but that he was legally innocent, because the killing was justified under the Jewish law of "rodef"—a concept akin to preventive or anticipatory self-defense, or defense of others. This concept, which derives from a Biblical passage, as interpreted by Jewish sages including Maimondes, authorizes the killing of a person who is about to do great harm to an individual or to the community as a whole. The man who killed Rabin apparently believed that Rabin was about to make a peace with the Palestinians that involved giving back "sacred" land that had been captured by Israel during the Six Day War. He also believed that such a peace would endanger the lives of Israelis, and so he set out to stop it by killing the "rodef" who had endangered it.[73]

The trial of Rabin's killer promised to be among the most interesting of my career and among the most important in the history of the Jewish state. Although the crime did not carry the death penalty (Israel has abolished the death penalty except for the Nazi genocide against the Jewish people, under which Adolph Eichman was hanged), the case fit many of the criteria I generally consider in taking a case. But I decided not to take it.

The reason was that it involved the kind of political defense that I abhorred. If every citizen had the right to decide who was a "rodef" deserving of death, there would be anarchy. The "rule of personal politics" would replace the rule of law. The defense of "rodef" was not, in my view, a legitimate legal defense, and I, as a lawyer, was not obligated to present it.

[73] I am comfortable describing this "defense," since it was made public by him and his family.

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I had a more personal reason as well. I deeply admired Rabin and I supported his efforts to make peace. We knew each other, though not well, and he had consulted with me regarding several issues, including the one that may have led to his death.

Eight days before Rabin was killed, Israel's Ambassador to the United States had asked me to meet with Prime Minister Rabin, when he was scheduled to speak in Boston later that month. I asked the Ambassador what the subject of the meeting would be, and he told me that the Prime Minister was deeply concerned about the increasingly virulent level of rhetoric in Israel and the fact that certain fringe religious and political figures were advocating violence against government officials. He wanted to discuss whether there were ways of constraining the level of vitriol without infringing on the right of free speech.

I agreed to meet with Rabin and wrote the appointment in my calendar. The meeting was not to be. Rabin was murdered a week before his scheduled trip to Boston. I could never erase the scheduled meeting from my appointment book.

I declined the offer to represent Amir, and watched with interest as his lawyers tried to present the "rodef" defense to an appropriately unsympathetic judge. Amir was convicted and sentenced to life in prison. He was married while in prison and allowed conjugal visits, during which he fathered a child.

Other murder clients I rejected included Radovin Karadic, the head of Bosnian Serbs during the terrible ethnic wars in the former Yugoslavia. Karadic first called me while he was still a fugitive and while the killings were still ongoing and asked me to represent him. I told him of my policy of not representing fugitives or people involved in ongoing crimes. He asked if he could call me again if the circumstances changed. I did not say no.

Shortly after receiving this call, I had occasion to be at a dinner with then President Clinton and First Lady Hillary Clinton. My decision to turn down Karadic had been reported in the press (he or someone close to him disclosed it) and it became the subject of discussion. Mrs. Clinton was adamantly against my representation of this "butcher," but President Clinton said that if I could persuade him to turn himself into the international tribunal in the Hague as a condition of my representing him, it would be a worthwhile tradeoff. Karadic did not turn himself in, and when he was finally caught many years later, he asked me to meet with him in his prison cell in the Hague. I met with him just days after his capture and we discussed his case, as well as the cases of several of his former colleagues (one of which I was involved in). In the end, I did not represent him. He is still on trial in the Hague.

During the "Arab Spring" of 2011, I received calls from individuals representing both deposed President Hosni Mubarak of Egypt and then fugitive leader of Lybia, Muammar Gaddafi, both of whom were being accused of killing innocent civilians.

A Norweigan human rights activist who was close to Mubarak asked me if I would be willing to go to Cairo as part of the Mubarak legal team. I raised the question of whether it would be wise for Mubarek to be represented by a Zionist Jew. He said that I would be part of a team of three

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lawyers, the other two to be selected by the Arab League. I doubted that the Arab League would agree to have me participate in such a team, but he assured me that he would try to obtain their consent. That was the last I heard. I don't know whether, in the end, I would have been willing to go to Cairo as part of such a defense team, but I certainly was tempted.

I was less tempted by the offer made by Gaddafi's Lybian lawyer. The Gaddafi offer was firm, accompanied by a signed formal retainer letter and contract. I have the contract in front of me as I write these words. It begins "In the Name of G-d, the most gracious, the most merciful. In G-d we trust." In the end, I couldn't agree to what they wanted me to do, and the issue became moot with the fall of the Gaddafi government and the assassination of Gaddafi. I was later asked whether I would consider representing his son in the International Criminal Court, but that issue too became moot when the rebels decided to try him in Libya.

My final offer came from a deposed African head of state, accused of mass murder, who offered to pay me with gold bricks he had stolen from his country. Needless to say, I declined his offer, since the gold was not his to give.

One American case I turned down grew out of a request from the author Norman Mailer that I represent Jack Henry Abbot. Mailer told me that he had urged the authorities to release Abbot, who was serving time for murder, because he had become a great writer while in prison. Abbot had written a memoir called "In The Belly of the Beast" that had become a best seller and had elicited excellent reviews. Mailer told me that he had succeeded in his efforts to have Abbot released, but that shortly after being set free, Abbot stabbed a waiter to death. Now he was facing a murder charge, and if convicted he would never again experience freedom, regardless of his writing skills.

I agreed to visit Abbot on Rikers Island, where he was being held pending trial. I was allowed to meet with him in a private lawyer's conference room, with guards standing outside. We began to talk and I became increasingly skeptical of the media story that Mailer had secured his release. I had his prison record in front of me and as I perused it, the thought occurred to me that perhaps Abbot had earned his freedom by informing on other prisoners. I made the mistake of asking Abbot whether he was a "snitch." Upon hearing that word, he leaped over the table and grabbed me around the neck. The guards quickly rescued me from his clutches. The last words he heard me say as I left the room were "No way I'm becoming your lawyer."

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Conclusion: How homicide cases have changed over the past half century

There are two clearly discernable trends in regard to homicide cases—and they point in totally opposite directions. Science is helping to solve homicide cases that previously remained unsolved (cold cases) or that produced erroneous results. Many innocent people who were wrongly convicted of murder have been exonerated by the new science, and some guilty murderers who had never even been suspected have been successfully prosecuted. There have even been some cases in which the DNA of the killer has been found and analyzed but could not be matched—at least not yet—with a specific person. In at least one case, an indictment has been issued against the unnamed person who may someday be matched with the "guilty" DNA. Such is the progress of science, and it will get even better (and scarier!) in the future.

At the same time that science is progressing, the law is regressing. It is becoming increasingly difficult to reopen "closed cases," even homicide cases that carry long prison sentences or the possibility of execution.

Over the past several decades, an increasingly conservative Supreme Court, and a Congress that couldn't care less about wrongly accused defendants, have shut the courtroom door to new evidence, including new scientific evidence. It may seem hard to believe but many judges and justices believe that it is not unconstitutional for an innocent person to be executed or to remain in prison if his conviction was "otherwise" constitutional. The idea that a process resulting in the conviction of an innocent defendant could be "otherwise" constitutional reminds me of the apocryphal question put to Abraham Lincoln's widow after the assassination in Ford Theater: "Other than that, Mrs. Lincoln, did you enjoy the play?" If a defendant is factually innocent, there is no "other than that."

Listen to Justice Scalia on this subject:

> "This court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable."

Let us be clear precisely what this means. If a defendant were convicted, after a constitutionally unflawed trial, of murdering his wife whose body was never found, and then came to the Supreme Court with his very much alive wife at his side, and sought a new trial based on newly discovered evidence (namely that his wife was alive), Justice Scalia along with several other justices, would tell him, in effect: "Look, your wife may be alive as a matter of science, but as a matter of constitutional law, she's dead, and as for you, Mr. Innocent Defendant, you're dead, too, since there is no constitutional right not to be executed merely because you're innocent." The same would be true if DNA evidence proved another person guilty of a murder for which an innocent person was about to be executed. According to the Scalia view of the Constitution, there would be nothing unconstitutional about executing the innocent man—and then trying, convicting and executing the guilty man. Such is the regress of law, and it may get worse if more justices with

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Scalia's anachronistic views are appointed to the court.[74]

This is not to suggest that plainly innocent people are being routinely executed in the United States. There are other checks and balances, such as gubernatorial commutation. (Though in some states they are rarely, if ever, granted.) Moreover, the courts, even the Supreme Court, sometimes find other ways to free the obviously innocent in most cases.

The real problem is how to prove one's innocence when the courts deny possibly innocent defendants the tools necessary to prove the certainty of their innocence. The Jeffrey MacDonald case discussed previously, is a prime example of this problem.[75] The courts have repeatedly shut the door on his serious claims that he can establish his innocence if he were to be given an opportunity to subpoena evidence and witnesses. In his case several crucial witnesses have died. These include Helena Stoeckley and her boyfriend, who may have been the actual killers, and Jim Britt, the Deputy Marshall who would have testified that the prosecutor improperly pressured Stoeckley to "forget" what she had seen—that is, to lie about her memory.

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[74] In 2009, I challenged Justice Scalia, who has written that he would have to leave the Supreme Court if his constitutional views conflicted with his obligation to the Catholic Church, to debate this issue:

> I hereby challenge Justice Scalia to a debate on whether Catholic doctrine permits the execution of a factually innocent person who has been tried, without constitutional flaw, but whose innocence is clearly established by new and indisputable evidence. Justice Scalia is always willing to debate issues involving religious teachings. He has done so, for example, with the great Rabbi Adin Steinsaltz, and with others as well. He also has debated me at the Harvard Law School. Although I am neither a rabbi nor a priest, I am confident that I am right and he is wrong under Catholic Doctrine. Perhaps it takes chutzpah to challenge a practicing Catholic on the teachings of his own faith, but that is a quality we share.
>
> I invite him to participate in the debate at Harvard Law School, at Georgetown Law School, or anywhere else of his choosing. The stakes are high, because if he loses—if it is clear that his constitutional views permitting the execution of factually innocent defendants are inconsistent with the teachings of the Catholic Church—then, pursuant to his own published writings, he would have no choice but to conform his constitutional views to the teachings of the Catholic Church or to resign from the Supreme Court.

Scalia did not take up my challenge.

[75] This is what the Court of Appeals had said in the Jeffrey MacDonald case:

> [W]e acknowledge that MacDonald has a daunting burden ahead in seeking to establish that he is eligible for habeas corpus relief solely because of his "actual innocence." The Supreme Court has only "assume[d], for the sake of argument . . ., that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)*. The Court has yet to come across any prisoner who could make the "extraordinarily high" threshold showing for such an assumed right. *Id.*; *see Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2321, 174 L. Ed. 2d 38 (2009)* ("Whether [a federal constitutional right to be released upon proof of 'actual innocence'] exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.").

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In the MacDonald case, justice delayed by the courts may actually result in justice being denied to an innocent man.

Nor is MacDonald alone in having the courthouse door shut on new scientific evidence that could acquit the innocent and convict the guilty. It is even possible that several innocent people may have been executed because the courts have refused to consider the scientific evidence that could have proved that others committed the murders.

One such case came to my attention too late for me to try to do anything to prevent a possible miscarriage of justice. A letter arrived at my office on a Monday. I opened it and read a poignant request from a condemned man to review his case. I receive many such requests but this one was different. It began by informing me that by the time I read this letter, the writer may already have been executed. I checked and sure enough, he had been executed a few days earlier. Nevertheless, he asked me to help clear his name posthumously, so that his family would know he was innocent. He had asked to have the blood on a towel tested for DNA, but his request had been denied. He believed that the DNA test would show that the killer was someone else. I immediately sought to have the blood tested at my own expense, but the authorities told me that the evidence has been destroyed when the defendant was executed.

It is entirely possible therefore that an innocent man was executed while the guilty man remains at liberty, because the courtroom doors were shut to new scientific evidence that could prove both innocence and guilt.

The prime lesson of the important scientific developments over the past half century is that the courthouse must always remain open to new evidence, even if such openness denies legal finality in criminal cases in which there is no scientific finality.

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Chapter 14: The changing politics of rape: From "no" means "maybe," to "maybe" means "no."

No legal concept has undergone a more dramatic change over the course of my legal career than the crime of rape. When I started to practice, there were enormous barriers to the successful prosecution of rapists. The testimony of the alleged victim had to be corroborated by external evidence, unlike other crimes where the testimony of the victim is sufficient. The alleged victim could be cross-examined about her entire sexual history, thus discouraging rape victims from coming forward. A husband could not be convicted of raping his wife, no matter how much force he used, because by law, "the husband and wife are one," and "he is the one." Under this bizarre sexist metaphysic, a husband was deemed "incapable of raping himself." Juries were reluctant to convict "upstanding" young men who were accused of raping "loose" women (often defined as unmarried non virgins). Moreover, being "dressed for sex" was considered a form of consent by some courts, and prostitutes could not be raped since they were in the "business" of consenting. In some states, lack of consent alone wasn't enough to establish rape; the victim had to "resist" to the "utmost" even in the face of deadly threats.[76] Some commentators even suggested that it was physically impossible for a non-consenting woman to be raped. Most importantly, date rape wasn't even considered a crime. Instead it was deemed a manifestation of macho entitlement among certain groups, such as some college fraternities, soldiers, gangs and athletic teams. Within some such groups if one "brother" was accused of raping a woman, all the other brothers would say that they too had sex with the complainant.

The upshot was that many predatory males got away with rape either because victims were unlikely to complain, prosecutors were reluctant to bring charges, jurors were eager to acquit or appellate courts were quick to throw out convictions.

This male-centered attitude toward rape, and the special rules reflected by that attitude, go back millennia in time. The Bible, which includes a prohibition against coveting one's neighbor's wife in the Ten Commandments, does not explicitly prohibit rape. In the Bible, there are permissible and impermissible sexual encounters, depending on the status of the man and woman. A married woman is prohibited from having sex with anyone but her husband, while a married man is permitted to have sex with any unmarried or unspoken for woman. If sex is permitted, it may be accomplished by force. If it is prohibited, it may not be engaged in even if both parties consent. If a man rapes an unmarried girl who is still in her father's care, his "punishment" is to pay the father a specified amount for damaging his "property," and he must marry her and may not ever divorce her. Who is punished more under this regime, the perpetrator or the victim? And who is the "victim," the girl or her father? Similar rules prevailed in other religions and other cultures during Biblical times and for centuries thereafter.

The common law attitude, which governed American courts from the beginning of our history, was summarized by British Lord Chief Justice Matthew Hale, who cautioned that rape was a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."

[76] One court put it this way: "if the carnal knowledge was with the consent of the woman, no matter how tardily given, or how much force had therefore been employed, it is no rape." Reynolds v. Nebraska, 27 Neb. 90 (1889).

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Even as recently as the early 20th Century, the influential legal commentator, John Wigmore, proposed that women who accuse men of rape should be subjected to a psychiatric examination because:

> "Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements, partly by bad social environment, partly by temporary psychological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victims, however, too often in such cases is the innocent man…"

Even as late as the 1960s, the Supreme Court of Georgia, in rejecting Justice Goldberg's view that the death penalty might be unconstitutional for rape, provided the following male-centered justification for why rapists must be executed:

> "We reject this [attempt to reduce the protection of] mothers of mankind, the cornerstone of civilized society, and the zenith of God's creation, against a crime more horrible than death, which is the forcible sexual invasion of her body, the temple of her soul, thereby soiling for life her purity, the most precious attribute of all *man*kind [sic!]."

During the last quarter of the 20th Century, political and academic feminism began to focus attention on the gender inequalities implicit, and often explicit, in rape laws. Within a short period of time, thousands of years of anachronistic rules governing the prosecution of rape cases were changed. The testimony of rape victims no longer had to be corroborated. Rape shield laws prohibited defense attorneys from questioning alleged rape victims about their prior sexual history. Husbands could be prosecuted for forcing their wives to have sex. The force and resistance elements of rape were amended in most jurisdictions to require only a lack of consent. Date rape was punished as seriously as stranger rape. Most importantly, attitudes changed, at least among some groups which no longer treated predatory males as macho heroes and women who dressed provocatively as automatically consenting sex partners.

Nearly all of the rules that had made it difficult to prosecute rapists were amended within the course of little more than a decade, as the pendulum swung quite dramatically from a male-centered view of rape to a female-centered view. As with many wide swings of a pendulum, there was little effort to strike a carefully calibrated balance that represented our general approach to all crimes: namely that there must be a heavy burden of proof on the prosecution and that it is better for 10 guilty rapists to go free than for even one innocent accused rapist to be wrongly convicted. Indeed even that salutary rule was challenged by some feminists in the context of rape.[77] One influential scholar went so far as to suggest that all sexual intercourse is essentially rape[78] and that

[77] [get sources]
[78] [Andrew Dworkin]

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all men should be presumed of being guilty of this crime. This led one of my colleagues to quip that "some feminists regard rape as so heinous a crime that even innocence should not be recognized as a defense."

Mostly the changes in the laws governing rape prosecutions were for the better: Many more guilty rapists were successfully prosecuted and the number of rapes went down perceptibly.[79] But these radical changes were not cost free: more innocent defendants, or those against whom the evidence was doubtful, were also convicted. When it comes to changing the rules of governing prosecution of serious crimes, there is no free lunch. Virtually every change that makes it easier to convict the guilty also makes it somewhat more likely that some innocents will be convicted as well. The difficult question is whether, as to any particular crime or rule, the trade off is worth it.

I have experienced and participated in the changing approaches to the prosecution and defense of rape cases. At the beginning of my career, when the rules were heavily skewed against women, I was reluctant to defend accused rapists because I didn't want to cross examine alleged victims about their sexual history. I regarded it as an unfair tactic designed not to probe their credibility as witnesses, but rather to discourage rape victims from bringing charges. Were I to have defended an accused rapist in those days, I would have no choice other than to use every legally permissible tactic. As the rules changed, I began to defend accused rapists—and to teach and write about rape—in order to help assure that an appropriate balance was maintained in the inevitable trade-off between the rights of the alleged victim and those of the accused defendant.

A revealing example of how this trade off works in practice is provided by the controversial rape prosecution of Mike Tyson, in which I served as his appellate lawyer. Tyson was convicted of raping Desiree Washington, a young woman who he met when she was a contestant in the Miss Black America pageant in Indianapolis, and he was an invited celebrity. He called her at 1:45 in the morning and invited her to his hotel room, where they engaged in sexual intercourse. She subsequently claimed that he had forced her. He said it was entirely consensual. The jury believed her and convicted him. Following his conviction, Don King asked if I would represent the former heavyweight champ on his appeal.

[79] The dramatic reduction in rapes coincided with an equally dramatic increase in the easy availability of pornography, thus disproving the causation claim made by some radical feminists: that pornography causes rape.

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Was Mike Tyson the victim of the changing politics of rape?

The first time I met Mike Tyson was the night before he was to be sentenced and sent to prison. Mike was deciding whether to accept Don King's recommendation that he hire me as his appellate lawyer. He was in a hotel room in Indianapolis, Indiana, with his large entourage. After briefly discussing the case and the appeal, he turned to me and asked point blank, "So professor, I have two questions. Do you believe I'm innocent and what do you think of me as a person?" I replied to the first question that I had no basis at that time to form a judgment about his guilt or innocence since I had not yet read the transcripts. He replied, "ok that's the lawyers' talk. I understand. Now, man to man, what do you think of me?" I looked him straight in the eye and said: "If you're innocent, you're a real schmuck." He looked back at me and said, "You calling me a schmuck?" I said, "Yes, if you're innocent then you're a schmuck for going up to a hotel room at three o'clock in the morning with a woman who you didn't know, without any witnesses, thereby putting yourself in a position where she could accuse you of so serious a crime." He turned to several members of his entourage and said, "This man's calling me a schmuck. He's right. I want to know why you guys didn't call me a schmuck. He's hired. I need somebody who's willing to call me a schmuck when I am a schmuck."

That was Mike Tyson - - direct and to the point. While preparing his appeal I went to visit him in prison several times. The prison rules required that we sit side-by-side facing a camera. Whenever I would say something he agreed with, he would give me a gentle love tap on my arm or on my thigh. A love tap to him! When I got back to my hotel I was black and blue.

One day I saw a guard taunt him mercilessly and watched him strain to control himself. He did hard time in prison. I sent him books to read—about subjects that interested him such as ancient Egypt, the "roaring 20s" in the United States, and the history of boxing. When I would come to visit him, he asked me to test him about what he had read. He passed with flying colors.

Mostly we talked by phone about his appeal. Mike would have to wait in the phone line for hours to call me. Once, as I picked up the phone, he heard my baby daughter crying in the background. He told me to "take care of your kid" and he would call back later. He was always considerate.

Some people find it hard to believe, but Mike was a wonderful client, always polite, always honest, always honorable, and always thinking of others. He ran out of money during the appeal and I continued to represent him without pay. I never thought I would see a penny of what he owed me, but several days after he fought his first fight upon being released, he sent checks to every one of his lawyers for the full amount that he owed.

Tyson's trial had been a disaster. His prominent white collar trial lawyer had little experience in rape cases and didn't seem to like Tyson. He made mistake after mistake, both tactical and legal. The legal expert who reported on the trial for USA Today described the trial as "filled with mistakes, omissions and elementary errors" by Tyson's trial lawyers. I had followed the trial in the media, but I didn't realize what a terrible job his chief trial counsel had done until I reviewed

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the transcript. After agreeing to do the appeal, I decided to start from scratch with a new investigation. My goal was to secure a new trial for the ex heavyweight champ.

I assembled a superb team, which included my brother Nathan, my son Jamin, who had just completed a two year stint with the New York Legal Aid Society following his graduation from Yale Law School and a clerkship with the Chief Judge of the Federal District Court in Massachusetts. It also included my co-clerk for Justice Goldberg, who was a leading Indiana lawyer.

On the basis of our investigation and the new evidence we uncovered, I was convinced that Mike Tyson did not intend to rape Desiree Washington, and that he got a bum rap.

Several of the jurors agreed with me after learning of some of the new evidence. One of them said: "We [the jurors] felt that a man raped a woman... In hindsight, it [now] looks like a woman raped a man."

Another juror told the media that Desiree Washington, the pageant contestant who accused Tyson of raping her, "has committed a crime."

In order to understand why these jurors had such dramatic second thoughts about their verdict, we must go back to the trial itself and see how Desiree Washington, the alleged victim, was portrayed to the jury. During the trial she did not even allow her name or face to be revealed. She was presented as a shy, young, inexperienced, religious schoolgirl, who wanted nothing more than to put this whole unpleasant tragedy behind her.

Her family said they had hired a lawyer for the express purpose of helping to "ward off the media," because she did not want any publicity. She said she had no plans to sue Tyson and she had certainly not hired a lawyer for that purpose. When she and her family were asked whether they had a "contingency" fee agreement with any lawyer -- the kind of agreement traditionally made with lawyers who are contemplating a money suit for damages -- they all claimed not even to know what that term meant. When Desiree's mother was asked whether there had ever been any "discussions" with lawyers about fees, she said no, and she swore under oath that there were no "written documents relating to the relationship between you and [the lawyer who was supposed to ward off the media]."

Thus, as one of the jurors later put it: "When she [Washington] said she wasn't looking to get any money," I believed her and "thought then that we made the right decision." Another juror agreed, saying that at the trial, "she was very, very credible," because she had no motive to lie, since she was not intending to collect any money, or to benefit in any way from Tyson's conviction.

Desiree Washington also pretended -- with the complicity of the prosecutor -- that she was an inexperienced virgin before she met Tyson.

She testified that she was "a good Christian girl," and the prosecutor told the jury that she expected to go home after her date with Tyson "the same girl" that she was before her date, namely a virgin. She was an "innocent, almost naive" girl, according to the prosecutor. She knew

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how to "handle the hometown boys" if they even dared to try to cop a "quick feel," thus suggesting that she did not even neck or pet. As a waitress in Washington's hometown put it: "America thought this girl was a blushing, virginal type." (Under the rape shield law, Tyson's lawyer could not counter this portrayal. The prosecution thus used the rape shield law as a sword to present a one-sidedly false picture of the alleged victim.)

The prosecutor also argued to the jurors a variation on the "dressed-for-sex" theory, telling them that Washington went to meet Tyson wearing "little pink polka dot panties," rather than "Fredericks of Hollywood underwear," thus showing that she did not put on the kind of sexy underwear that women wear when they are out to have sex. (He neglected to tell the jury that Desiree's sexy underwear was all still wet from having been washed, and that her only dry pair—when she went to meet Tyson at 2 o'clock in the morning—was the one with polka dots.)

Finally, Desiree Washington solidified her image as a totally non-sexual platonic date who only wanted to go sightseeing with Tyson at two o'clock in the morning, by describing to the jury how she responded when Mike tried to kiss her as she entered his limousine for the ride to his hotel: "he went to kiss me and I just kind of jumped back."

Thus, the jurors were presented with the picture of a zealously religious, young, naive "virginal type" girl, who does not kiss, neck or wear sexy underwear, and for whom a lawsuit or media attention were the furthest thing from her mind.

No wonder the jurors believed her testimony, in what was a classic "she said" -- "he said" credibility contest.

We discovered during our investigation that virtually everything "she said," and her family corroborated, was highly questionable if not outright false. The Washington family did not hire a lawyer to "ward off the media" as they claimed, but rather to do precisely the opposite—namely to sell Desiree's story for huge sums of money. After the trial, Donald Washington, Desiree's father, publicly acknowledged that he discussed movie rights with the very lawyer whom he falsely told the jury he had hired solely to "ward off the media." In an interview he gave after the trial he admitted that he: "I expected to get money from movie rights, that's where the money is."

It also now turns out that the trial testimony denying any "contingency" fee agreement and any "written document" between the Washingtons and the lawyer concerning a planned money damage suit against Tyson was categorically false. Immediately after Desiree Washington's sexual encounter with Mike Tyson, the Washington family went to see a high-powered lawyer in their home state of Rhode Island. The discussion turned instantly to how the Washington family could parlay Desiree's date with Tyson into big bucks. They talked about movie rights, book deals and multimillion-dollar lawsuits. The lawyer carefully explained what a contingency fee agreement was and the family agreed with this arrangement. Desiree signed a contingency fee agreement, which her father and mother officially witnessed. The family was given a copy of this document.

The prosecutor was fully aware of the contingency fee arrangement. Indeed, during the prosecutors' "rehearsal" cross examination of Desiree Washington, in preparation for her actual in

HOUSE_OVERSIGHT_017322

court cross examination by Tyson's trial lawyer, the issue of the contingency fee agreement was explicitly raised. Yet, the prosecutor did everything in his power to keep the truth from coming out. He arranged for the Washington family to take the courtroom pass away from their lawyer, so that he could not attend the trial and feel ethically compelled to stand up and correct the Washingtons' testimony when they falsely denied any contingency fee or written agreement with him. (The prosecutor also had an ethical obligation to correct the false testimony given by his witness. Indeed he had an even greater obligation because he was the one who put on the testimony that he knew was false.)

The ploy worked—at least for a while. But the Rhode Island lawyer soon learned that his clients were not being straight with the jury. He began to worry that he might have an ethical obligation to blow the whistle on his clients, as lawyers do when their clients or witnesses are committing perjury. So the lawyer went to the Rhode Island Disciplinary Counsel—the attorney in charge of enforcing the ethical rules that govern lawyers—to obtain guidance. She referred the matter to the Rhode Island Supreme Court which issued an unprecedented opinion concluding that "the attorney had an obligation to disclose the existence of his contingent fee agreement to the [Indiana] criminal trial court." The state's highest court found that the agreement's "existence might well have had a bearing upon the jury's determination." The Rhode Island court then directed the attorney to disclose to the Indiana court the information that the Washingtons had withheld. He did so but the Indiana courts ignored this new information, despite the conclusion of the Rhode Island Supreme Court that it might well have affected the jury's verdict. Indeed, what could be more important than the fact—unbeknownst to the jury—that Desiree Washington had millions of dollars riding on whether Mike Tyson was convicted or acquitted, since without a conviction, it would have been difficult for her to collect monetary damages or sell her story to the media. The only thing that might have been more important is that she had been untruthful about her financial motive for accusing Tyson of rape.

It also turns out that Desiree was hardly the naive virgin she pretended to be. Once her name was disclosed following the trial, numerous witnesses confirmed that Desiree Washington was a sexually active young woman who hung out in nightclubs. Indeed, her lawyer implied to the media that Washington had been examined for venereal disease a month <u>before</u> she had sex with Tyson and that she was "not sexually active" <u>during</u> that brief period.

Not only was the jury misinformed about Desiree Washington's general sexual proclivities, they were also denied the most crucial eyewitness testimony of what she was doing just minutes before she went to Tyson's hotel room. She denied necking with Tyson in the limo on the way to the hotel. Indeed, she testified that she rebuffed his attempt to kiss her and "jumped back." Tyson's testimony was precisely the opposite. He swore that when he kissed her, "she kissed me," and that on the drive to his hotel, he and Washington were "kissing, touching." The jury obviously believed Desiree's testimony because Tyson's was uncorroborated and self-serving.

But it turns out that there were three eyewitnesses -- disinterested outsiders who happened to be in front of the hotel when the limo pulled up -- who saw what was going on inside and outside the limo just before Tyson and Washington left it to go to his hotel room. They saw them necking -- "they were all over each other" -- and holding hands on the way to the hotel (Desiree denied both necking and holding hands).

HOUSE_OVERSIGHT_017323

Of course, the fact that they were necking and holding hands doesn't preclude the possibility that Desiree may have said no when it came to intercourse. Nor does it mean that a woman who engages in sexual foreplay may not refuse further sex at any point. Of course she may, and if the man then forces her to have sex without her consent, it is rape. But the testimony of these eyewitnesses shows three important facts: the first is that Washington was lying when she denied necking with Tyson; the second is that Tyson was telling the truth when he testified that they were necking; and third, that just moments before the hotel door closed behind them, Washington was involved in sexual foreplay with Tyson.

Despite the importance of this eyewitness testimony by three disinterested witnesses in an otherwise uncorroborated "she-said, he said" credibility contest, the trial judge adamantly refused to allow the jury to hear the evidence of the three eyewitnesses. She ruled that the prosecution—which admitted that the testimony was "pivotal" --would have been "prejudiced" by its late disclosure. This was absurd because the three witnesses had come forward before the close of the prosecutor's case—after learning that Desiree Washington had denied necking with Tyson—and well before the defense case even began. There was plenty of time for the large team of prosecutors to prepare to cross examine them, and if they needed more time, the judge could have briefly recessed the trial. In any event, surprise defense witnesses are common in criminal trials, and the Bill of Rights explicitly guarantees a criminal defendant the right to call "witnesses in his favor." Despite this the judge denied Tyson the right to call these three pivotal witnesses. So much for the "search for truth."

In all my years of practice and teaching criminal law, I had never heard of a case in which a judge had refused to allow a criminal defendant the right to call eye witnesses who could help establish his innocence. The law, including the law of Indiana, clearly supported Tyson's right to do so.

It should come as no surprise, however, that this particular trial judge made such a bizarre and unprecedented ruling to exclude such relevant and exculpatory evidence. The trial judge, Patricia Gifford, who used to be a full time professional rape prosecutor, had prosecuted more than 50 rape cases. She expressed extremely strong feeling about rape, especially what has come to be called "date rape." Indeed, she lectured the lawyers against even using the term date rape in her courtroom and refused to give the traditional date rape instruction, which requires acquittal if the jury concludes that the defendant reasonably believed the woman consented, even if she did not intend to consent.

After reading the transcript, it became clear to me that Patricia Gifford did not see her role in rape cases as being a neutral judge, but rather as another prosecutor, with a stake in the outcome. She wanted to see the most famous "rapist" in Indiana history convicted and put away. Judge Gifford made virtually every important ruling in the prosecutor's favor, including the exclusion of those three "pivotal" witnesses who would have won the case for Tyson. She also excluded evidence—under the rape shield law—that, would have proved that Desiree Washington had a strong motive to frame Mike Tyson for rape. (More on this soon.)

HOUSE_OVERSIGHT_017324

In light of Judge Gifford's attitudes and professional background in regard to rape, it might be wondered how the prosecution got so lucky as to have her as the judge in the Tyson case. Luck, however, played no part in the selection. Using Indianapolis law and practice, the prosecutor was able to pick the judge who will try a criminal case. I am aware of no other place in the free world where a prosecutor has this ability, other than in Indiana. And the prosecutor picked wisely, if not fairly.

Several distinguished commentators—including Indiana's leading authority on criminal procedure—concluded that the trial judge committed a serious legal error by excluding the three crucial witnesses. Articles in *The American Lawyer* and the *New York Law Journal*—reached the same conclusion, as did most of the lawyers and law professors with whom I conferred.

Despite the strong issues that she knew could be presented on appeal, Judge Gifford denied Tyson bail pending appeal, apparently accepting the prosecutor's silly argument that this celebrity defendant would somehow sneak away and flee to a country with no extradition treaty with the United States. She also ruled that all the appellate issues would be "frivolous." Finally, as if to prove she was an advocate rather than a judge, she actively lobbied in the media against any reversal of the conviction, convening a press conference and, according to news accounts, "express[ing] some worries about having her ruling overturned, especially in an internationally publicized case in which prosecution costs alone reached $150,000." She commented on "the enormousness of the reversal of the a case that would have to be tried again like this." We were advised by several local lawyers that she also personally lobbied the appellate judges against reversing the conviction. These actions were completely unethical, and in direct violation of the Code of Judicial Conduct, but apparently acceptable in Indiana.

The case was a close one at trial. Judge Gifford's one-sided rulings shifted the balance against Tyson in what was otherwise a difficult prosecution. Even without all this exculpatory evidence, the initial jury vote was six to six. Eventually, the six who voted for conviction were able to persuade the six who voted for acquittal that there was no reason to disbelieve Desiree Washington's account. But that account, especially when reviewed against the background of the information that is now known, is extremely unconvincing.

What then was Desiree Washington's account of what happened that night?

Although Desiree Washington insisted she had no interest in having sex with Tyson, she acknowledged that she led him on and that she acted like a groupie would behave. The director of the Miss Black America Pageant, in which Desiree was a contestant, even criticized her for behaving like a "groupie." She sat in his lap and hugged him during the pageant rehearsal when they first met. She showed him a picture of herself in a bathing suit, gave him her hotel room number and agreed to go out with him. She took his call at 1:45 in the morning and agreed to come down to meet him in his limo. She then went into her bathroom and put on a panty liner to keep her expensive borrowed dress from becoming stained by the beginning of her menstrual flow during the partying and sightseeing she said she expected to do over the next several hours. She willingly accompanied Tyson to his hotel room at 2:30 in the morning, sat with him on his bed, and she then went into his bathroom and removed her panty liner without replacing it. How did she expect to prevent her borrowed $300 outfit from becoming stained over the next several

HOUSE_OVERSIGHT_017325

hours of anticipated partying and sightseeing? The most plausible explanation for the removal and non-replacement of the panty liner was that it was done in anticipation of consensual sex.

Moreover, if she did not want to have sex, she could easily have locked herself in the bathroom and called for help from the bathroom phone. The bathroom had a working lock and a phone. Instead, she willingly came out of the bathroom, passed a door leading to the outside corridor and went back to Tyson's bedroom, where they had sex on the bed.

According to Washington's own testimony, Tyson asked her, during their sexual encounter, whether she wanted to "get on top" and she responded "yeah," and proceeded to get on top—not the usual position for a rape victim!

Mike Tyson had every reason to believe that Desiree was just another groupie looking for sex with a celebrity athlete. The "rules" of groupie sex are well known to both groupies and athletes. The groupies want sex with superstars in exchange for bragging rights that they slept with the "high-scorer," the "champ" or the "star." Some, like Washington, hope that the star will fall for her and make her rich and famous. Indeed, several other contestants - - friends of Desiree - - testified that after meeting Mike Tyson, Desiree bragged to her friend that she was going out with him because "this is Mike Tyson. He's got a lot of money. He's dumb. You see what Robin Givens got out of him." She told another friend that "Robin Givens had him. I can have him too ... He's dumb anyway." To her roommate, she said: "Mike doesn't have to know how to speak well. He'll make all the money and I'll do the talking."

Tyson testified that he was blunt, direct and unambiguous about what he wanted from Washington. When he asked her out—in front of a witness—she suggested a movie or dinner. But he said no: "That's not what I [have] in mind... I want you. I want to fuck you." The witness—Johnny Gill, a singer—testified that Tyson said, "I want to fuck." Gill later asked Tyson how he could be so straightforward with women, and Tyson explained that he is used to saying what is on his mind.

Desiree Washington knew full well that Mike wanted to have sex with her when she went to his hotel room after two o'clock in the morning. Yet she testified that she had no idea that Tyson had any interest in having sex. How any rational person could believe that, especially in light of what is now known about Washington, is mind-boggling. She may have been disappointed and hurt when he treated her like a groupie—a one-night stand—rather than as a continuing romantic interest. She realized that she could not exploit his sexual interest in her the way Robin Givens had done, and she was afraid of the reaction of her friends and family when it became known that she had indulged in a one-night stand with Tyson. A friend of hers told the press that Desiree "only cried rape" after her furious father found out she'd had sex with Tyson.

Our investigation revealed that she had had previously engaged in consensual sex with an athlete—the high school football hero—and when her father found out about it and threatened to beat her, she lied to her father and told him she had been raped, thus falsely accusing the football player.

HOUSE_OVERSIGHT_017326

Our investigation also uncovered that Desiree's father had a history of violence toward her. According to a news report, Desiree's mother had her father arrested and charged with assault and battery against Desiree. "In her account," reported in the media, "Desiree alleged to the police that her father 'hit me and pushed my head under the sink…He continued slamming my head into the wall and the floor. I freed myself and reached for a knife to protect myself.'" A sworn statement by the mother reportedly said that her husband "flew off the handle" when Desiree told him "she had lost her virginity."

In order to avoid his fury once again, this time for having consensual sex with Tyson, she apparently decided to cry rape once again. At first, she said that he had "tried" to rape her. She initially denied having sex with Tyson. Then she said they had sex "on the floor." She told the female chaplain at the hospital that there had been some "participation" and consensual physical involvement on her part, before he forced her. Finally, she settled on the account she gave at trial: that he had raped her on the bed with no prior consensual involvement on her part.

No one except Tyson and Washington knows exactly what went on behind the closed doors of his hotel room. There was no videotape. Nor was there any physical evidence to corroborate Washington's unlikely story. Indeed, the available physical evidence completely undercuts her story. She was wearing a sequin-studded outfit, which she claims Tyson "yanked" off her as he "slammed [her] down on the bed." If that had happened, there would have been sequins all over the hotel room. Indeed, at the trial, when the dress was gingerly introduced into evidence, sequins fell off in the courtroom. But only one sequin was found in Tyson's hotel room after the allegedly forcible rape.

Nor were there any bruises—external or internal—found on Ms. Washington that were consistent with her account of how Tyson had "forced" her to have sex. She testified that Tyson "slammed [her] down on the bed," got on top of her, held her down with his forearm across the chest, and forced himself inside her.

Had the 230-pound, muscular Tyson done that to the 105-pound, slight Washington, there would have been bruises, welts, contusions, and even broken ribs. Yet there was not even the slightest bruise on Washington's body when she went to the hospital just hours after the sexual encounter. The doctors found only two tiny microscopic abrasions, which, according to leading experts, are perfectly consistent with consensual sex—especially if the man has a larger-than-average penis or the woman a smaller-than-average vagina. Such tiny abrasions are also more likely when two people have consensual sex with each other for the first time and are not used to one another's sexual movements and desires. Mike Tyson's account of what occurred, on the other hand, was entirely consistent with the physical evidence. And it would have been corroborated had the judge not excluded the three objective eye witnesses who saw them necking and kissing just moments before they went to his hotel room.

Despite the absence of physical evidence to corroborate Desiree Washington's story, the jury eventually believed her because there was no compelling reason to disbelieve the testimony of a young, religious, sexually inexperienced "girl" who had no possible motive to put herself through the agony of a rape trial. But it turns out that there were very good reasons for not believing her.

HOUSE_OVERSIGHT_017327

As one juror subsequently put it: "She was very, very credible [at the trial], but now she's not credible at all. Right now, I wouldn't believe anything she said. I would sign an affidavit that if we had known about the money, I couldn't have voted to convict him. Mike Tyson deserves a new trial."

In light of the numerous errors made by Judge Gifford at the trial, this should have been the easiest appeal I ever argued. The law, the new evidence and the judicial and prosecutorial errors made at trial, clearly required a reversal of the conviction and a new trial.

Legal experts who read our brief and heard the oral argument concluded that we should win the appeal. The law was on our side. The facts were on our side. And our briefs and arguments were much stronger than those of our opponents. As the legal expert who reported on the trial and appeal for USA Today put it after watching the appellate argument:

> "Ex-heavyweight boxing champion Mike Tyson had his best day in court Monday.
>
> As Tyson completed day 328 of his six-year prison term for rape, famed appellate lawyer Alan Dershowitz vigorously attacked: Tyson's accuser, Desiree Washington; trial judge Patricia Gifford; and the Marion County (Ind.) prosecutor's office.
>
> In spite of a trial record filled with mistakes, omissions and elementary errors by the fighter's ex-defense team, Dershowitz and colleagues argued that Tyson's conviction must be set aside…The major arguments cited by Mike Tyson's attorneys Monday in appeal of his rape conviction [were the following]:
>
> > -Trial judge Patricia J. Gifford erred by blocking testimony from witnesses who might've challenged the credibility of accuser Desiree Washington
> > -Gifford's refusal to allow the jury to hear an instruction regarding "mistake of fact, or "reasonable belief" concerning whether Tyson believed Washington wanted to have sex with him.
> > -Gifford should have prevented jurors from listening to Washington's call to 911 reporting the alleged attack. Defense claims Washington invited the attack to sue Tyson, and that the call might have been part of the scheme.
> > -The prosecution committed misconduct by concealing from the defense an attorney-fee agreement for book and film rights to Washington's story.
> > -Prosecutors manipulated court selection procedure to pick a supposedly sympathetic judge.
> > -The judge should have stopped prosecutors from arguing before the jury that the defense is not obligated to tell the truth.
>
> …
>
> "Tyson got his money's worth Monday…Reversal of a criminal conviction by a jury is rare, but Tyson's attorneys might have successfully pinpointed the crucial issues that will free him."

HOUSE_OVERSIGHT_017328

I am convinced—and I think most observers were convinced—that if Tyson had gotten a second trial with all the new evidence before the jury, he would have quickly been acquitted. But this was Indiana. They had a trophy in Tyson. And they had a trial judge determined to prevent a new trial that would have embarrassed her and freed Tyson. The conviction was eventually affirmed on a two to two tie vote by the Indiana Supreme Court, with the chief justice disqualifying himself from participation in the decision on a phony pretext. He sent his wife to speak to me during a Yale Law School event. She said, "your New York style won't work in Indiana." I asked who she was, and when she identified herself as the wife of the chief justice, I quickly moved away saying, "We can't talk." He used this contrived encounter as an excuse to disqualify himself. I believe that the real reason he got out of the case was because his own previous decisions would have required him to vote for reversal, and if he did, the public would be reminded that he himself had been accused of sexual impropriety with a law clerk by a fellow judge.

In my half century of practicing law throughout the world, I have never encountered a more thoroughly corrupt legal system than I did in 1992 in Indiana and a less fair trial and appeal than those accorded Mike Tyson. If hard cases make bad law, then the Tyson case proves that unpopular celebrity defendants often receive bad justice. If Mike Tyson had not been a celebrity, with a reputation for toughness, and if he had a zealous lawyer experienced in rape cases and a fair judge, he never would have been convicted of a rape he didn't commit. If he had been convicted in a different state, or at a different time, his conviction would have been reversed. The deck was stacked against Tyson and he paid a heavy price—loss of his career, and several years of hard prison time—for a consensual one night stand with a young woman who apparently regretted her decision and then decided to exploit it for money.

Different perceptions on Rape

My decision to represent Mike Tyson on appeal generated considerable controversy and some outright animosity. Rape is a highly emotional issue, like abortion. Extremists on both sides of such issue tend to see things in black and white terms.

It used to be thought that there were some lines that were crystal clear. Remember the old quip about not being a "little bit pregnant" or a "little bit dead"? But today it may matter greatly whether a woman is a little bit pregnant or a lot pregnant. The right to have an abortion may turn on the trimester of the pregnancy. Even the issue of what constitutes "death," that absolute of absolutes, may now be hotly disputed in close cases.

Polemicists and absolutist on all sides of these and other gray-area issues refuse to recognize matters of degree. To an absolute right-to-lifer, life begins at the moment of conception and is as sacred then as it is at the moment before birth. To an absolute pro-choicer, a woman's right to terminate pregnancy is as compelling in the last trimester as in the first. Some radical feminists, such as Judge Gifford, regard acquaintance rape in which the man honestly but mistakenly believes his friend has consented as indistinguishable from a stranger rape at knife point. A letter to the editor critical of columns I wrote on date rape made the point as follows:

> Dershowitz further endears himself by explaining that date rape and acquaintance rape is an area in which differing perceptions may produce inadvertently false testimony about

HOUSE_OVERSIGHT_017329

> actions that fall into a gray area. Let me explain something: No means no. There is no gray area.

But in many date rape situations, the alleged victim didn't say no. Nor did she say yes. There are grey areas.

I received countless letters, phone calls, and personal attacks denouncing me for agreeing to represent Tyson on his appeal. Here are some excerpts from the letters:

> It's too bad that a punk like Tyson can afford to pay for the top legal representation…but since you had the right to refuse to represent him, I fault you!
>
> It saddens me that you yourself continue to worship at the altar of the great god of violence and fear of women.
>
> Mr. Tyson is a convicted rapist with obvious psychological problems who needs a psychiatrist not an attorney who will argue excuses for his behavior! If, through your efforts, Mike Tyson is not held accountable for his behavior, then you do a disservice to all women and we become victims of a pandemic legal system gone awry!
>
> Mike Tyson? He doesn't deserve the best—it's a shanda!! ("Shanda" is the Yiddish for "shame.")
>
> When you choose to represent someone like Mike Tyson, you attach the Jewish community to your action…I now find it hard to understand how you can mount a passionate defense for a convicted rapist.
>
> Shame on you, Alan Dershowitz, if you handle this appeal.

The most surprising response came from some Harvard Law School students, who should understand that our adversary system of justice requires that all convicted defendants be accorded a zealous appeal.

I don't know what actually took place in Mike Tyson's hotel room on that fateful night, but it may well have fallen into the category of gray area. He believed that she wanted to sleep with him. She may have been ambivalent or sending mixed signals (though I doubt it). It was a close case and Tyson was entitled to have his defense presented vigorously, both at trial and on appeal.

Yet several of my students strongly objected to their teacher representing "a convicted rapist." A couple of them even threatened to file "sexual harassment" charged against me because my representation of Tyson created a "hostile environment" for students who believed he was guilty.

The protest then broadened to the way I discussed the crime of rape in class. In my criminal law class, I teach the law of rape as an example of a cutting-edge subject that poses a sharp conflict between the rights of defendants and their accusers. As usual, I take a "devil's advocate" position on politically correct issues. For example, although I personally oppose capital punishment, I

HOUSE_OVERSIGHT_017330

argue in favor of the death penalty and ask the students to come up with better arguments. Unless they can, they will never be able to persuade the majority of Americans, including judges, who favor the death penalty.

Similarly, in the area of rape I present positions that students are reluctant to defend but which many Americans believe. I point out that according to FBI statistics, rape is both the most underreported and the most overreported crime of violence: For every reported rape there are an estimated ten than are not reported; but at the same time, a significant percentage of all reported rapes turn out to be unfounded, and this rate of false reports is higher than for other violent crimes.

All in all, my classes on rape tend to be controversial and emotionally charged. The majority of students seem to love the exchanges. Some even change the opinions they brought to class.

But my "devil's advocate" views on rape are "politically incorrect." Indeed that is precisely why I insist that they be expressed. The education of my students would be incomplete if they heard only the comfortably "correct" views. I tell my students that my job is not to make them feel good about their opinions but rather to challenge every view. That is what the "Socratic method" of law teaching is all about. That is also what the real-life practice of law demands.

A small group of students complained about my teaching rape "from a civil liberties perspective." I responded that it was important for the students to hear a variety of perspectives about rape, just as they hear, without objection, about other crimes. I also reminded them that the majority of students who speak in class present the "politically correct" views. I told them that the answer to an offensive argument is not to censor but rather to come up with a better argument.

One of the students then told me that several radical feminist students had met and decided on a course of action: they would use the student evaluations at the end of the semester to send a message to professors who don't follow the "party line" in teaching rape. She warned that I should expect to be "savaged" in this semester's evaluations.

When the evaluations arrived, I realized how dangerous it would be for an untenured professor to incur the wrath of the political-correctness patrol. Most of the students appreciated the diversity of viewpoints ("willingness to broach sensitive subjects and take unpopular viewpoints," "very good at presenting alternative views, "helped me get a less dogmatic view of the law," "open to criticism," "the most engaging class on campus," "the most intellectually honest professor I've had," "eagerness to present views with which he disagrees is a tremendous asset," "as far left as you can get [but] he'll be assailed by the politically correct for challenging their knee jerk reactions," "fair in presenting sides that usually aren't raised.") But this time, a small group of students used the power of their evaluations in an attempt to exact their political revenge for my politically incorrect teaching. One student said that I do "not deserve to teach at Harvard" because of my "convoluted rape examples." Another argued that women be allowed an "option" not to take my class because I "spent two days talking about false reports of rape." Another demanded that my "teaching privileges" be suspended. One woman purported to speak for others: "Every woman I know in the class including myself found his treatment of rape offensive and disturbing."

HOUSE_OVERSIGHT_017331

Although I always try to learn from my evaluations, I refused to be bullied into abandoning a teaching style that I believe is best designed to stimulate thinking. It takes no courage for me to exercise my academic freedom, since I have tenure. But if I were an untenured assistant professor, would I have the courage to risk the wrath of the P.C. cops? Are other, less established, teachers being coerced into changing their teaching by the fear of negative evaluations, which can be fatal to tenure? You bet they are, and it poses a real danger to academic freedom and good education. One criminal law professor told me that he searches for casebooks that don't cover rape: "If it's covered in the book and I skip it, I get criticized. And if I discuss it, I get criticized. This way I can blame it on the book." Talk about lack of courage!

I told the students who threatened to charge me with sexual harassment to go ahead and make my day. I would love to defend against such a charge, by demonstrating their misuse of the serious moral crime of real sexual harassment. I have represented women who have experienced real sexual harassment—including a graduate student who was explicitly told by her faculty advisor that the quality of her recommendation would depend on whether she slept with him—and I understand the enormous pain it can cause. In that case of quid pro quo sexual harassment, there was no grey area. The professor was as clear as could be. The student told me that she had really thought the professor liked her because of the excellent work she had done for him. Now she wasn't sure. She was devastated. Her self confidence was shattered. She wanted justice. She also wanted to make sure that her career as an academic would not be hurt by her refusal to "go along" with the offer of a good recommendation. That was real sexual harassment! Listening to views about rape that are different from your own isn't sexual harassment. It's called education.

I advised the sexually harassed student to file a complaint and bring a lawsuit. She agreed. I explained to her what a complaint would entail. She said she understood and was prepared to endure depositions, cross examinations, and other attacks on her. The next day she came to my office and told me she couldn't go through with it. She was terrified that it would destroy her prospects for an academic appointment to take on so influential and powerful an academic. She was also afraid that if she did nothing, he would carry out his threat to write her a bad recommendation.

I suggested that she talk to the professor and tell him that she had consulted me but had decided not to fill a complaint or lawsuit and that she hoped that he would give her the recommendation she deserved. She did that and eventually received a superb recommendation. She is now teaching at a fine university. So is he.

The students in my class never followed through on their threat.

Some women do lie

I continue to challenge the students by teaching both about cases in which guilty rapist are wrongly acquitted, and cases in which innocent people have been falsely accused of rape. I teach that when it comes to the serious crime of rape, it appears that both men and women lie, exaggerate, or misremember more often than with other, less emotionally charged, crimes. Here are some examples:

HOUSE_OVERSIGHT_017332

A Dedham, Massachusetts, woman accused four men of rape. Several days later the charges were dropped because the accuser recanted when approached by the district attorney with inconsistent forensic evidence along with information that she had falsely accused other men. The names of the falsely accused men were published in the press, but the false accuser's name was withheld.

St. Paul, Minnesota, police determined that within one week, two reported rapes were false. In the first case, a woman reported being abducted and raped by a man who hid in her car as she gave a talk to a chemical dependency treatment group at a local high school. When police checked the story, they found that the treatment group had never heard of her and that she didn't own a car. In the second case, a sixteen-year-old girl claimed to have been abducted at a downtown bus stop, imprisoned in a closet, and sexually assaulted by a man and his son over a thirty-three-hour period. In reality, the woman had been seen with her boyfriend several times over that thirty-three-hour period and had apparently been bruised by him. In both cases the women gave police detailed descriptions of their attackers and in both case the alleged assailants were black.

A seventeen-year-old girl from Washington State accused three twenty-year-old men of holding her down and raping her. Several days after the men were arrested, the woman recanted saying she had the whole thing up out of spite. In a statement to police, the woman admitted, "When I was leaving [he] called me a whore and a slut…and I became very angry and decided over the weekend that I would get back."

In Rhode Island, a college student reported that her former boyfriend raped her at gun point. She admitted that she made up the entire story after learning that the man she accused was 1,500 miles away at the time.

In New York, a woman who claimed she was raped at gun point in Central Park was arrested after it was discovered that she had filed eleven false reports of rape.

In Nebraska, a woman was required to broadcast an apology to a man she had falsely accused of raping her in order to "get the attention of her husband."

In Great Britain, a number of highly publicized rape accusations turned out to be false. A nineteen-year-old girl woman from Lincolnshire accused her former boyfriend of raping her after she spent the night with a different man. A jilted nurse falsely accused her former lover of beating her and also falsely accused his best friend of raping her. After analyzing several such cases, Angela Lambert, a British journalist, concluded that there are "plenty of reasons why a woman might falsely accuse a man of rape." She went on to argue that "the belief that all women are truthful and all men are rapists does not prove us good feminists; quite the contrary. It reveals us as prejudiced, narrow-minded, and as bigoted as any racist."[80]

[80] In recent years numerous inmates serving time for rape based on eye witness identification have been exonerated by DNA. In these cases, the rapes occurred but the victim misidentified the rapist. Many of these cases involved black defendants misidentified by white victims.

HOUSE_OVERSIGHT_017333

The reality that rape is the most falsely reported of crimes must not blind us to the equally important reality that rape is also the most underreported of crimes. Many rapists still go free and repeat their predatory crimes.

Moreover, "acquaintance" or "date" rape is an area which differing perceptions may produce inadvertently false testimony about actions that may well fall into the gray area between aggressive seduction and criminal sexual assault. When it comes to sexual encounters, both men and women often "remember" differently from what a videotape would show. The truth-testing mechanisms of our criminal justice system must not be compromised in the service of some "politically correct" notion that when it comes to rape only women always tell the truth.

This bias is an wrongheaded as the anachronistic bias, reflected in the writings of Wigmore and others, that men are more likely to tell the truth than women.

A highly publicized case in 2011 may well illustrate the reality that both men and women may lie, even when a rape has occurred. A cleaning woman in a fancy New York hotel accused Dominic Strauss-Kahn—then the head of the World Bank—of forcing her to have oral sex with him. His lawyers first denied that there had been any encounter, claiming that he had an alibi. He was having lunch with his daughter at the time. When his DNA evidence was found on her underwear and in the area of the room where she said he ejaculated, his lawyers changed their tune, admitting the oral sex but insisting it was entirely consensual. DSK, as he was known throughout the world, was indicted for sexual assault.

Within days, the credibility of the alleged victim began to fall apart. She had made false statements on her application for asylum, including a claim that she had been gang-raped back in Guinea, where she grew up. A recorded phone conversation between her and a friend in prison also suggested, though her words (translated from a local African jargon) were ambiguous, that she may have had a financial interest in suing the wealthy man who she said assaulted her.

Eventually, the Manhattan District Attorney decided to drop the charges. I thought that this was a perfect teaching vehicle and I invited the alleged victim's lawyer to join in the class in which I assigned the D.A.'s memorandum seeking dismissal. It was a spirited class, after which several students told me they had changed their minds—both ways. One student described it as "Rashamon—first, I thought he was guilty, then not guilty, then guilty and finally 'I'm not sure.'" I pressed the students on what the appropriate standard should be for a D.A. to drop a rape prosecution when he had doubts about the alleged victim's credibility. Some argued that as long as he believed the crime had occurred, he should let the jury decide, based on all the evidence, including the DNA and other circumstantial proof. Others argued that he should never bring a prosecution unless he has complete faith that the alleged victim is being truthful.

In order to put some flesh on the bones of these abstract arguments, I decided to role-play the prosecutor's closing argument. Here is what I said:

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"The alleged victim in this case says she was forced by DSK to give him oral sex. His defense counsel have argued in the press, and in their briefs and in their opining statements that the oral sex was entirely consensual.

In deciding which version is true and which false, I want you to accept the fact that the alleged victim has told many lies in the past and can't be completely trusted. In other words, if there were no other evidence or arguments beyond the uncorroborated word of the victim, there would be a reasonable doubt of DSK's guilt. But the totality of the evidence and arguments in this case establish that it is far more likely that the oral sex in this case was forced rather than consensual.

First, I want you to look at the participants. She is an attractive young woman who was wearing two pair of pantyhose and an additional undergarment. The defendant's DNA was found on the elastic of her undergarments, strongly suggesting that he was trying to pull them off.

You have seen the naked photograph taken of the defendant following his arrest, when he was examined by doctors for bruises. Look at that photograph and imagine what the alleged victim in this case saw, when DSK walked out of the shower and into the bedroom naked, as his lawyers acknowledge he did.

In order to accept the defense theory of consensual oral sex, this is what you have to believe.

The alleged victim looked at this overweight, out of shape, 6__ year old man and decided, without any words spoken, that she was so sexually attracted to him, that she simply had to give him seven minutes of oral gratification in the corner of the bedroom. What was in it for her? According to the defense theory, only the sexual pleasure of giving a short, fat, old man oral sex.

That, in essence, is the defense lawyers' version of what took place. Now, we all know that the burden of proof is on the prosecution to prove our case beyond a reasonable doubt, and that the defendant need not take the witness stand nor offer any proof of innocence. But in this case, the defendant, because he is a public figure, has put forward a defense—actually two defenses—though his lawyers in the courtroom and in the court of public opinion. The first—that he wasn't even there at the time because he was lunching with his daughter—has been withdrawn. His current defense—his theory of innocence—is that she wanted to give him oral sex, that it was entirely consensual. If you believe that—or even if you have a reasonable believe that she might have offered him oral sex because she was so attracted to him—you should acquit. But if you believe, beyond a reasonable doubt, that the defense theory of consensual oral sex is utterly implausible, then you should look at the totality of the evidence corroborating the alleged victim's account—that he forced her to give him oral sex—and decide whether it establishes beyond a reasonable doubt that her account is true.

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> This corroborative evidence includes the location of the DNA in the room and on her undergarments; the shoulder pain she reported to the doctors; the time sequence; the absence of evidence that she knew who DSK was at the time of the encounter; and a comparison between the two participants, in terms of their ages, appearances, status and what each had to gain or lose by a consensual sexual encounter in that room.
>
> When you consider the totality of the evidence and arguments offered in this case, I am confident that you will have no reasonable doubt that the oral sex in this case was not consensual.

After hearing this "mock" argument, many of the students concluded that the D.A. acted harshly in dismissing the case. Most believed that this was a case in which both the woman and the man had lied, but that the man's lies were far more relevant than the woman's on the issue of consent.

By any objective standard, the case against DSK was far stronger than the case against Mike Tyson, since there was far more corroborative evidence in the former than in the latter. Moreover, Tyson's alleged victim was caught in a series of lies that directly related to her account of the alleged rape and her motive for bringing the charge.

Yet Tyson was convicted and the case against DSK was dropped. Such are the vagaries of rape prosecutions in which objective truth can rarely be established because when it comes to sex both men and women often distort reality.

Male "Victims" Lie Too

Early in my career, I learned that men also lie, both as defendants and as alleged victims in rape cases. One such case took place in Provincetown, Massachusetts. A young woman who was related to an associate of one of my legal colleagues was engaged to a man and they were vacationing together in Provincetown. The man went out for a stroll and came back several hours later upset and disheveled. His fiancé asked him what happened and he told her that he was invited to go on a boat ride with a group of guys and one of them proceeded to rape him while the others did nothing to stop him. He described the rapist as a black man wearing a shark tooth around his neck. He reported the alleged rape to the police who immediately issued an all points bulletin describing the alleged rapist.

The police interrogated the alleged victim, who persisted in his description of the sexual encounter as rape. His fiancé called my colleague and asked her to advise him. She sought my assistance. We went to the police station where we observed the police interrogation of the young man. As experienced defense attorneys, we soon became suspicious of his story, but we couldn't be sure.

My colleague asked to be alone with her client and questioned him about the circumstances of the encounter. Eventually the young man broke down and admitted that he had consented to the sexual encounter. He confided in her that he was uncertain about his sexuality, that he was about to be married, and that he wanted to test his attraction to men. He was ashamed of what he had done and didn't want his fiancé to find out, because he was afraid it would end their engagement.

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My colleague insisted that the young man had a moral obligation to his fiancé and a legal obligation to the police to be truthful.

At first, the young man refused, but my colleague, after conferring with me, told him he really had no choice, because she would be obligated to report his continuing crime of making a false report—a crime that endangered the life and liberty of anyone fitting the made-up description of the black man with the shark's tooth. (The young man didn't want to get the man with whom he had consensual sex in trouble, so he invoked the stereotype of the "black man" rapist.) My colleague told him that she would try to make a deal with the police under which he wouldn't be charged with a crime in exchange for telling the truth.

The young man then told the police and his fiancé the truth. The police called off the all points bulletin, and my colleague persuaded the police not to press charges against the young man. I do not know how the engagement worked out, but I do know that I learned a great deal from this experience about the complexities of sexual encounters and the need to subject claims of rape to the usual probing of the adversarial process.

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Rape by cocaine?

Is it possible for a man to rape a woman even if he uses no force, she offers no resistance and appears to consent? The answer is yes. Under the law, her consent must be freely given and not the product of drugs, alcohol or other factors that may negate voluntary consent. This is especially so, if the drug was administered to her by the alleged rapist without her knowledge. This is a serious problem not only when "date rape drugs" are slipped into an unsuspecting woman's drink, but when men deliberately get their dates drunk in order to lower their resistance. In the former situation the law is clear: It is not only rape; it is also a separate crime to drug a person against their will. In the later case, the law is less clear: A woman is generally deemed responsible for her own decisions—to drink, to get drunk, to agree to sex—but if a man takes unfair advantage of a woman's drunkenness, he may cross the line into rape. It's very much a matter of degree.

Several years ago, I worked on a case raising these difficult issues. My client was an accountant in a Western state, who had a reputation for seducing female secretaries who worked for him. Seduction, of course, is not a crime, although it may constitute sexual harassment if the seduce works for the seducer. In this case, the accountant's office was set more for up for seduction than for work. It was light on books and heavy on thick, plush rugs, couches, pillows and a fully stocked bar. On the evening at issue, a young secretary stayed late after work and had dinner and several drinks with her boss and a few of his friends. When the other guests left, they remained behind. He walked her into his office. She laid down on the rug. He undressed her, performed oral sex on her and then engaged in sexual intercourse. She did not object, and she appeared to be consenting—as others had apparently done in that office.

During the sexual encounter he asked her if she was using birth control. She said no, and as a result, he did not ejaculate in her. Afterwards, she dressed herself, he walked her to the parking lot, kissed her, and she then drove home.

The problem was that she was engaged to another man and when she got home, he sensed that something was amiss. After pressing her, she acknowledged having sex with her boss and said she must have been "drugged." They went to the police, claiming that her boss had given her a "mickey" which had denied her the ability to object or protest. She told the police that she couldn't say "no" even though she didn't want to have sex. She did, however, say "no" when her alleged rapist asked her if she was on birth control. She also told the police, and subsequently testified before the Grand Jury, that she had ingested no cocaine prior to the night at issue. So, when a test of her urine turned up positive for cocaine (though a test of her blood was negative), the police believed that the drug she had been given on the night at issue was cocaine.

The police decided to wire the woman and have her try to get her boss to admit that he had used cocaine to seduce her—that is, to rape her. The wired conversation consists mostly of the accountant bantering and joking with the secretary while trying to persuade her to continue to have a relationship with him. She repeatedly asked him whether he had given her cocaine, and he said no. At one point he jokingly said yes, but then immediately said he was "bullshitting her." When she asked him directly were you telling the truth or were you bullshitting, he responded, "I was bullshitting."

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The accountant was prosecuted for rape. The case was essentially was essentially a "he said"—she "suspected" contest, and there was some forensic evidence—the cocaine in her urine—to corroborate her suspicions. But the value of the forensic evidence depended entirely on whether she was telling truth about not having used cocaine prior to the alleged rape. If she had recently used cocaine, then the urine test would not establish that he had given her the drug, but would be equally consistent with her having ingested the drug on her own in the days or weeks prior to the sexual encounter.

We came up with the idea of testing her hair for traces of cocaine residue. In my research and teaching, I had come across scientific information that established that the past use of cocaine could be determined by a test of the hair. Indeed, the location of the cocaine residue in the hair could even establish the approximate timeframe of the cocaine use, if the hair was long enough, since hair grows at a fairly consistent rate. She had long hair.

Accordingly, we subpoenaed hair samples from the alleged victim. We learned that immediately upon receiving the subpoena, she rushed to the nearest barber shop—an establishment that cuts men's hair—and had a very short haircut, leaving an insufficient amount of hair to be tested. We tried unsuccessfully to find the barbershop and collect her hair. But her efforts to destroy the evidence upon receiving the subpoena certainly suggested that she had not been truthful about her cocaine use.

In the end, the jury, after hearing all of the evidence, concluded that there was a reasonable doubt about whether the accountant had placed cocaine in her drink, or whether she alone was responsible for her decision to drink alcohol and then engage in relatively consensual sex with her boss.

The acquittal certainly did not signify approval of the accountant's behavior. It was a correct application of the principle that proof of rape, like proof of every other serious crime, must be beyond a reasonable doubt, and that all doubts must be resolved even in favor of all defendants, regardless of what the jurors might think of their sexual morality.

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Too Young To Consent?

Under the law, can a rape occur even when both parties consent and even when the alleged victim is eager to engage in the sexual activity? The answer to this question is also yes. This is so because every state has a statutory age of consent, and anyone below that age (girl or boy) is irrefutably deemed incapable of consenting even if she initiated the encounter and was sexually experienced. The age of consent varies from state to state and from country to country. In some places, it is as low as fourteen; in other places, it is as high as eighteen. In some states, the age of the alleged rapist is also relevant. Under these "Romeo and Juliet" statutes, consensual sex between people of approximately the same age is not rape even if one of them is below the age of consent.

May contemporary commentators believe that the age of consent statutes in states that place it as high as 17 or 18 are unrealistic, since a large percentage of teenagers become sexually active at lower ages. Setting the age of consent higher than the norm accords prosecutors enormous discretion to pick and choose whom to prosecute among the many violators. I worked on such a case recently

My client in this case lived in a state in which the age of consent was seventeen, had a home in a country where the age of consent was fourteen, and also had a home in a state where the age of consent was eighteen. Unfortunately for him the sexual encounter for which he was charged took place in the state where the age of consent was 18. It was also a state in which the age when most teenagers became sexually active was far lower than 18.

My client was a wealthy businessman and philanthropist, who was single, middle-aged, and had many young girlfriends. He loved receiving massages, and his preference was to be massaged by young women in their late teen years. (He was not a pedophile, and had absolutely no interest in prepubescent girls).

My client had a large home with a swimming pool at which he liked to entertain willing young women who often sunbathed and swam topless. No crime there. His assistant arranged for the young women who would come and give him massages, which sometimes ended happily. The young women were paid for the services they rendered, which sometimes included some touching, but nothing beyond that. The assistant was instructed to ask for ID for each of the masseuses and to be certain they were all over eighteen. Because he paid handsomely for services – $200 for half an hour – young women were eager to provide them, and a few of them presented false IDs to conceal the fact that they were not quite 18. Some of them already worked as masseuses in what were euphemistically called "jack shacks," where they were paid to provide happy endings to massage customers. Others worked as strippers. And several were prostitutes who paid for their drug habits by selling their bodies for sex. None was sexually inexperienced.

One day, the wife of a policeman overheard their seventeen-year-old daughter talking on the phone about giving a massage to a middle-aged man. The policeman reported the incident to his chief, who then began a full-scale investigation.

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I was called by the man, whom I had known for several years, to help represent him in the matter. I conducted extensive research on the policy of the local prosecutor with regard to such cases, and learned that no one had ever gone to prison under similar circumstances. I then met with the prosecutor on several occasions and we worked out a plea bargain, in which my client would plead guilty to contributing to the delinquency of a minor but would get no jail time. We thought the case was over, until we learned that the local police were not satisfied with this resolution and were bringing the matter to the attention of the United States Attorney's Office, thus turning it into a federal case.

The federal statutes governing sexual contact with underage girls are draconian. Had my client been convicted under them, he could have received a sentence of 25 years for each separate massage. This could have resulted in life imprisonment. We probably could have won the case had we decided to litigate, because there was no interstate aspect to the alleged crimes: all the girls were local and everything happened within that state. Moreover, the alleged "victims" were anything but victims—they sought out my client and repeatedly called his house asking for more business. But the risks were simply too high, in light of the possible sentence if he were to be convicted.

For that reason, we entered into an unusual plea bargain, under which the federal government would not prosecute him if he agreed to plead guilty to a state crime that resulted in 18 months imprisonment and the need to register as a sex offender (which he really isn't). He served only a few months in jail and the rest under house arrest. A group that brings lawsuits on behalf of the victims of sex crimes then sued the federal government for being "too lenient" and tried to get the plea bargain rescinded. I doubt they will succeed.

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Rashomon Rape Cases

In the great Japanese film, Rashomon, a horrible crime is presented through the very different perspectives of several participants. In some rape cases, a similar Rashomon perspective is sometimes at work. In the Mike Tyson case, for example, it is possible (though unlikely in my view) that Desiree Washington did not intend to consent to sex but that Mike Tyson reasonably believed—based on her "groupie-like" actions and statements—that she did. What should the law be in such situations?

Under American law, if a person makes a reasonable mistake of fact which leads to the commission of a crime, he is generally not guilty. For example, if a person walking down the street sees another person coming at him with a gun about to pull the trigger, and he shoots first and kills his assailant, he is not guilty, even if the "assailant" turns out to be an actor in a movie holding a gun that shot blanks. Since the defendant reasonably, though mistakenly believed, that his life was in danger, his reasonable mistake of fact constituted a complete defense to a murder charge. A crime requires both a criminal act and a criminal intent, and if the defendant reasonably believes that facts, as he saw them, made what he was doing permissible under the law, then he does not have a guilty mind. A mistake about law, on the other hand, is not a defense, since everybody is presumed to know the law. (This latter point led an English wag to comment that "all Englishmen are presumed to know the law, except Her Majesty's judges, who have a court of appeals above them to set them right.")

In recent years, however, there has been a movement to deny defendants in rape cases the right to raise the defense of reasonable mistake of fact, especially when it comes to whether the woman consented. No means no, and no man should be allowed to believe that no might mean yes or even maybe. (There is the anachronistic joke about the difference between a diplomat and a lady: When the diplomat means maybe, he says yes. When he means no, he says maybe. A diplomat never says no, for to say no would mean he was not a diplomat. When a lady says no, she means maybe. When she says maybe, she means yes. A lady never says yes, for to say yes would mean she was not a lady.)

The law is correct in demanding that a man understand no to mean no. He may subjectively believe that no means maybe when it comes to him, but such a belief is unreasonable as a matter of law. In some situations, however, the woman does not say no. Nor does she say yes. Nor does she even say maybe. (There was a song made famous by Ella Fitzgerald entitled "She didn't say yes. She didn't say no." The lyrics continued: "She didn't say stay, she didn't say go…clearly she took one sly little look and something awoke and smiled inside. Her heart began beating wild inside. So what did she do? I leave it to you. She did what you'd do too…she didn't say yes. She didn't say no. She wanted to stay but knew she should go. She wasn't so sure that he'd be good. She wasn't even sure that she'd be good…above her, sweet love was beckoning and yet she knew there'd be a reckoning….") In real life, women often convey their intentions via ambiguous verbal and physical cues. In such situations, it is morally wrong, in my view, for a man to assume consent, but it may also be legally wrong for the law to punish such immoral behavior

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as rape. There are clearly gray areas in which the man ought to resolve doubts in favor of not acting and where the law ought to resolve doubts in favor of not convicting.

I have represented several clients who fit this situation. One such case was a highly publicized prosecution of three prominent doctors and a nurse at one of Boston's leading hospitals.

One of the doctors had a party at his house for some of the hospital staff. During the party, the nurse danced with several of the doctors and two of them "fooled around" with her in the bathroom. As the party was ending, the three doctors invited the nurse to join them for a drive to Rockport where one of the doctors had a vacation home. She went along with them because in her words, she thought they were just "horsing around."

When they arrived at the Rockport home, two of the doctors smoked marijuana and all of three of them began to disrobe. She said she protested and told them to stop when the three of them began to undress her. Each of the defendants then had sex with the nurse in the bedroom. She testified that she felt physically numbed and could not resist.

Sometime later, they drove back to Boston and stopped to view the beach, to have breakfast and fill the car up with gasoline. One of the doctors gave her his card and said he would be interested in hooking up with her again. The defendants each testified that the sexual intercourse was entirely consensual, that it was she who took her dress off and that she appeared at all times to be a willing participant.

The issue in the case was what the jury should do if they believe <u>both</u> the nurse <u>and</u> the doctors—that is, if they thought that the nurse did not want to have sex with the three doctors, but if the doctors believed that she was a willing participant.

The jury convicted the defendants and the judge sentenced them to six months imprisonment obviously suggesting that he had some doubts about the sufficiency of the case. I was asked to consult on the appeal. I accepted the assignment because I wanted to preserve the mistake of fact defense in the face of efforts to abolish it in rape cases.

Unfortunately for these defendants their trial lawyers had not appropriately raised the issue of reasonable mistake of fact. They asked for an instruction that might have invited the jury to acquit even if the mistake had been unreasonable—that is, even if the doctors believed that "no" meant "yes." The appellate court ruled, therefore, "We need not reach the issue whether a reasonable and honest mistake to the fact of consent would be a defense, for even if we assume it to be so, the defendants did not request a jury instruction based on a reasonable mistake of fact. We are aware of no American court of last resort that recognizes mistake of fact, without consideration of its reasonableness."

In a subsequent case, in which I was not involved, a Massachusetts Appellate Court ruled that even a reasonable mistake of fact is not a defense when it comes to consent or lack of consent in the context of a rape prosecution.

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This decision, disallowing even the most reasonable mistakes of fact in rape cases, opens up the possibility of some very unjust results. To illustrate this, let's go back to the filming of the movie, *Deep Throat*, discussed in an earlier chapter.

Harry Reems had sex on camera with Linda Lovelace. Anyone watching the film[81] can see that she is consenting, both verbally and by her unambiguous actions. But it now turns out, at least according to a book she wrote, that her apparent consent wasn't real, that she was compelled to pretend she was consenting by her husband's threats to kill her unless she went forward with her starring role in the movie *Deep Throat*. Under the extreme view expressed by some radical feminists and accepted by the Massachusetts Appellate Court, Reems could be guilty of rape even though his mistake of fact about her consent was entirely reasonable.

Or consider the following case I discuss in class. Among the group of American citizens in California who come from the Hmong tribes in the mountains of Cambodia, there is a traditional wedding ceremony for arranged marriages. The groom is supposed to go to the home of the bride, where the father of the bride greets him at the door. The groom pushes the father aside, finds the bride, and carries her, screaming and yelling, from her parents' abode. He is supposed to act like a young warrior, and she like a young virgin who wants to retain her status. It's all playacting, and part of the traditional wedding ceremony. In the case I teach, the young woman didn't actually want to go through with the marriage, and her resistance was not playacting; it was real. But there is no reason that the groom would know this, so he took the bride home to his house, and over her "resistance", which he believed was feigned, he consummated the arranged marriage. She then ran away and reported the rape to the police, who arrested the young man. I asked my students how a case like this should be decided.

The class is generally divided, some argue that no always means no, even in the context of a traditional marriage ritual in which no is supposed to mean yes. Others argue that it would be unfair to impose our values on a minority that has its own culture and traditions.

Another case that raised similar issues arose in the context of a college friendship that turned ugly.

[81] I have never seen the entire film (see pages __ supra), but during the preview of a documentary about the film, I saw excerpts from it.

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The 99-pound rapist

The great violinist Itzhak Perlman called me one day and asked if I would look into a disturbing case involving a young violinist he knew who attended college in the Boston area. The young violinist—who was 5 feet tall and weighed 99 pounds, and whose only exercise was lifting a bow—had been accused by a 5 foot 4, 140-pound lacrosse player of raping her. Itzhak did not believe that the allegation could be true. The circumstances of the case certainly didn't lend credence to the charge.

The young man and woman had been close platonic friends. She had a steady boyfriend back home, with whom she regularly had sex. One night she invited the violinist to her dorm room where they had sexual relations. Several weeks later, she invited him to spend the weekend with her family, where he said they again had sexual relations. But soon thereafter she began to experience psychological problems and someone at the college left an anonymous message with her parents that she may have been the victim of an unwelcome sexual encounter. After being confronted by her father, who was adamantly opposed to any premarital sex, she told him that the violinist had raped her in the her dorm room. She then filed a complaint with the police. The young man was immediately suspended from college and subsequently indicted for rape.

I referred the case to a small law firm in town that specialized in criminal matters, and the case was assigned by the senior partner to a well-known woman lawyer active in feminist causes. She found the story implausible – so much so that the lawyers decided to waive a jury trial and have the case decided by a judge, whom they believed would be less susceptible to political correctness. They were wrong and they were right. The judge found the young man guilty, but gave him a prison sentence of only 95 days thus suggesting that he didn't find him *that* guilty.

I followed the appeal closely, reviewing the briefs and offering suggestions. The argument was made by the feminist lawyer. The opposing lawyer was also a feminist. Although the court found that there was sufficient evidence to sustain the conviction, it considered the evidence quite weak. This is what it said:

> "In this case the defense was consent. The evidence is many ways was contradictory, and, even looking only at the complainant's testimony, in some respects was inconsistent with allegation of rape."

The court then ruled that the defense should have had access to certain treatment records that the defendant generated when she was hospitalized following the alleged rape. Accordingly it reversed the conviction and remanded the case for a new trial. In the end the prosecution dropped the case and the defendant went free, but not before his college career was seriously disrupted.

The court's decision was roundly criticized by many feminists, on the ground that allowing the defense to have access to the complainant's psychiatric records would discourage complainants from coming forward. The court was sensitive to this concern and said the following:

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> "Because victims of sexual crimes are likely to suffer a 'depth and range of emotion and psychological disturbance…not felt by the victims felt by most other crimes' we remind lawyers and judges that the mere fact that such victims sought counseling may not be used for impeachment purposes."

Notwithstanding this warning, it seems quite likely that at least some rape victims would decline to press charges if they knew that their treatment records could be rummaged through by defense lawyers eager to discredit them.

The feminist lawyer, who successfully argued the appeal, had mixed feelings about the results, acknowledging that she "had hurt the cause," and that her victory for her client was "a step back for women." But she understood that her responsibility in this case was to this defendant, rather than to future rape victims who she cared deeply about but who were not her clients. She did her job, and she did it well.

This is another example of the "no free lunch" doctrine, in which doubts were resolved in favor of defendants and against the victims of rape.

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Chapter 15: The changing impact of the media on the law

Criminal trials involving life and death, such as the O.J. Simpson case, or rape, such as the Mike Tyson cases, always generate massive media coverage, especially when famous people are in the dock. Some civil trials, especially those with allegations of sexual misconduct, are also widely covered. In this chapter, I focus on two such cases—both quasi-criminal in nature, both involving allegations of improper sexual relations—that reflect the changing impact of the media on our legal process. I also relate my involvement in other high profile cases in which celebrities and public figures have become the focus of media attention. Based on these and other cases, I draw conclusions about the nature of celebrity justice and the impact of the media on high visibility cases.

In the days before radio and television, trials were covered primarily by the print media. Newspapers wrote articles about notorious cases. Pamphlets were issued containing excerpts from the transcripts. Some lawyers became famous even without the benefit of the electronic media. Daniel Webster, Abraham Lincoln, William Jennings Bryant, Clarence Darrow were all household names. So were some of their famous and infamous clients.

The advent of gavel to gavel television coverage has changed the way in which the public views the law and the way in which the law operates. It has turned lawyers into celebrities and clients into household names. Today, everyone has an opinion on the high profile cases of the day, and these opinions have impact not only in the court of public opinion but in the courthouse as well. No lawyer, especially those who practice criminal or constitutional law, can afford to ignore the impact of this phenomenon on tactics and strategy. Cases can be won or lost as easily on the courthouse steps as in the courtroom itself.

I have played a role in the ongoing debate regarding the manner by which trials are covered, most particularly whether they should be televised. (I think they should and have strongly advocated that view in debates, on television and in articles.) Several of my cases were among the first and most widely televised trials, in our history. In others, I have served as a real-time commentator for trials covered by network television and Court TV.

Throughout my career, I have tried to use the media to the advantage of my clients, and the media has tried to use me and my clients in an effort to sell soap and other commercial products. Sometimes the relationship is symbiotic. More often it is antagonistic. It is rarely neutral. This is especially the case involving the many celebrities I have represented.

Although the vast majority of my clients over the years have been obscure and often penurious—about half of my cases have been without any fee—the media often portrays me as a "celebrity" or "high profile" lawyer. I don't like those characterizations of my life-work, but there is some truth in it, because many of my cases have been extensively covered by the media. That is in the nature of criminal or constitutional lawyer, since cases involving my specialties tend to raise issues of public interest. It is also true that because I have become relatively well known as a result of these cases, I receive calls from famous people seeking my advice or my representation. I don't like the term "celebrity lawyer" because it suggests that I select my cases on the basis of the status of the client, rather than the nature of the case or cause. Nothing could be further from

HOUSE_OVERSIGHT_017347

the truth. I turn down most celebrity requests, and cases involving celebrity clients form a tiny fraction of my practice over the years, but the few that I do take garner far more publicity than do the many cases involving unknown clients.

Is there anything special about famous clients—celebrities? Should "high profile" cases be handled differently from less visible controversies? These are questions I have pondered during my career as a lawyer.

Most people see celebrities at a distance – on the screen, stage, television, athletic field, or auditorium. They see them at their best – acting, posing, playing, speaking, being interviewed or participating in charitable causes.

I see celebrities close up and at their worst. They come to me when they are in trouble, often deep trouble. Their celebrity is no longer a shield protecting them from the ordinary tribulations that befall most people on a daily basis. When they come to me, their celebrity has been turned into a sword being wielded against them. Celebrities generally live by publicity. When they come to me, they are dying from the publicity and want privacy and anonymity. But they can't have it, because the very celebrity that brought them fame and fortune now threatens to magnify their problems.

I have represented, advised and consulted with dozens of celebrities, ranging from Presidents and Prime Ministers to world famous athletes, actors, writers and financiers. Most have gotten into trouble for one overarching reason: because they were willing to risk what they have limited amounts of in order to obtain more of what they have unlimited amounts of.

This may sound self-defeating, if not bizarre—so let me explain. Celebrities share several common characteristics. They have more of something than ordinary people have: great athletes have extraordinary physical skills; good actors have unusual thespian skills; successful politicians have a special charisma; financiers have money and the ability to make more. These special characteristics generally give celebrities access to certain desiderata of life: lots of money and the things money and fame buy, and the benefits that come with these commodities, such as access to numerous sexual partners – if they choose to use their celebrity to obtain such access (and excess!)

Many of my celebrity clients, who have unlimited amounts of money or access to sex, have sacrificed what they have limited amounts of – freedom, career, time with loved ones, health – in order to obtain even more money or sex. Let me provide a few examples of such bizarre risk-taking in cases that are a matter of public record. (I could provide many more examples if I were free – which I am not – to disclose confidential information given to me by celebrity clients)[82].

Leona Hemsley, the celebrity hotel "queen", had more than a billion dollars in the bank when, according to the government, she whited out the words "stereo system" on a bill for services and changed them to "security system" in order to have her accountant deduct its cost from her taxes.

[82] See Larry David's "Buckner" episode on Curb Your Enthusiasm, where a psychiatrist tells Larry about his celebrity patients, without disclosing the names, while identifying them by unique characteristics: e.g., a well known film director who directed Star Wars.

HOUSE_OVERSIGHT_017348

She also, according to the government, evaded sales taxes on expensive jewelry in New York (which has a sales tax) by having the jeweler send empty boxes to Florida (which has no sales tax). As a result, she may have saved several thousand dollars, but she spent more than a year in prison, when she had only a few years left to live and even less time to spend with her dying husband. By any rational calculus, this is crazy behavior.

Mike Tyson, as the world's greatest boxer, had a limited career ahead of him but virtually unlimited access to sex. As with many famous athletes, women were falling all over him, sending him "audition" tapes, waiting for him wherever he appeared and begging him to have sex with him. Yet, he agreed to be alone in a hotel room with a young woman he had just met and to risk being falsely accused of rape – which, in my view, he was – in order to get even more sex. The result was that he was sentenced to several years in prison near the end of his short career, and lost almost everything he had worked so hard to acquire. Even he later acknowledged to me that he was a "schmuck" for risking so much for so little.

In both of these cases, celebrities risked what they had limited amounts of – in Helmsley's situation the few remaining years of her life and her time with her husband; in Tyson's situation the few remaining years of his career – in order to obtain more of what they had unlimited amounts of: money and sex. Of course, neither one expected to be convicted for what they did, but they both engaged in behavior that carried the risk of being deprived of what they had only limited amounts of. No rationally calculating person, weighing the costs and benefits of taking such risky actions, would do so. But these celebrities – and many others who have consulted me – have done just that.

Some of my celebrity clients have also gotten into trouble because they need, or feel entitled to, immediate gratification without sufficiently considering the longer term implications of their conduct, not only to themselves and their careers but to their loved ones, friend and associates. They believe that when the future finally arrives, there will be new quick fixes. And often they are right. Someone generally manages to clean up the mess they left behind. It requires a combination of unlikely factors and some bad luck to produce disaster, since most successful people are good at making problems go away. But even celebrities are subject to the law of probabilities and eventually – if they persist in their reckless behavior – the statistics will likely catch up with them.

Why do so many celebrities act so recklessly? Is there something special about being a celebrity that makes one feel invulnerable to ordinary risks? Are they so accustomed to "getting away with it" that they weigh costs and benefits differently from ordinary people?
Is there a sense of entitlement? Are there expectations that the rules don't apply to them? Do they feel guilty about their "undeserved" success and want to be caught? Do they surround themselves with groupies who encourage bad behavior and refuse to be truthful with them about the risks? Are temptations placed so readily before them that they become difficult to resist?

One answer may well be that some of them have been doing it all their lives, starting well before they were rich and famous. People often have a hard time changing old habits. I know that no matter how much money I now have, I cannot throw away a tea bag after using it only once. It drives my family crazy to see soggy tea bags in a cup waiting to be reused, but I simply can't

HOUSE_OVERSIGHT_017349

"waste" a good tea bag that has at least one more good cup in it. I'm not suggesting that reusing tea bags is in any way analogous cheating on one's taxes or committing other financial or sexual crimes, but I am suggesting that people who have earned their money or fame by illegally cutting corners will sometimes continue to do so, even though there is no longer a financial or other rational need to do so. Old habits die hard, but they can also kill or at least wound those who can't break the illegal ones. This is not in any way to justify such continuing misconduct. Indeed, quite the opposite, it is to condemn it—because celebrities have few excuses for their misconduct—while at the same time trying to explain why it persists among some celebrities.

I have thought a great deal about what motivates famous and powerful people to act so self-destructively. The celebrities who I represented and advised have faced a wide array of problems, ranging from criminal charges, to loss of careers, to public humiliation, to custody fights, to defamations and to physical threats. Some of the most fascinating stories I can never tell because I learned them in confidence and helped resolve them without their ever becoming public. Most have become matters of public record, and I am free to write about those and to offer my insights about the famous people I have advised over the years and the problems they faced.

The question I am asked most frequently is: does being famous help a celebrity who gets in trouble with the law? Or does it hurt? My answer is "yes." Sometimes it helps. Sometimes it hurts. Always it matters. One of the most important jobs a lawyer who represents famous people has is to figure out how to turn his or her celebrity into an advantage rather than a disadvantage, or at the very least to neutralize it (which is a near impossibility in our celebrity-driven world.) I recall Claus Von Bulow once telling me that in England it's all about "class and breeding," while in America it's all about "fame and celebrity." Before he became famous for being accused of trying to kill his wife, Von Bulow couldn't get a good table at certain posh restaurants despite his wealth and social status, but when his name and face began to appear in every newspaper, he got the best table in every restaurant.[83]

[83] This conversation suggests an important distinction between different types of celebrities and their relationship to the legal process.

The first type consists of individuals who were already very famous before they got into trouble or before they needed my legal advice. Among my clients who fit this category are OJ Simpson, who was among the most famous football players in the country before he was accused of murdering his wife and her friend; Mike Tyson, who was even more famous around the world, because boxing is an international sport; Mia Farrow, the actress who had been married to Frank Sinatra and Andre Previn, and was involved in a bitter custody dispute with her long time lover Woody Allen; Marlon Brando, Robert Downey, Jr.; Ben and Casey Affleck, Brook Shields; Martha Sterwart; David Merrick, Frank Sinatra, David Crosby, John Lennon and several other actors, athletes and entertainers. Also included in this category would be President Bill Clinton, Israeli Prime Minister Benjamin Netanyahu, Israeli President Katzav, Senator Mike Gravell of Alaska, and Senator Alan Cranston of California.

A second category of celebrities that I have represented are those who were not well known to the public but whose alleged crimes made them famous. Claus Von Bulow is a prime example of this phenomenon, as he made clear in his conversation with me. Also included in that category, at least to some degree, are Michael Milken, the financier; Conrad Black, the newspaper mogul; and Julian Assange of Wikileaks.

A third category would include people who were somewhat well known, but whose trial brought them considerably more fame and/or infamy. Included in this category are Leona Helmsley, Abby Hoffman, Doctor Benjamin Spock, William Kuntsler and F. Lee Bailey.

HOUSE_OVERSIGHT_017350

The most frequent misconception about celebrities is that they must be "so fascinating." The opposite is often the case. Most of my famous clients, with some important exceptions, have been uninteresting. Some have been outright boring. We tend to confuse their public persona and surroundings, which fascinate us, with their private personalities, which are often banal, mundane and self-centered. Many of them have no ideas, no insights and little to say about matters outside the narrow spheres of their professional lives. Yet we listen to their often uninformed opinion on important issues of the day affecting the world, just because they have a handsome face, strong muscles or other talents or attributes that are irrelevant to their presumed credibility on matters about which they are opining. Celebrities may seem fascinating from a distance, but reality, viewed close up, it is often very different.

Their cases and controversies may be fascinating, in part because of who they are, in part because of what they are accused of doing, and in part because the public obsesses over celebrity.

The two cases on which I will now discuss received enormous media coverage. Both, not surprisingly, involve sex. Both involve world famous people who are accused of having inappropriate sexual contact with inappropriate young women. Unlike most celebrities, both of these were fascinating people.

The paradigm of a famous person being tried under the Klieg lights of worldwide media coverage was, of course, the impeachment of President William Jefferson Clinton, in which I played several roles: witness, advocate, television commentator, book author and friend.

A final category includes very famous celebrities who have hired me to keep their name and alleged wrongs out of the media. I have had several such cases, and for obvious reasons, I cannot disclose the names of these celebrity clients. Nor can I disclose the names of clients who have successfully used their celebrity to avoid the consequences of their actions.

HOUSE_OVERSIGHT_017351

President Bill Clinton

I first met President and Mrs. Clinton, both of whom who are indeed fascinating, on Rosh Hashanah in 1993. We shared many mutual friends and teachers from Yale Law School, but we had never actually met before I invited the President and First Lady, who were vacationing on Martha's Vineyard, to join my family at the M.V. synagogue for Rosh Hashanah services. When I learned that the Clintons were living near us on the Vineyard, I had the following letter hand delivered to the President by a mutual friend:

> Dear Mr. President:
>
> It is my great honor to invite you on behalf of the Martha's Vineyard Hebrew Center (the only Jewish house of prayer on the Island) to attend one of our Rosh Hashanah (Jewish New Year) services. It is a part of the Jewish tradition for the congregation to bless the President of the United States and the great nation that has given us the freedom to practice our religion without prejudice or discrimination. Our congregation would love to extend that blessing personally to you and to invite you to respond with your own New Year's greeting or to accept our good wishes silently.
>
> In years gone by, Jews in different countries lived in fear that government officials would enter their religious sanctuaries. Such visits were often prelude to crusades, inquisitions, pogrom, and—eventually—the Holocaust. The lyrics of the Broadway hit "Fiddler on the Roof" include the following mock prayer for the Russian Czar. "May the good Lord bless and keep the Czar—far away from us." In contemporary America, the attitude of the Jewish community is quite different: We welcome our president with open arms.
>
> The services will be held in the Whaling Church in Edgartown—a wonderful building used for year as a place of Christian prayer for whaling captains and their crews. The use of this church for Jewish services symbolizes the ecumenical nature of our wonderful Island…We hope you and your family and staff members (Jewish or non-Jewish) can join us as we pray for a year of peace, health and productivity.

The president immediately accepted, thus becoming, we are told by the eminent Jewish historian Jacob Marcus, the first sitting American president ever to attend a Jewish High Holiday service. I sat next to him during the service and shared a mahzor (Holiday prayer book) with him for most of the davening, pointing out the prayers and whispering explanations of such concepts as the "talit" (prayer shawl) and "mitzvot" (good deeds). We used a prayer book in which the Hebrew was transliterated for the parts that are chanted, and the president and Mrs. Clinton sang along in Hebrew. Then the president spoke briefly from the lectern, declaring his role in the Mideast peace process "one of the most rewarding things I've done," and wishing the Jewish people a "Shana Tova." He wore a white Kipah my wife and I gave him from our wedding. He and Hillary signed it and gave it back after the service. We have kept it as a treasured reminder of that historic night.

HOUSE_OVERSIGHT_017352

As I watched the president, "davening" in his yamulka, I thought of Jules Farber's quip: "The time is at hand when the wearing of prayer shawl and skullcap will not bar a man from the White House—unless, of course, the man is Jewish!"

Following the service, the Clintons invited us to join them for dinner at the Savoir Faire Restaurant in Edgartown. We had already eaten before the service, but we readily accepted. My wife, Carolyn, my son Elon and I dined with the Clintons. We were later joined for dessert by Vernon Jordan and his wife, Anne.

The dinner was relaxed. The President discussed movies with my producer son, while my wife and I discussed health care policy with Hillary. The President told a joke that wasn't particularly funny. My family has very high standards of humor, so we didn't laugh. The president, apparently thinking we didn't hear or get the punch line, repeated it. This time, we laughed—a bit. When the dessert was brought, the waiter put a large chocolate bombe in front of the president. My son thought it was large enough to be shared by the table and so he raised his spoon to take a piece. The president stared him down, saying with his eyes, "that's all mine!" Elon dropped the spoon and the president consumed the entire bombe. (Today, Bill Clinton is a vegan—no more bombes for him!)

At the end of the evening, over dinner, the president lifted a glass of champagne to toast the Jewish New Year. As I touched my glass to his, I gave the traditional Jewish toast, "L'Chaim"—to life. President Clinton responded, "This has been a really great evening."

A few days later, I wrote the following about President Clinton's historic visit to the Martha's Vineyard synagogue:

> Skeptical as most American Jews are about any lowering of the wall of separation between Church and State, we still want the President of the United States to be the President of all the people. We are the most diverse, heterogeneous, multiethnic-nation in history, in which more than 150 religious groups practice a wide array of rituals and express an even wider array of beliefs. Our president, unlike the Queen of England, is not the Defender of the Faith. He is the defender of the Constitution, which prohibits the establishment of religion, guarantees its free exercise and forbids any religious test for office.
>
> President Clinton frequently attends church services of his own Baptist denomination, as well as of other Christian denominations. He lights the national Christmas tree and this year also lit Hanukkah candles in the White House.

I then contrasted President Clinton's warm actions with the response I received from former President Gorbachev several years earlier. I had been invited to speak at an international conference in the Kremlin, during the week of the Jewish New Year. I invited the then-president to join the Jewish invitees at the conference to services in Moscow. He refused, suggesting to me that an appearance at a synagogue would not help his prospects for holding on to the office he would soon be losing.

HOUSE_OVERSIGHT_017353

I concluded my article with the following words:

> President Clinton's visit was entirely in keeping with President George Washington's letter to the Jews of Newport, Rhode Island, in which he wrote that mere "toleration" is not good enough in America. Here, Jews as well as others, must be treated as equals. The attendance of our president and first lady at a Jewish service made many Jews feel like first-class citizens, rather than tolerated guests.

I sent the President a copy of my article. He sent back a handwritten note expressing his appreciation for being invited to the services and for the article, and included a signed photograph of the dinner.

During the subsequent summers, the Clintons vacationed in Martha's Vineyard and lived right near us. We frequently dined, partied and even square danced with them and became their friends. We were invited to the White House on several occasions and the President sought my advice from time to time.

Sometimes, I offered unsolicited advice, such as when I repeatedly urged him to commute the life sentence of Jonathan Pollard to time served. I pestered him so much about Pollard that he finally told me he didn't want to hear anything more about it. I replied, "You can choose not to listen, but I'm not going to stay quiet." In the end, he wanted to commute the sentence, but he got push-back not only from the intelligence community but also from several Jewish senators. He told me that if I can't even get the Jewish senators to support commutation, how could he justify it to the intelligence community, which was adamantly opposed to it.

Another issue on which I initially offered my unsolicited advice involved the Monica Lewinsky matter. As I watched the Lewinsky drama unfold, I saw a familiar pattern that had had gotten many other celebrities into trouble: opting for short term gratification without considering the longer term consequences.

At every decision point, the President and his advisors opted for a political tactic that helped them get good headlines and poll results in the short term, rather than focusing on the longer term strategy that might have prevented an entirely lawful sexual indiscretion from turning into a possible crime.

The first – and most important – point was the President's foolhardy decision to engage in a surreptitious sexual relationship with a White House intern at a time when he knew he was under intense investigation by Kenneth Starr, a somewhat puritanical prosecutor and was subject to a lawsuit for sexual harassment by a vindictive woman who was represented by politically motivated lawyers.

If there was indeed a "right wing conspiracy" out there waiting to "get" the President, as Hillary Clinton had alleged in a television interview, it is difficult to imagine any action more reckless than oval office sex with a young blabbermouth whose goal was probably as much to brag about

HOUSE_OVERSIGHT_017354

her conquest of the President as to engage in an intimate relationship. She really did want oral sex: she wanted to talk about it. And she did – to more than a dozen people. The President achieved immediate gratification while risking long term consequences to his marriage, his daughter, his presidency and above all the nation's stability.

At the time he began his sexual encounter with Lewinsky, Clinton knew that he might possibly have to testify under oath about his sex life. He knew that two sets of enemies had the powerful legal weapon of subpoena power aimed directly at his presidency. That is probably why he was reluctant to engage in sexual intercourse. He wanted sex with deniability. What he got was unsatisfying sex with unconvincing deniability. Or, as Maureen Dowd put it:

> "Mr. Clinton's habit, with language and behavior, has been to try to incorporate his alibi into his sin. The result is more twisted than titillating."[84]

This was surely not the first time Bill Clinton put his future at risk for immediate sexual gratification. But in every other instance he was able to avoid the long term consequences. I am certain that he believed that this pattern of short term risk-taking and subsequent avoidance of long term consequences would be repeated. I doubt he believed, at the moment that he first allowed Lewinsky to touch him in a sexual manner, that this action would eventually lead to possible removal from office and damage to his family life. He surely would not have consciously taken such a knowing risk. But when people have succeeded so often in the past in achieving both immediate gratification and long term avoidance of consequences, they miscalculate the odds and act as if they can have their cake and eat it too.

The history of many of my own celebrity clients is largely a history of defendants who for years – sometimes decades – have risked their careers, family lives, fortunes and freedom for some form of immediate gratification. Finally when they were caught, everyone asked the same question: "How could they have risked so much for so little?" What that question fails to understand is that the "little" thing for which they were eventually caught was usually only the tip of a very large iceberg of sin or crime which they had gotten away with for years. In their minds therefore, they were risking very little (the extreme unlikelihood that this time they would get caught) for a great deal (a lifetime of small, short term gratifications, which add up to something for which it is worth taking small risks.)

In retrospect, we consider such actions reckless because we are running the video backwards: we know he was caught. But at the time Clinton made the decision, he probably did not regard it as any more reckless than the many similar decisions he had previously made, without destroying his career and his family. He had probably played the same sexual-verbal game before: limiting his sexual contact so that he could plausibly deny that he engaged in "sexual relationships" outside of his marriage,[85] but he never before had to testify under oath about these relationships. What he failed to comprehend was how much the risks had increased as the result of the legal proceedings

[84] See Maureen Dowd, Maladroit Du Siegneur, N.Y.Times, 9/30/98, p.A23. ("He would be laughed out of any locker room in the country.")

[85] Prior to the Lewinsky matter becoming public, there were widespread reports that the President limited his extra-marital sex to oral gratification since he believed that it did not constitute Biblical adultery and it gave him verbal deniability regarding sexual relations. This history actually strengthens his legal claim that he did not commit perjury when he denied having what he regarded as sexual relations with Lewinsky. A 28 year old waitress was

HOUSE_OVERSIGHT_017355

then in place – the Jones lawsuit and the Kenneth Starr investigation. These legal proceedings escalated the stakes by turning a private sexual encounter into the subject of sworn testimony and investigation by an independent counsel.

It is unlikely that Bill Clinton confided the truth of his relationship with Monica Lewinsky to any of his lawyers. He couldn't, because his principle lawyer was representing both him and his wife. Thus if he didn't want his wife to find out about Lewinsky, he could not tell his lawyer about her. It is likely that his lawyers suspected the possibility that there was some truth to the rumors that something untoward had occurred between Bill Clinton and Monica Lewinsky. After all, Clinton did tell his lawyers – and did testify -- that he engaged in adulterous sex with Gennifer Flowers, despite his previous public denial. Moreover his reputation was well known. Any lawyer worth his salt should have based decisions regarding the president's testimony on the assumption that he may well have engaged in a sexual relationship with Monica Lewinsky. A good lawyer should also have assumed that a twenty two year old intern who had engaged in a sexual relationship with the President would talk about it.

His lawyer in the Paula Jones case, Robert Bennett, was on notice that the president was going to be asked about Lewinsky. If he had conducted any kind of investigation to determine the nature of their relationship he would surely have uncovered the widespread concern around the White House over Monica Lewinsky's unusual access to the President. He would also have learned of the dozens of logged meetings between the President and a young government employee. This should have put Bennett on notice to probe more deeply. At the very least he should have interviewed Lewinsky, confronted her with the concerns, and asked her direct questions. He should also have interviewed those White House officials who had expressed concern. Yet on the basis of little more than an assurance from the President, he allowed an affidavit to be submitted by Lewinsky denying any sexual relationship. Putting aside the ethical issues arising from relying on an affidavit that he was on notice might well be false, and having his client testify to facts that he had to suspect might be false, it is difficult to understand the tactical considerations that led the president's lawyers to allow him to testify about his sex life.

It is not as if Bennett had not been cautioned about the risks of having the President testify about his sex life at the Jones deposition. On May 27, 1997, six months before President Clinton testified at a deposition in the Paula Jones lawsuit, I was a guest expert on "The Geraldo Rivera Show." I made the following observation and offered the following advice:

> This case never should have gotten this far. It should have been settled early when he could have settled it easily. He must settle the case. . .
>
> Remember, depositions are very broad in latitude. He could be asked questions about adultery. He could be asked questions about his prior sexual life. There are no relevancy objections that are generally sustained to depositions. . . .

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quoted by *Newsweek* as saying that as Clinton continuing to define sex more and more narrowly, she begins to think of herself as a virgin!

HOUSE_OVERSIGHT_017356

> I think the President could win if it actually went to trial, but it won't go to trial. What I would do if I were his lawyer is to say, "Look, the dignity of the office precludes the [P]resident from answering any of these questions. We realize that as a result of not answering these questions, we will reluctantly, without admitting anything, have to be sanctioned by having the verdict directed against us on the merits. We accept that because we can't answer the questions and preserve the dignity. And now let's move on to the damages, where the focus is not on the [P]resident but on Paula Jones." And in that way, he can, in effect, settle the case, even if the other side doesn't settle because the damages will be very low, there won't be an apology. There'll be a judgment against him, but the judgment will be explained on the basis of the dignity of the presidency. So if the settlement talks fail, that's what I would recommend that his lawyers think about. . . .
>
> And the [P]resident has to start asking himself: Is he well advised here?

The President had three options, but he was aware of only two of them. He knew that he could litigate and try to win – as he ended up doing. He also knew that he could try to settle the case, which would have avoided the necessity of testifying at the deposition or trial. A settlement requires both sides to agree. In the Jones case, the president reportedly offered to pay Jones $700,000, in order to settle the case. Jones insisted on an apology[86] and the settlement talks eventually broke down.

The third option, <u>of which the president was unaware</u>, was to default the Jones case. Every litigant in a civil case has the right to default – which means, essentially, to settle the case unilaterally by simply refusing to contest the allegations in the complaint. Consider, for example, the following hypothetical case: a fired employee of a high tech business sues for $10,000 in back pay. The business realizes that in order to defend its actions, it would have to reveal commercial secrets valued at $1,000,000 and take the time of executives which it estimates at being worth $200,000. It offers to settle the case for the $10,000 that the employee is demanding, but the angry employee prefers a trial at which he will be publicly vindicated. The company has the right simply to default, have the judgment entered against it, and have the court order it to the pay the damages sought by the employee. No stigma is attached to defaulting a case. It does not even necessarily entail an admission of liability. It represents a practical assessment of the costs and benefits of litigating and not litigating – just as a settlement does.

Robert Bennett never told President Clinton that he could have defaulted and paid Jones without making any apology. Perhaps the Lewinsky story would have leaked, but the President would not have had to dignify a rumor with a response. It was the entirely avoidable decision to have him

[86] Paula Jones' lawyer have subsequently revealed that the Jones lawsuit could have been settled at one point for no money with just a simple apology from President Clinton which made it clear that Paula Jones did not do anything wrong in the hotel room.

HOUSE_OVERSIGHT_017357

testify under oath – not once, but twice – that turned a sex rumor into a possibly impeachable offense.

How do I know that Robert Bennett never told President Clinton of the default option? Because both men personally told me. Here is the story.

On January 17, 1997, President Clinton was deposed in the Paula Jones lawsuit and was asked questions about his relationship with Monica Lewinsky. Among the questions were the following:

> "Did you have an extramarital sexual affair with Monica Lewinsky?"
>
> "If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?"
>
> "I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?"

Clinton answered as follows:

> "I have never had sexual relations with Monica Lewinsky. I've never had an affair with her."

His answer was based on the following definition of sexual relations accepted by the judge:

> For the purpose of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes
>
> > 1. contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person;
>
> "Contact means intentional touching, either directly or through clothing.

Under that definition, oral sex does constitute sexual relations. After the Jones lawyers completed their questioning, the President's own lawyer, Robert Bennett, asked the following question:

> "In paragraph eight of her affidavit, [Monica Lewinsky] says this, 'I have never had a sexual relationship with the president, he did not propose that we have a sexual relationship, he did not offer employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for reflecting a sexual relationship.'

HOUSE_OVERSIGHT_017358

Is that a true and accurate statement"

The president responded: "That is absolutely true."

Shortly thereafter, reports began to appear of tape recorded conversations between Linda Tripp and Monica Lewinsky suggesting that there had been a sexual relationship of some kind between the President and Monica Lewinsky.

On January 23, 1998 I appeared on the MSNBC program "Internight" and criticized Bennett for allowing the President to walk into a perjury trap and a swearing contest. I recommended that the President "get out in front of this story. He has to tell the truth, and if the truth is inculpatory he has to tell it." I recommended that the president "get a new lawyer, tell him the truth, sit down with your new lawyer … and [have him give you] the straight poop." The lawyer has to be someone "who doesn't care what the president thinks of him. His obligation is to tell the president what he doesn't want to hear."

On January 27, 1998, Robert Bennett called me to complain about what I said on television. Bennett kept me on the phone for nearly half an hour telling me that I did not understand his "strategy" in the case and accusing me of "Monday morning quarterbacking" his decisions.

I asked Bennett a direct question: "Did you ever advise the President that in addition to the option of settling the Jones case, he could simply default on the liability phase of the case?"

Bennett replied that defaulting would have been "ridiculous" and "a stupid idea" and that he would never recommend it.

I asked Bennett what kind of an investigation he had conducted of the Lewinsky matter before he allowed the President to be deposed, and he acknowledged that he simply accepted the President's word, since it was supported by Lewinsky's affidavit. I asked him whether he had ever questioned Lewinsky and gave a vague response. He did say that he was surprised about the questions asked concerning Lewinsky at the deposition.

I told Bennett that I strongly believed he had made a mistake by walking his client into a perjury trap and allowing him to get into a swearing contest about his sex life. He assured me that he knew what he was doing and that it would all work to the advantage of his client. I told him I hoped he was right, but that I still thought he had made a mistake.

A lawyer owes his client the duty to explain all available legal options, even if he believes that the client will probably reject a given option. Bennett failed in this duty. He now argues, in his own defense, that if Clinton had defaulted the Jones case, many more litigants would "come out of the woodwork" and sued Clinton in the hope that he would default. This is a fallacious argument for several reasons. First, the statute of limitations would have passed on virtually all allegations arising – as the Jones case did – before Clinton became President. Even more importantly, the moment it became public – which it quickly did – that the President previously had offered a $700,000 settlement to Jones, there was more than enough incentive for gold-diggers to come

HOUSE_OVERSIGHT_017359

forward and sue. If Clinton was prepared to pay $700,000 to settle a suit he regarded as utterly frivolous and untrue, no greater incentive would have been added if he defaulted and paid.

The sad reality is that Robert Bennett, perhaps in his zeal to chalk up a high visibility win, failed or neglected to tell the president that this was one case that was better for the client to lose and avoid testifying rather than to win and risk testifying falsely.

Defaulting the Jones case would have resulted in bad headlines the next day—and perhaps for an additional week. But testifying about his sex life resulted in a dangerous threat to the Clinton presidency – a threat which would not materialize for several months. Thus we see another instance of the President making a decision which helped him in the short run – by avoiding the negative headlines of a settlement or default – but hurt him greatly in the long run. It was a pattern that would persist.

On January 26, 1998, President Clinton, with the assistance of Hollywood producer Harry Thomason , decided to make a public statement denying a sexual relationship with Monica Lewinsky. Pointing his finger at the TV camera for emphasis, he said:

> "I want you to listen to me. I'm going to say this again. I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time – never. These allegations are false. And I need to go back to work for the American People."

This statement, made directly to the American public and not under oath, has come back to haunt Clinton. Why did he make it? He was under no legal obligation to make any statement. He could easily have said, as so many others have said, "Since the matter is now the subject of a legal proceeding, my lawyers have advised me to make no public comment about it. I'm sure you understand."

But instead, he issued a firm denial of what he would later have to admit was essentially true: namely that he did, in fact, have some kind of a sexual encounter with "that woman."

Once again, the President and his advisors opted for the quick fix. They felt that it was necessary to put out the political brushfire that was burning around them. By issuing a firm denial, the President could postpone – perhaps forever – the longer term consequences of his improper sex and his misleading testimony. At the time he made the statement, the President may not have been aware that Lewinsky had saved the semen-stained dress that would eventually force him to change his story. Without the dress, it would always be a "she-said, he-said" conflict between the President of the United States and a woman who acknowledges on the Tripp tapes that she frequently lies, and whose own lawyer said is an impressionable woman who sometimes fantasizes.

On July 28, 1998, Monica Lewinsky's lawyers struck a deal with Starr under which she was given total immunity in exchange for her cooperation and testimony. On July 29, 1998, the President's lawyer announced that an agreement had been reached with the Independent Counsel regarding the President's subpoenaed grand jury testimony. The subpoena would be withdrawn, the President would submit voluntarily to four hours of questioning in the White House, in the

HOUSE_OVERSIGHT_017360

presence of his own lawyers. In reaching this agreement, the President withdrew his constitutional challenge to the power of a grand jury to compel his testimony. This was a serious constitutional issue, especially since Starr had given Lewinsky total immunity from prosecution. This left Clinton as the primary target of the grand jury. But there is grave doubt whether a sitting President can be indicted or prosecuted. If he cannot, then there is even graver doubt whether it is proper to use a grand jury to gather information for an impeachment. In my view, the President could have leveled a serious challenge, on this and other grounds, against the grand jury subpoena. Such a challenge would have taken at least a year to resolve. In the meantime, he would not have had to testify.

But the President decided to waive this challenge and to testify "voluntarily." What I don't know is whether at the time the President made the decision to testify he knew of the existence of the semen-stained dress. There had, of course, been rumors of such a dress over the prior months, but they had been denied by Lewinsky's lawyer. The news of the uncleaned dress with a telltale stain became public only after the President made his decision to testify. It is fair to ask whether the President's decision would have been different if he knew about the existence of the dress. It is also fair to ask whether the President's testimony in front of the grand jury would have been different had there been no dress. We don't know.

What we do know is that the President's decision to testify before the Starr grand jury gave the prosecutor an opportunity to trap the President once again into committing perjury – this time not in a live deposition in a dismissed case where the testimony was only marginally relevant, but in a grand jury proceeding where the testimony was central.

It also gave the prosecutor an unprecedented opportunity to videotape the interrogation so that it could be seen by Congress and the public.

Again short term considerations prevailed. First, the President's political advisors urged him to avoid that day's image of the President walking into the courthouse – the so-called "perp walk." The White House agreed therefore, to the making of a videotape which would later show the President being evasive and perhaps even dishonest. Although the President's videotaped testimony was not as bad as many thought it would be – at least in the short run -- it was more damaging in the long run than a walk to the courtroom might have been.

Ultimately, after the disclosure of the semen-stained dress made it undeniable that there had been sexual activity between them, President Clinton had to appear on television and acknowledge that he had behaved "inappropriately" with Monica Lewinsky. It was a low point both in his presidency and in his personal life.

The day after President Clinton publicly acknowledged that he had behaved "inappropriately", he flew to the Vineyard. The next day, we were both at a party. The President gathered a small group—including several lawyers—around him and began to discuss the case. He said that following the unanimous Supreme Court decision refusing to postpone the lawsuit brought against him by Paula Jones, he had no choice but to submit to a deposition about his sex life, because Jones refused to settle the case. I told him he did have an alternative: he could have ended the law suit by simply defaulting and paying Paula Jones' damages. If he paid the damages

HOUSE_OVERSIGHT_017361

she sought to the court, the case would be dismissed, regardless of whether or not Paula Jones agreed. If the lawsuit were dismissed, there would be no depositions. I told the president that he could have justified his decision to pay off the suit by explaining that the American presidency is more than a full time job and that he had no time for depositions—the preparation for which are extremely time consuming—even if the Supreme Court justices (who work relatively short hours) thought he did.

The President looked surprised: "Nobody ever told me I could have had the case dismissed if I had paid the money. [My lawyer] told me I had to be deposed."

Shortly thereafter, Bob Bennett was no longer representing President Clinton, and Clinton was seeking my legal advice, as his problems—all of which derived from the deposition he didn't have to give—multiplied. He came close to being indicted. He was impeached (and eventually acquitted by an evenly divided Senate vote), and disbarred.

During the course of these proceedings I conferred with the President, provided legal memoranda to him and his lawyers, and discussed his case in the court of public opinion.

I also testified on the President's behalf as an expert witness on the law of perjury before the congressional committee that was considering whether to impeach Clinton for the "high crime" of perjury. The chairman of the committee was Republican Congressman Henry Hyde, with whom I repeatedly clashed. The front page of the Washington Post featured a large photograph the next morning of the two of us angrily pointing accusatory fingers at each other. [get this photo]

The source of our conflict was over the selective outrage directed by Congressman Hyde and other Republican lawmakers at President Clinton's alleged perjury. I began my testimony by putting President Clinton's false statements into a broader historian context:

> For nearly a quarter of a century I have been teaching, lecturing and writing about the corrosive influences of perjury on our legal system -- especially when committed by those whose job it is to enforce the law, and ignored or even legitimated by those whose responsibility it is to check those who enforce the law.
>
> On the basis of my academic and professional experience, I believe that no felony is committed more frequently in this country than perjury and false statement crimes. Perjury during civil depositions and trials is so endemic that a respected appellate judge once observed that, quote, "experienced lawyers say that in large cities scarcely a trial occurs in which some witness does not lie." Police perjury in criminal cases, particularly in the context of searches and other Exclusionary Rule issues, is so pervasive that the former police chief of San Jose and Kansas City has estimated that hundreds of thousands of law enforcement officials commit felony perjury every year testifying about drug arrests alone. But in comparison with their frequency, perjury crimes are among the most underprosecuted in this country.

I then distinguished among various types of perjury.

HOUSE_OVERSIGHT_017362

> Historically I think we can all agree that false statements have considerable variation and degree. The core concept of perjury grows out of the Ten Commandments, "bearing false witness," a term that consisted in accusing another falsely of a crime. Clearly the most heinous brand of lying is the giving of false testimony that results in the imprisonment of somebody who is innocent. Less egregious, but still quite serious, is false testimony that results in the conviction of a person who may be guilty, but whose rights were violated in a manner that would preclude conviction if the police testified truthfully….The least culpable genre of false testimony are those that deny embarrassing personal conduct of marginal relevance to the matter at issue in the legal proceeding.

I then tried to place Clinton's false statements in their proper place along this continuum.

> I think it is clear that the false statements of which President Clinton is accused fall at the most marginal end of the least culpable genre of this continuum of offenses, and would never even be considered for prosecution in the routine cases involving an ordinary defendant.

I then blasted the Committee for having never conducted hearings on the corrosive problems never conducted hearings on the corrosive problem of police perjury—"testilying."

> If we really want to reduce the corrosive effect of perjury on our legal system, the place to begin is at or near the top of the perjury hierarchy. If instead we continue deliberately to blind ourselves to pervasive police perjury and other equally dangerous forms of lying under oath, and focus on a politically charged tangential lie in the lowest category of possible perjury, hiding embarrassing facts by evasive answers to poorly framed question, which were marginally relevant to a dismissible case, we will be reaffirming the dangerous and hypocritical message that perjury will continue to be selectively prosecuted, as a crime reserved for political or other agenda-driven purposes.

I then warned that:

> [H]istory will not be kind to this committee. History will not be kind to this Congress. I think this committee and this Congress will go down in history along with the Congress that improperly impeached Andrew Johnson for political reasons.

Following my testimony, Chief Judge Gerald B. Tjoflat, of the United States Court of Appeals for the 11th Circuit, was asked to comment about the different types of perjury I had discussed. He replied that "perjury is the same, regardless of the circumstances." I then responded to Judge Tjoflat's view:

> I think this committee is doing a terrible disservice to the rule of law and to the sanctity of the oath by trivializing the differences, as Judge Tjoflat said in one of the most

HOUSE_OVERSIGHT_017363

> unbelievably wrong-headed statements I have ever heard from a judge, that there is no difference between types of perjury.
>
> I challenge anybody to say that there is no difference between a police officer who deliberately frames an innocent man or woman who he knows is [innocent] and subjects that person to false imprisonment or the electric chair, and someone who lies to cover up a private, embarrassing sex act.

Congressmen Hyde and Conyers replied:

> **REP. HYDE:** I thank you, Professor Dershowitz. I don't thank you for criticizing the motives, saying that we're out to get the president. You haven't the slightest idea of the agony that many of us go through over this question.
>
> [W]e are concerned about the double standard. That may mean nothing to you --
>
> **MR. DERSHOWITZ:** It means a great deal to me.
>
> **REP. HYDE:** -- but it means something to us.
>
> **REP. CONYERS:** Mr. Chairman?
>
> **MR. DERSHOWITZ:** It means a great deal to me. (Applause.) [W]hen is the last time this committee has expressed concern about the rights of criminal defendants -- (a chorus of "regular order" from committee members)… It's a sham.
>
> **REP. CONYERS:** Mr. Chairman?
>
> **REP. HYDE:** Yes, Mr. Conyers.
>
> **REP. CONYERS:** And I thank you for this interchange. [W]e are split totally down the middle in the most partisan fashion that has ever happened.
>
> The result is fairly obvious of what's going to happen to anybody with the least understanding of this matter. So for you to be offended by the Dershowitz evaluation strikes me as a little disingenuous. You know what we're going to do here because it's been said repeatedly by every Republican member of the committee! So let's not get offended by the truth at this point in our proceedings.

Congressman Hyde then angrily began to lecture me about the rule of law:

> Does the rule of law -- have you been to Auschwitz? Do you see what happens when the rule of law doesn't prevail?

HOUSE_OVERSIGHT_017364

> Now, I don't leap from the Oval Office on a Saturday afternoon to Auschwitz, but there are similarities when the rule of law doesn't obtain, or where you have one law for the powerful and one for the nonaristocratic.

He did not give me an opportunity to respond to his absurd invocation of Auschwitz. But I did insist on responding when Congressman Barr contrasted me with the "real America" and how "the real America views these matters." The following heated exchange then took place:

> **MR. DERSHOWITZ:** Can I respond, 30 seconds, to what I perceive to have been a personal attack? First of all, whenever I hear the word "real Americans," that sounds to me like a codeword for racism -- a code word for bigotry, a codeword --
>
> **REP. BARR:** That's absurd, professor, you ought to be ashamed. That is the silliest thing I have ever heard --
>
> **MR. DERSHOWITZ:** When I hear you describe me as something other than a real American -- shame on you. We may have a disagreement about the merits of these issues, but I would no more impugn your Americanism than you should impugn mine, sir.
>
> **REP. BARR:** You're being silly, professor. You are being absolutely silly.
>
> **MR. HIGGINBOTHAM:** May I respond, Mr. Chairman?
>
> **REP. HYDE:** Yes, indeed -- far be it from me to not have anyone respond. Go right ahead.
>
> **MR. HIGGINBOTHAM:** I take profound disagreement with Congressman Barr's categorization of the "real America," which he apparently understands with such fine discernment, and those of us who teach at universities are oblivious. You know we have students, and they teach us something. And my father was a laborer. My mother was a domestic. And I climbed up the ladder, and I did not come to where I am through some magical wand. So t hat I am willing to match you any hour any day in terms of the perception of the "real American."

Not all the Congressmen were angered by my aggressive testimony. This is how Congressman Rogan summarized his views:

> I guess, in fairness, Professor Dershowitz, I have to single you out just for one moment, because I want to assure you that you and I have no hard feelings between ourselves. I know that you raised a few hackles here with some of my colleagues with controversial comments, but I want you to know I personally found them to be very therapeutic, because up till now the only excuse I had for not having attended Harvard Law School was my grade-point average. (Laughter.) So you've given me a little different perspective.

Following my testimony, I worked closely with the president's legal team both on the impeachment and on the Starr investigation. One summer day, during the impeachment crisis, the

HOUSE_OVERSIGHT_017365

White House switchboard tried unsuccessfully to reach me. (The White House has an unparalleled capacity to reach people. Once when flying on a commercial flight, the pilot came out and whispered in my ear, "the President is on the radio-phone. I took the call in the cockpit.) I was on a beach, which had no cell phone service. When I got back to my house, there were seven frantic messages that the President needed to see me right away. He was staying a couple of miles away from our house, at the home of Dick Friedman in Edgartown. I jumped into my old Volvo and drove straight to Friedman's house. The Secret Service man at the end of the road waved me through, telling me that the President was expecting me. But I was then stopped by another Secret Service man, telling me that the rules required that they search under the hood, so I would have to lift it up. I started looking for the mechanism to open the hood. After a few minutes, the Secret Service man smiled and said, "Professor you don't know how to open up the hood on your own car, do you?" I responded sheepishly, "I'm not sure." I then asked him if he had heard of the comedian Jackie Mason? He said yes. I said, "Jackie Mason tells a joke about how when a non-Jew hears knocking under the hood of his car, it makes his day. He gets in there and he fixes and fixes. But when a Jew hears knocking under the hood of his car, he immediately trades it in for a new one." He laughed, and showed me where the lever was. I then drove down the road a short distance where the President was waiting for me in his jogging shorts. He had already heard that I didn't know how to open up the hood of my own car and laughingly wondered whether he should be seeking advice from such a klutz.

During the height of the Lewinsky affair, I found myself sitting right next to the President at a large dinner party. He asked me what I was working on and I told him I was finishing a book called the Genesis of Justice about the first book of the Bible. Clinton is incredibly knowledgeable about the Bible and we spent much of the dinner in intense conversation about the various Biblical stories in the Book of Genesis. The next day I received a call from Gail Sheehy [check this] of Vanity Fair saying that she had heard from somebody <u>at another table</u> at this party that the President spent the entire dinner grilling me about whether oral sex constituted adultery within the Biblical meaning of that term. I told her, truthfully, that the subject of adultery and oral sex had simply never come up during our discussion. We had talked about Abraham and Jacob and Joseph. I gave her the names of other people at our table—including Anthony Lewis of The New York Times—and suggested she check with them if she didn't believe me. She said, "Damn, that was such a good story but I guess I can't use it." I said, "Of course you can't use it, it didn't happen." When the article appeared in Vanity Fair, she included the story, knowing that it was false. I wrote a letter to the editor telling what happened and she replied that although I had denied the truth of the story, somebody at another table confirmed that it was true. Of course the person at the other table couldn't possibly hear our conversation but he probably heard some words suggesting that we were talking about the Bible, and simply assumed that it must have been about adultery. So much for journalistic integrity.

Shortly after the Clinton case was resolved, John Kennedy, Jr.—the late son of the former President—called and asked me if I would contribute an article to his magazine, *George*. He asked me if I would describe the ten greatest legal blunders of the 20th Century. Here is what I described as the number 1 and 2 greatest blunders:

HOUSE_OVERSIGHT_017366

By far the greatest legal blunder of the 20th Century was committed by President Clinton's lawyer in the Paula Jones case, Robert Bennett. Bennett allowed his client to be questioned under oath in a deposition about the details of his sex life and to deny that he had sexual relations with Monica Lewinsky. This sworn denial became the basis for an impeachment investigation and opened the way for the President to have to testify in front of a grand jury. The Paula Jones case should have been settled immediately after the President's reelection in 1996. If Paula Jones' lawyers refused to settle the case, Bennett could have advised the President simply to default – that is to pay the money and refuse to contest the charges. Bennett never even told Clinton about this option.

The second greatest blunder, believe it or not, was also committed by Bennett. After walking his client into the perjury trap, Bennett himself helped to spring it. Not content to let the President answer the opposing lawyers' questions, Bennett did the unthinkable: he asked the President to affirm, under oath, the truth of Monica Lewinsky's affidavit without having asked Lewinsky what she meant when she said she had not engaged in sexual relations with Clinton. Then, Bennett mischaracterized the affidavit by saying that the affidavit indicated that "there is absolutely no sex of any kind in any manner, shape or form." Finally, in a "cover your ass" letter to the court, Bennett implicitly blamed his client for misleading the court, instead of forthrightly acknowledging his own failure to find out what Lewinsky meant by sexual relations. These blunders give Bennett almost unique bragging rights as the only lawyer in American history who has helped his client get impeached.

At the very beginning of the Lewinsky matter, I had received a call from someone close to the White House giving me the phone number where Monica was staying and urging me to call her. I

HOUSE_OVERSIGHT_017367

perceived a possible conflict of interest, and didn't make the call. Several years later, I was approached by Monica's mother at a Jewish event. She said, "I wish you had called Monica." I have often wondered whether the case would have turned out differently if I had called and agreed to represent her.

Although I helped defend Clinton before Congress and in the court of public opinion, I was critical of his sexual misconduct while in office. In my book *Sexual McCarthyism*, I argue:

> "At bottom this is a story of how two men who are obsessed about forbidden sex—Clinton about engaging in it and Starr about exposing it—managed to turn a tawdry series of Oval Office sexual encounters into a constitutional crisis. Clinton and his advisers made mistake after mistake in a futile effort to keep his embarrassing little secret from becoming public. Starr and his staff overreached, overreacted, exaggerated and pressed every issue to the limits of its logic to expose the secret and embarrass the President. The result was a highly unlikely combination of factors that led the nation to where almost no one wanted to go—to the brink of a constitutional crisis with international implications.
>
> Some critics believe that Bill Clinton and Kenneth Starr deserve each other. But we the people do not deserve to see our delicate system of checks and balances endangered by the reckless actions of two obsessed men."

Remarkably, I have remained on friendly terms with both Clinton and Starr after writing these harsh words. Most celebrities I have encountered have extremely thin skins. They never forgive even small slights because they are accustomed to being universally adored. Both Clinton and Starr have thick skin. They accept criticism, especially when they know it is well intentioned. The same cannot be said about the next celebrity (and his lawyers) in whose case I played a major role.

HOUSE_OVERSIGHT_017368

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Woody Allen vs. Mia Farrow

In my article on the 10 greatest legal blunders of the 20th Century, I included on my list, the decision by Woody Allen's lawyers to sue Mia Farrow for custody of several of her adopted children as well as the one child they conceived together. I played an unusual role in that lawsuit, in which both sides were focused heavily on the media: Woody was concerned that negative coverage, particularly of allegations involving sexual improprieties with a young girl, might ruin his career; and Mia's concern that any coverage might hurt her children. Every legal maneuver in the case was made with an eye (sometimes two) on the media.

I first met Woody Allen when he was filming Manhattan. He was given to me as a birthday present by a group of friends, one of whom knew Woody from his earlier film "The Front." [check dates] He agreed to meet me for lunch. He didn't know he was my birthday present. When I told him, he immediately began to speculate as to who he would want as a present: "Louis Armstrong," he said would be his first choice.

"He's dead," I reminded him.

"Exactly," he replied.

"Jimmy Hoffa would be my second choice."

"He's missing," I said.

"Exactly," he repeated.

He then asked me which dead person I would have wanted to represent as a criminal lawyer. I immediately replied "Jesus."

"Do you think you could have won?" he asked.

"In front of a Jewish jury, maybe."

"Those biblical Jews were tough. They didn't tolerate troublemakers like Jesus. They probably wouldn't have liked Jews like us from Brooklyn," Woody mused.

"Yeah, but imagine how different history would be if a Jewish lawyer saved Jesus. They couldn't accuse us of killing their Lord."

"But he wouldn't have been their Lord, if you had won. He wouldn't have been crucified. And without crucifixion, there's no Christianity, so if you had won they'd be blaming the Jews for destroying Christianity."

Woody reminded me of the riff that got Lenny Bruce into so much trouble. Bruce quipped that if the Roman's electrocuted rather than crucified their enemies, millions of Christians would be walking around wearing tiny electric chairs around their necks.

HOUSE_OVERSIGHT_017369

We then discussed "The Front" and I told him that my father knew Zero Mosel—the star of the film—whose relative had a store on the lower east side near my father's. We discussed "blacklisting," "McCarthyism" and other subjects in which we shared a common interest. It was a great birthday present.

Several years later Woody and his then girlfriend, Mia Farrow, came to hear me speak in New York about the Rosenberg trial. I had written a positive book review for The New York Times about a book which had concluded that Julius Rosenberg had indeed been a Soviet spy. This is how I began my review:

> WERE Julius and Ethel Rosenberg guilty of transmitting American atomic secrets to the Soviet Union in the 1940's, or were they scapegoats of the cold war whose execution was a grave miscarriage of justice? That both are true is the intriguing argument of [the new book.]

Woody and Mia both insisted that the Rosenberg's were innocent and I promised to send them the evidence that Julius was a spy and Ethel a collaborator if not a conspirator.

Over the next several years I saw Woody and Mia on a few occasions. Mia called me a few times to discuss political issues and Woody and I wrote to each other.

Then everything changed. Early one morning, Mia called. We exchanged pleasantries and I asked her how Woody was. "He's abusing my children," she said. I replied, "Don't even joke about that, it's not funny." She said, "no, really. He's been sleeping with one of my daughters and acting inappropriately with another one." I again asked her if she was serious, since the allegations seemed so out of character. She told me she was dead serious and asked if I could drive down to her house in Connecticut and meet with her. I told her I would, and that I would bring my wife, who is a PhD psychologist with extensive experience in such matters.

We drove to Connecticut and Mia greeted us. She was fixing a leaky roof while trying to take care of her numerous children, including a blind girl and a crack baby, who she had adopted. She told me that Woody had started an affair with her adopted Korean daughter, Soon-Yi. I asked her how old Soon-Yi was and she told me nobody knew for sure because she was adopted when she was a baby and she could be anywhere from 17 to 19. She then told me that Woody had been seen by one of the nannies touching her ____ year old daughter, Dylan, in an inappropriate way. She also told me that Dylan had told her that Woody had taken her up to an attic crawl space where he had also touched her inappropriately. She showed me the crawl space. She also showed me naked Polaroids that Woody had taken of Soon Yi, that she had found in Woody's apartment, along I with a naked photo of Dylan. My wife Carolyn then had a conversation with Dylan about her relationship with Woody.

I was shocked beyond belief and asked how I could help. Here was yet another example of a celebrity putting his own desire for immediate gratification above the needs of his long time lover and her family. Even if only the allegations regarding Mia's adopted daughter, Soon Yi, were

HOUSE_OVERSIGHT_017370

true, Woody's actions would demonstrate extreme insensitivity to Mia Farrow's family. Here is how the appellate court ultimately characterized Woody's behavior.

> "In January of 1992, Mr. Allen took the photographs of Ms. Previn [Soon Yi] which were discovered on the mantelpiece in his apartment by Ms. Farrow and were introduced into evidence...Mr. Allen in his trial testimony stated that he took the photos at Ms. Previn's suggestion and that he considered them erotic and not pornographic. We have viewed the photographs and do not share Mr. Allen's characterization of them. We find the fact that Mr. Allen took them at a time when he was formally assuming a legal responsibility for two of Ms. Previn's siblings to be totally unacceptable. The distinction Mr. Allen makes between Ms. Farrow's other children and Dylan, Satchel and Moses is lost on this Court. The children themselves do not draw the same distinction that Mr. Allen does. This is sadly demonstrated by the profound effect his relationship with Ms. Previn has had on the entire family. Allen's testimony that the photographs of Ms. Previn "... were taken, as I said before, between two consenting adults wanting to do this ..." demonstrates a chosen ignorance of his and Ms. Previn's relationships to Ms. Farrow, his three children and Ms. Previn's other siblings. His continuation of the relationship, viewed in the best possible light, shows a distinct absence of judgment. It demonstrates to this Court Mr. Allen's tendency to place inappropriate emphasis on his own wants and needs and to minimize and even ignore those of his children. At the very minimum, it demonstrates an absence of any parenting skills."

Mia asked me to call Woody and tell him to stop doing what he was doing. She told me that Woody admired me and that he kept a copy of my book *Chutzpah* on his bed table.

I asked Mia to have Woody call me but he apparently refused so I decided to write him a letter, which I asked his lawyer to give him. In the letter, I urged Woody to try to resolve the matter privately:

> "I still believe that matter can be resolved without even more escalation and damage to all parties. As you and Mia both know, I am a great admirer of your work, and I do not want to see your career and your life destroyed. Right now you are on that road and something must be done to head it off, not only for your sake, but for the sake of the children and for Mia."

I don't know whether he ever got the letter. I received no reply. Mia then asked me to contact his lawyers and see if the matter could be resolved without any public disclosure. I said I would try. I called his lawyers and they agreed to a meeting in New York. I brought with me to the meeting a law school classmate, David Levett, who was a leading lawyer in Connecticut and was knowledgeable about the Connecticut law relating to such issues. Our goal, and Mia's, was to bring about some resolution of this troubling matter without any publicity, which she felt would be harmful to her children.

HOUSE_OVERSIGHT_017371

In the middle of the meeting, we received notice that Woody's lawyers, the very ones we were discreetly negotiating with, had publicly filed a lawsuit against Mia, and that Woody was about to hold a press conference in which he was going to accuse Mia of making up stories about him.

I was shocked at this duplicity. I'm not used to dealing with lawyers who mislead their opponents in this way.

Woody Allen's suit was seeking custody of several of the children Mia had originally adopted, as well as the one biological child they had conceived together. IT was an extraordinarily stupid move on the part of Allen's lawyers, because at the time he filed the custody suit, Woody Allen barely knew the children and their siblings, had no idea who their friends were, did not know the names of their pediatricians and had virtually nothing to do with their upbringing. Mia Farrow, on the other hand, was a hands-on mother who was deeply involved in every aspect of her children's lives.

At the trial, Woody's lawyers pulled off an even more bone-headed maneuver. They claimed that Levett and I, by seeking to resolve the matter quietly, were "blackmailing" Woody into settling the case favorably to Mia. This was a ridiculous claim, as the judge found. Courtroom observers could not believe that Woody's lawyers would force me to appear as a witness, knowing that I would surely side with Mia in her efforts to maintain custody over her children. But having been falsely accused of trying to blackmail Woody, I had no choice but to testify as to precisely what had transpired. No one could understand why Woody's lawyers had decided on a tactic that would make me a witness. But I knew something they didn't know, which led me to conclude that they put me in this position not out of a desire to help Woody, since there was no way my testimony could in any way support his claim. They accused me of blackmail in an effort to hurt me. That, at least, was my assessment, based on what I knew.

Why would they want to hurt me rather than help their own client? Because the senior partner of the law firm representing Woody, a former prosecutor named Robert Morvillo, was seeking revenge against me for my having prevented him from becoming the United States Attorney for the Eastern District of New York. That was his dream job and he was about to get it when I exposed his prosecutorial misconduct in a case I was litigating. He had essentially bribed a key government witness with money that was owed to the creditors of a bankrupt corporation. He had arranged for the witness to obtain the bankrupt funds which he knew had been secreted in a Caribbean account. In doing so, Morvillo had committed two serious crimes: bribing a witness and facilitating the stealing bankrupt funds. The federal district judge who presided over the case wrote a scathing opinion condemning Morvillo's actions. That opinion appeared as a front page story in the Village Voice, thus scuttling any chance Morvillo had of receiving a federal appointment. Morvillo was so angry that he told the Village Voice that if he ever saw me again, he would "deck" me. He never had a chance to throw a punch at me, and so he decided, in my opinion, to use this lawsuit as a way to deck me. I'll bet that he never told Woody Allen of his hidden agenda.

As any decent lawyer would expect, the ploy backfired. My letter to Woody, coupled with the testimony of other lawyers who were involved in the negotiations, proved that my interest was in protecting the children not in blackmailing Woody. I testified that I was seeking:

HOUSE_OVERSIGHT_017372

"to have a preliminary discussion which might eventuate in saving the children from the kind of atmosphere that they have tragically been placed in as a result of Woody Allen's lawyers.

Q: And not as a result of Miss Farrow's lawyers.

A: Absolutely not.

Q: In any respect?

A: If Mr. Allen had listened to Miss Farrow's lawyers, we would not be in court today and the children's best interest would have been served.

I was then asked about my efforts to have Woody call me or respond to my letter:

Q: Now lastly, Mr. Dershowitz, did you ever instruct—prior to August 13, did you ever instruct Miss Farrow to tell Mr. Allen that he should talk to you because this is a criminal act and I needed a criminal lawyer?...

A: Was I trying to get hired by Woody Allen to be his criminal lawyer? No…My recollection is that Miss Farrow called me and asked me if I would speak to Woody Allen. I said I felt uncomfortable calling Woody Allen.

I have to tell you I wish I had. I wish I had a chance to talk to him directly. I wish I had had a chance to do something to stop this steamroller that occurred, and I wanted very much to talk to him. I thought he was getting terrible advice from his lawyers. I tried to write him a letter. I don't know if he ever read the letter.

I think that bad advice has contributed to this and now the lawyers are trying to figure out a scapegoat for this and they are pointing a finger in the wrong direction.

Q: You think you are the scapegoat for this?

A: I think the reason you've had me on the witness stand for as long as you've had me on the witness stand as a result of 15 or 20 minutes direct testimony for a meeting that I played a facilitative role shows that there is an agenda here a little bit different than the agenda that you're presenting in the court, yes, I do.

The court would not permit me to expand on the nature of this hidden agenda, but the damage to Woody's case had been done. My testimony, in sum, was very supportive of Mia's efforts to

HOUSE_OVERSIGHT_017373

retain custody of her children and highly critical of Woody's attempt to portray her in a negative light.

The judge credited my testimony and ruled against Woody Allen in every respect, denying him not only the custody of the children, but even the right to see his own biological son without severe restrictions. As far as I know, Woody Allen never did see his biological son, who has grown into quite an adult, having won a Rhodes Scholarship for his extraordinary work on human rights. To this day, I doubt that Woody Allen knows how Robert Morvillo tried to use his case to settle a score with me.

Shortly after it was publicly announced that I would be helping to defend Mia Farro against the lawsuit brought by Woody Allen, my phone rang. The voice on the other end said, "Hey Alan, this is Frank."

I asked, "Frank who?"

The voice on the other end sounded surprised by the question and immediately responded, "Frank Sinatra."

Sinatra had previously called me when Kitty Kelly's notorious biography was about to be published. He asked if I was interested in representing him in a lawsuit against Kelly for defamation. I described to him what effect the lawsuit would have on the quality of his life and told him that I thought it would be a bad idea to bring one and that I would not be willing to represent him in such a matter. He apparently agreed and didn't bring the suit. [check]

"Nice to talk to you Mr. Sinatra," I responded to his latest call. He immediately got down to business. "I love Mia. We were married, you know. She's a great girl. Woody's trying to bully her. He can't be allowed to get away with that. What can I do to help?"

I told Mr. Sinatra that I appreciated the call but that the legal case was under control.

He quickly responded, "Well beyond the legal case, what can I do to call Woody off?"

Aware of Sinatra's reputation as a tough guy, I nervously told him to leave it to the lawyers and that any approach to Woody Allen would be used against Mia and would backfire.

Several months later, during the summer, Andre Previn—another of Mia's former husbands—was performing in the Whaling Church on Martha's Vineyard. My wife and I attended his concert and then went to a reception that followed. Previn, like Sinatra, told me how much he loved Mia and that she was a great person.

He continued, "I feel like marching up to his apartment, knocking on the door, and punching him in the face, telling him to leave Mia alone."

Recalling the Sinatra call, I let out an uncontrollable laugh. Previn asked, "what's so funny?"

HOUSE_OVERSIGHT_017374

I responded, "If I wanted any of Mia's former husbands to put the fear of God in Woody Allen, I'd pick Sinatra over you Mr. Previn." He laughed in agreement.

I have maintained a good relationship with Mia. Woody Allen eventually married Soon-Yi, and they have adopted children. Their marriage seems to be working.

Both the Clinton-Lewinsky impeachment and Woody Allen-Mia Farrow cases involved sordid accusation of improper sexual conduct by famous and powerful men. These kinds of accusation directed against these kinds of men are grist for the media mill. Every legal and political move is covered in detail. Everyone has an opinion. Litigating in such an environment is perilous. Every mistake is magnified. You don't learn how to manage such cases in law school. There are no rule books. Experience is the only teacher.

After years of experience in dozens of high profile cases, I now try to teach my students how to avoid, really minimize, inevitable mistakes. Here are some of my everchanging rules:

1. Never take a case just because the client is a celebrity or because the case is "high profile." Make sure the issues in the case are within your area of expertise.

2. If you do take the case, don't "hang out," "chill" or socialize with the celebrity. (It is ok to get an autograph for your kid, but that's all.) Never assume the celebrity, or high profile client, is your friend. You have an entirely professional relationship. Charge your usual fee. No discount, no gauging.

3. Never say anything about the client or the case to anyone unless you are prepared to see it in The New York Times or The National Enquirer.

4. Every time you meet the client, be prepared to be fired for telling him or her what they don't want to hear. Famous people often get bad medical treatment and bad legal service for the same reason: the doctor and lawyer don't want to offend or upset them and care more about keeping the patient or client than telling them the painful truth.

5. Don't pretend your celebrity or high profile case is just like an ordinary case. The media is watching your every move, and every move should take into account the anticipated media coverage. This doesn't mean you should make or refrain from making the right move because of the anticipated coverage, but rather you should consider (and perhaps reject, but at least consider) what is the right move.

6. Remember that judges, jurors and prosecutors, their family members, their friends and colleagues all watch television and read the papers. The media environment may have an impact on their decisions.

7. Remember that high profile and celebrity cases tend to distort the legal system, because the law treats famous people differently. Sometimes better. Sometimes worse. Never the same. It has been said that hard cases make bad law. So, often, do high profile cases.

HOUSE_OVERSIGHT_017375

8. Celebrities will almost always disappoint you. Most are boring, banal and self-centered. High profile cases are a decidedly mixed bag. If you never have a celebrity case during your career, you haven't missed anything.

9. Clients whether civil or criminal, are increasingly brought to trial not only before a judge in robes and a jury of peers, but also in the "court of public opinion," where every citizen gets to "cast a vote" on the legal and moral aspects of the case. For some clients in the public eye—political figures, entertainers, business moguls, even ordinary citizens—the "verdict" rendered by the court of public opinion may be as important as the verdict of the jury or court. But being aware of the importance of winning in the media is not enough. A good lawyer must be prepared to face the media, where the usual rules of evidence do not prevail. A good "all purpose" lawyer must learn the very different "rules" of the court of public opinion and must develop the skills with which to win in that important forum as well.

10. Despite the often distorting effect of the media on the administration of justice, the press serves as an important check and balance on judges, prosecutors, and defense lawyers. The First Amendment, which guarantees freedom of the press, may sometimes be in conflict with other amendments designed to guarantee a fair trial. An appropriate balance, difficult as it is to achieve, is essential to democratic governance.

HOUSE_OVERSIGHT_017376

PART IV: THE NEVERENDING QUEST FOR EQUALITY AND JUSTICE

Chapter 16: The Changing Face of Race: From Color Blindness to Race-Specific Remedies

When I was growing in the pre-Brown versus Board of Education era of legally mandated segregation, the goal of all decent people is the same: color blindness. As Martin Luther King was to put it so eloquently several years later:

> "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

We all shared that dream of a color blind America, where success would be based on merit, not race, religion, gender, national origin, ethnicity, class, sexual orientation (this came a bit later) or any other irrelevant or invidious characteristic.

Our idol was Jackie Robinson, who by his skill, speed, grace and character broke down the color barrier and became the best player on our beloved Brooklyn Dodgers, leading his team to several pennants and its sole World Series championship (only to be unceremoniously traded to the hated Giants at the end of his career, a trade Robinson rejected by retiring with dignity).

At college my hero was Professor John Hope Franklin, the first African American to chair an academic department at a college that had not been historically Black.

At law school, two of my classmates were African-American twins, one of whom went on to become a judge on New York's highest court, the other of whom became a professor.

All that these heroes needed in order to achieve great success was the elimination of racial barriers – color-blindness. That had also been the case for Jews: as soon as religious barriers were dropped, Jews raced to the top of the legal, medical and academic professions. I believed that the same would be true of all victims of racial and other forms of discrimination. I really believed that all men and women were created equal. All they needed was equal opportunity and equal access to achieve equal outcomes. I believed it because I saw it with my own eyes—at least with regard to my heroes.

I participated in the civil rights movement in order to help to bring about racial equality – to make Martin Luther King's dream a reality.

During the 1950s and 1960s, there was little talk of race-specific affirmative action – of having positive, rather than negative, decisions based on the race of the person. It was enough, we believed, to eliminate race from decision making. The result, we believed, would be equal opportunity and success, as it had been for Jackie Robinson, John Hope Franklin, and my law school classmates.

HOUSE_OVERSIGHT_017377

We were unaware of the pervasive poverty and deprivations – educational, economic, medical, nutritional – that would make real equality impossible, at least in the near term, for so many black people, even if legal inequalities were eliminated.

I should have known better even back then, especially after I twice travelled to the Deep South occasions during the turbulent years of the civil rights movement. My first trip was in the early 1960s as part of a student group that was trained at the Howard Law School to be "observers." During that short visit I had little direct contact with local Black residents of the South. I did meet several Black lawyers and civil rights workers, but they were generally from similar backgrounds to my own. My second trip was by myself in the early summer of 1965, when the Harvard Law School sent me to several historically black colleges in an effort to recruit students for a special program we had instituted to help prepare minority students for law school. I traveled to several Southern states and lived on the campuses of predominantly Black colleges for several days. There too I met college students and professors, many of whom came from middle class homes. I almost certainly met some students from deprived backgrounds, but they appeared, in the context of a campus setting, no different from students with middle class upbringings.

I also spent time at several southwestern colleges with Native American and Hispanic students. I had insisted that our recruitment efforts not be limited to African American students and that they should include other minorities and disadvantaged groups that sent few if any students to elite law schools. Even back then, I felt uncomfortable having any decisions, even affirmative ones, based on race alone. I believed then, and I believe now, that the ideal goal of affirmative action is to level the playing field by providing a current advantage to individuals who were subject to past disadvantages, in order to assure future equal opportunities to compete on the merits with advantaged individuals. That is the theoretical ideal – individual justice to assure that each person is judged by the quality of their character and other meritocratic criteria – but I soon learned that in practice group factors inevitably come into play. The real issue is how to strike the appropriate balance between the theoretical ideal and the practical necessities.

This issue came to the fore in a series of controversial Supreme Court decisions, in which I played different roles. The first was the case of DeFunis in 1974.[87] The second was the case of Bakke in 1997.

The DeFunis case was brought by a white applicant to the law school of the University of Washington, a state school, who had been rejected. He claimed that if he had been Black, he would have been admitted under the school's affirmative action program. The school did not dispute this claim, but argued that it had the right to try to achieve "a reasonably representation" of minority students.

The lower court ruled in favor of Marco DeFunis and ordered his admission. By the time the case reached the Supreme Court, he had nearly graduated and the school told the justices that he would be allowed to graduate even if the Supreme Court ruled against him. For that reason, the High Court dismissed the case as moot, thus postponing the decision as to whether it would uphold race-specific affirmative action programs. But Justice William O. Douglas, probably the

[87] DeFunis v. Odegaard, 416 U.S. 312 (1974).

HOUSE_OVERSIGHT_017378

court's most liberal member at the time, and a man who had grown up in Washington State, wanted to decide the issue. He wrote a dissenting opinion that represented the conventional liberal view with which I, and many in my generation, had been brought up. He argued that the equal protection clause does not:

> prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would be offered admission not because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria.
>
> Such a policy would not be limited to blacks, or Chicanos or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the Committee.

Justice Douglas was, in fact, describing his own background in Washington State. His autobiography was informing his constitutional ideology, as is often the case. He then went on to distinguish the approach he described from the one employed by the University of Washington law school:

> The difference between such a policy and the one presented by this case is that the Committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race.

He concluded therefore that since the "clear and central purpose" of the equal protection clause was to "eliminate all official sources of racial discrimination in the states," it follows that each applicant must be evaluated in "a racially neutral way:"

> There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

Douglas thus rejected the schools efforts to achieve "representation" of minorities:

HOUSE_OVERSIGHT_017379

> The State…may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans…

Justice Douglas' dissenting views quickly became the standard approach of old fashioned liberals committed to Martin Luther King's dream of a color blind America where every student was judged "not by the color of their skin" but rather by their individual achievements in light of the barriers they have had to overcome.

I became an active advocate for an aggressive affirmative action program at Harvard based on non-racial criteria. I participated in numerous campus and faculty meeting debates, and believed that I was on the side of the angels, favoring a system that would produce real diversity without violating the racial equality mandate of the constitution. And I had Justice Douglas on my side!

But not every liberal accepted Justice Douglas' race-neutral approach. Many Black leaders saw the issue not as one of individual rights, but rather as one of group aspirations. Blacks had a collective right, under thus view, to "reasonable representation" in the student bodies of universities and other institutions, both public and private. Some went so far as to argue for "proportional representation." This raised the spectre of "quotas," which might limit the number of those accepted or hired to their proportion of the population.

The fear of quotas or proportional representation increased as schools throughout the country adopted affirmative action programs with many different elements. Some contained "targets" for the number of admitted Blacks. Other had "floors." Non black students who were denied admissions to schools with such programs began to file lawsuits.

As these cases made their ways through the courts, a conflict arose between some leaders of the African American and Jewish communities. Most African American leaders were deeply committed to race-specific affirmative action programs that gave advantages to all Black applicants, regardless of their individual backgrounds. Most colleges preferred this group approach as well, since I was simpler and they preferred to admit wealthy, well educated, and privileged Black candidates over poorer, less well educated and more "difficult" inner-city Blacks. Derek Bok, first the Dean of Harvard Law School and then the president of Harvard University, candidly acknowledged that it was far easier to integrate African American graduates of Groten, Fieldston, and St. Paul's into Harvard than it would be to integrate inner city public school graduates. (GET BOK QUOTE)

Many Jewish leaders were worried that the hard-earned access of Jews to elite schools would be endangered by what they regarded as "racial quotas". They recalled, with bitterness, the "quotas" that had limited Jewish applicants to single digit "Jewish places" in college and university admissions. There is, of course, a difference between "floor quotas" and "ceiling quotas". Blacks were seeking a floor on the number of affirmative action admittees: no less than 10 or 15 percent.

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Jews had been subjected to "ceilings: no more than 7 to 8 percent. (When I started Yale Law School in 1959, I noticed that the university's motto was written in Hebrew—the biblical words "Urim V'Tomim." When I asked a friend who has graduated Yale College why Yale's motto was in Hebrew, he replied: "It's a test—if you can read it, you can't go here!") But in a zero sum game – which admissions surely are – floors can impose ceilings, especially if the Black percentage is taken from the Jewish percentage, as Jewish leaders feared was happening. This reality led to the famous "bagel" exchange:

> Dr. Chase N. Peterson, dean of admissions at Harvard, recently addressed a group of Jewish faculty members suspicious that Harvard had decided to reduce the number of Jews it would admit. Peterson averred that there is no particular "docket" or area of the country whose quota of admissions has been reduced. Rather, he said, it is "the doughnuts around the big cities," which are not as successful with the Harvard Admissions Committee as they used to be…"But now we have to be terribly hard on people with good grades from the good suburban high schools, good, sold clean-nosed kids who really don't have enough else going for them." The doughnuts, said Peterson, included such areas as Westchester County and Long Island, New York, suburban New Jersey, and Shaker Heights, Ohio. When he described these areas to the Jewish faculty members, the Crimson reports, one stood up and said, "Dr. Peterson, those aren't doughnuts, they're bagels."

After the account of this exchange appeared, I received dozens of letters and calls from indignant alumni and parents of applicants concerned that Harvard was returning to a quota system. These concerns increased when the Bakke case came to the Supreme Court and Harvard took the lead in defending race-specific affirmative action programs, such as the one it has adopted.

My brother, Nathan, was then working as the top lawyer for the American Jewish Congress, a generally progressive social action organization. He asked me to help draft an Amicus in the Bakke brief that presented the views of Jews who supported civil rights but who were concerned about the impact of race-specific affirmative action programs on Jewish applicants. It was a daunting task, requiring an exquisite balance.

The Bakke case involved a white applicant to the medical school at the University of California at Davis (also a state school). Allan Bakke had been denied admission, he claimed, based on his race. The California Supreme Court agreed with Bakke, ruling that the medical school's admission policy violated equal protection. The medical school sought and obtained review by the Supreme Court. This time there could be no claim of mootness, since Bakke was not completing his medical school education. The court would have to confront directly the divisive issue of race-specific affirmative action.

Our brief strongly supported affirmative action as a mechanism for remedying past "educational handicaps" and for assuring diversity among the student body, but we opposed the concept that every racial, religious or other group was entitled to proportional representation—or quotas:

> A society permeated by racial, ethnic, religious and sexual proportional representation

HOUSE_OVERSIGHT_017381

> would be something quite different from the America we have known. Far from being abhorrent, invidious and irrelevant, racial and ethnic classifications would be officially sanctioned and recognized in all walks of life; each professional or office holder would be regarded, and would regard himself, as a representative of the group from whose quota he comes; and individual aspiration would be limited by the proportionate size of the group to which the individual belongs.

We argued in favor of individualized preferences based on actual experiences:

> If individual blacks applying to Davis Medical School have suffered economic hardship because they encountered discrimination, attended segregated schools or lived in segregated neighborhoods, these facts could be brought to the attention of the Admission Committee and their records evaluated accordingly. Any other system of preferences based on mere membership in a group which, because of its color or physiognomy, has suffered discrimination can only result in a society in which race consciousness and partisanship become the significant operative forces and race prejudice, rather than being minimized, is legitimated.

We quoted several Black leaders, such as Roy Wilkins, who opposed proportional representation:

> . . . It is ridiculous for Negroes to claim that because they are 40 percent of the population, they should have 40 percent of the jobs, 40 percent of the elected offices, etc.
>
> This is self-defeating nonsense, for no person of ability wants to be limited in his horizons by an arbitrary quota or wants to endure unqualified people in positions that they fill only because of a numerical racial quota.
>
> . . . Such practices and, in fact, the whole black-tilted system are doing no favors to Negro applicants. God knows it is true that the cards have been deliberately stacked against blacks. Every feasible step, even those costing extra money, should be taken to correct this racialism.
>
> But there must not be a lowering of standards. Negroes need to insist on being among the best, not on being the best of the second- or third-raters. . . .

We urged the Court to require the medical school to develop an affirmative action program that was compatible with the dream of a color blind America:

> Schools may and, we think, should evaluate both grades and test scores in the light of a candidate's background; whether he came from a culturally impoverished home; the nature and quality of the schools he attended; whether family circumstances required him to work while attending school; whether he chose to participate in athletics, the orchestra, school newspaper, literary magazine, campus government; whether he had demonstrated a

HOUSE_OVERSIGHT_017382

> concern and interest in the broader community by political activity or volunteer work among the sick or underprivileged; and whether he had manifested leadership, industry, perseverance, self-discipline and intense motivation.
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> …
>
> Moreover, if petitioner were to conclude that the medical profession as presently composed fails to serve the disadvantaged elements in society, then it could also consider whether applicants for admission, irrespective of race or ethnicity, manifest a genuine commitment to serve those groups currently lacking adequate service. Indeed, it could expressly offer special consideration in the admissions process to those who enter into a binding commitment to serve for a specified period in an urban ghetto, barrio or Indian reservation.
>
> All of these procedures would result in greater educational opportunities for members of our society's historically deprived minorities, as well as other applicants who are economically and culturally deprived; none of them would offend the Constitution. But what the school may not do, we submit, is to classify applicants for admission on the basis of race or ethnicity and so structure its selection process as to admit an essentially predetermined proportion of members of certain groups.

The Supreme Court's decision in Bakke accepted our argument against the sort of racial quotas employed by the medical school at issue, but it approved affirmative action programs, such as the one used by Harvard College, that vested enormous discretion in the Admissions Committee. A five person majority ruled that the type of admissions program used by Davis Medical School did not pass constitutional muster, while the type used by Harvard College does. Justice Powell, whose opinion contained the judgment of the Court, expressly singled out Harvard College for approval. He quoted extensively from the description of the Harvard program contained in the amicus curiae brief submitted by Harvard, Columbia, Stanford and Pennsylvania universities. Powell apparently found it easier to point to an existing system than to define the factors that would satisfy the constitutional and statutory standard (This reminded me of Justice Steward's "I know it when I see it" quip about hard core pornography.)

Powell's selection of Harvard College as a model for Davis Medical School was inapt, both because medical school admission is vastly different from college admission and because Harvard, with its vast applicant pool, is vastly different from Davis. But Powell had a good reason for pointing to the Harvard undergraduate admissions program: it is so vague and discretionary as to defy description. It reposes all decision making with a group of Platonic guardians whose task is to shape an entering class so as to maximize its diversity in certain unspecified ways. A Harvard admissions officer may be unable to define the factors that make a good candidate for admission, but is supposed to know a Harvard man or woman when he sees one.
The *Bakke* decision was thus a triumph of ambiguity and discretion over clarity and candor. Powell condemned Davis Medical School for reserving a discrete number of places in each class for disadvantaged members of specified minority groups, but he applauded Harvard College for employing a process that eschews "target-quotas for the number of blacks" but allows "the race

HOUSE_OVERSIGHT_017383

of an applicant [to] tip the balance in his favor just as geographic origin or a life spent on a farm tip the balance in other candidates' cases."

At bottom, Powell's opinion really said little about affirmative action as such. It simply delegated to universities the discretionary power to decide on the degree and definition of the diversity—including or excluding racial factors—that they feel enhance the educational experiences of their students.

The Harvard College description, as quoted in the Powell opinion, tells far from the whole story of Harvard's quest for diversity. It fails to disclose the enormous efforts that Harvard Colleges undertakes simultaneously to assure a certain kind of uniformity in its student body over time. Harvard (like many other Ivy League colleges) always has given great weight to genealogy—whether the applicant's parents or other family members attended or taught at Harvard. Since Harvard's past student and faculty bodies were anything but diverse, this "grandfather policy" guarantees a good deal of homogeneity over the generations of Harvard College classes, as well as homogeneity in a large part of any given class.

Mr. Justice Blackmun doubted whether there was much difference between the Davis and Harvard programs, commenting that the "cynical" may say that "under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly." Justice Powell nowhere disputed this. His answer seems to be that even if both programs produce the same result, the Davis program—because of its explicit acknowledgment of racial quotas—"will be viewed as inherently unfair by the public generally as well as by applicants for admission…," whereas the Harvard program—with its vague consideration of many unquantified factors—will not be as grating to the public or to its unsuccessful applicants.

But there is one way in which the Harvard system is ultimately less fair than the Davis one. In order to receive special consideration under the discredited Davis program, an applicant had to be *both* individually disadvantaged *and* a member of a specified racial minority. Under the approved Harvard program, the applicant's race alone "may tip the balance" in his favor even if he is the scion of a wealthy and powerful family who attended the best schools and personally experienced almost none of the trauma of racial discrimination. (Indeed, today some applicants seek a double preference: as a disadvantaged black and as an advantaged offspring of a Harvard alumnus.) Harvard's program has the effect of preferring the wealthy and black applicant, for example, over the poor and disadvantaged black or white applicant. In practice, Harvard probably makes more turn on race alone than did Davis. But it does it with typical Harvard class: low-keyed, muted, and without displaying too much exposed skin. Moreover, the history of Harvard's use of "geographic distribution" as a subterfuge for religious quotas leaves lingering doubts about the bona fides of its alleged quest for diversity.[88]

It will be interesting to see whether the courts, in looking to the Harvard model for constitutional and statutory guidance, will limit themselves to the Harvard College admissions program as described by Justice Powell, or whether they will go beneath the placid surface and probe the

[88] The current dean of admissions at Harvard College genuinely seeks diversity and has worked hard to recruit inner city Blacks. But at the time of the Bakke decision this was not nearly as true.

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more complex and troubling realities of the Harvard College program as it surely must operate in practice. (I have no inside knowledge of how the Harvard College admissions process actually works; my speculations derive from reading the newspapers and from having publicly debated several Harvard officials on the *Bakke* issue.)

For example, Justice Powell was anything but clear about the degree to which an applicant's race may be considered in university admissions decisions. At different points in his opinion, he articulates different formulations of the limits on explicit consideration of race in attempts to produce a diverse student body. He says that race must be "simply one element—to be weighed fairly against other elements—in the selection process"; that a school must place "all pertinent elements of diversity…on the same footing, for consideration, although not necessarily according them the same weight"; and that a school must "adhere to a policy of individual comparisons."

Let us assume that Blank University seeks diversity by trying to include musicians, farm boys, Oklahomans among its entering class, but that it does not instruct its admissions officers to aim for a specified minimum number of musicians, farm boys and Oklahomans in each entering class. May Blank University direct its admissions officers—either explicitly or implicitly—to make certain that the number of blacks or Chicanos should not go beneath a certain approximate percentage in the class? Would that put race on a different "footing" than the other elements of diversity?

The answer to that question may well turn on whether one looks for legal guidance to the description of the Harvard program as quoted in Mr. Justice Powell's opinion, or to the real world operation of the Harvard program as it probably works in practice. The following description certainly implies that race is not treated differently from other elements of diversity:

> "In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.

A closer look at the admissions program in practice might well reveal that the Harvard admissions officers, though interested in assuring geographic, occupational and musical diversity, really pay little or no attention to numbers: it would be no great crisis if one particular entering class at Harvard College had few or even no violinists, Oklahomans, or farm boys. (Football quarterbacks or basketball centers might be another thing altogether.) But these very same admissions officers may well be under instructions—explicit or implicit—to pay close attention to the number of blacks so as to assure that the proportion does not fall below a certain approximate floor.

HOUSE_OVERSIGHT_017385

The issues raised by the Delphic decision in Bakke continue to challenge the courts and the constitution. As I write these words, the Supreme Court has agreed to review yet another affirmative action program. The issues may be similar to that raised in Bakke and subsequent cases, but the personnel on the court has changed. Stay tuned.

My principled opposition to race-based decision making has been softened somewhat by experience. I have seen it work in practice. First and foremost, it has helped produce a new generation of remarkable Black leaders, many of whom were my students and remain my friends and colleagues. This has changed the face of America – and the world. Second, it did not have the feared negative impact on the admission of Jewish students. Jewish leaders were appropriately concerned that the "Black places" would be taken from the hard-earned "Jewish places," because colleges like Harvard and Yale would never reduce the number of White Anglo Saxon Protestants, who were the "backbone" and the "heritage" of these schools. Well, that turned out to be wrong. There has been a significant decrease in the number of "WASPs" admitted to elite schools. The "donuts", it turns out, have not only been "bagels;" they have included white bread. Put another way, Jews have become WASPs, when it comes to admissions. Many Jewish applicants are now "legacies" who are given an advantage in admission. It may still be a bit more difficult, all things being equal, for a Jewish non-legacy applicant to be admitted, because all colleges seek "diversity", but the number of Jewish admittees remains high. So it has been a win-win, rather than a zero sum game, at least as far as Blacks and Jews are concerned. There may still be implicit ceilings for some Asian applicants to some schools, but that may be because there are so many qualified Asian-American applicants as well as applicants from many Asian countries. The donuts therefore include "nan" and dim sum.

My philosophy of life has always been that experience is the primary source of our morality – that rights come from wrongs. Rights also come from a recognition that they may not produce the wrongs that are feared. It should not be surprising therefore that based on experience I have changed my views somewhat on the propriety of race-based decisions. It would also not be surprising if, in the future, I changed my views again, as many African-Americans secure greater power, influence, and privilege in America. It may become necessary at that point – a point we may not have reached– to base affirmative action programs more on class and other relevant factors than on race alone.

In sum, therefore, my views regarding equality have not changed over the years, since equality is a principle and in my view an enduring and never changing goal. The means by which we seek to achieve the goal of equality will vary over time and place with experience. The ongoing experiment with various types of affirmative action programs will never provide a perfect solution to an extraordinary complex problem, but I believe we are moving in the right direction.

HOUSE_OVERSIGHT_017386

Chapter 17 The crumbling wall between church and state: from separation to christianization

The "equal protection clause" of our Constitution is not the sole mechanism for security equality. The clauses that require separation of church and state were designed, at least in part, to assure religious equality.

My first memory of being aware of the separation of church and state goes back to the 1950s, when the words "under God" were being added to the pledge of allegiance. The Yeshivas I went to as a kid were very patriotic. We recited the pledge at assemblies, and some teachers made us say it every day in class.

Most kids hate change, so when the two words were added, there was some grumbling, not because of the content of the words, but just because it was different from the way we always had done it.

I remember thinking about the meaning of the two new words. Under which God? Under whose God? Is there only one God that all American can pledge allegiance to or are there different gods that different religions worship? What about the Trinity? Is Jesus God? And what is that thing the Catholic kids call "the Holy Ghost?" Scary! But is it God too? Are Jews even supposed to say the word God (we were always taught to spell it, G-d)? Is Allah the same god as Elohim? What about Jehovah—the name we were absolutely prohibited from pronouncing?

These were precisely the sort of theological questions we were not supposed to be thinking about. We were supposed to do and not do—go to shul, don't eat shrimp—and to ask our Rabbi what to think about such esoteric issues. They know the religiously correct answer. Yet the addition of the two words to the pledge forced me not only to think about them but to try to place them in the context of my own role as a young Orthodox Jewish skeptic in a largely Christian America. Our school taught us that even though America was a majority Christian country, George Washington, in his famous letter to the congregants of the Truro Synagogue in Newport, had assured Jewish Americans that in this New Republic "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights." Here, all Americans "possess alike liberty of conscience and immunity of citizenship" because our government "gives to bigotry no sanction [and] to persecution no assistance."

These powerful words written by the father of our country were displayed on the bulletin board of our Yeshiva as if they constituted the Magna Carta for American Jews.[89]

Yet we saw bigotry all around us. We knew that no Jew had ever been elected president. No Jew had ever been the head of a major corporation or university. We knew that there were quotas limiting the number of Jews at most Ivy League colleges. Still, we believed that this was a land of opportunity and that we could do anything, within certain limits, and that even these limits were narrowing, though not yet disappearing.

[89] Most of the words were borrowed by Washington from the letter written to him by the Rabbi of the Truro Synagogue.

HOUSE_OVERSIGHT_017387

I also knew that our Constitution said some things about religion. In our Yeshiva we learned mostly about the First Amendment's protection of freedom of religion. But I started to read a little more about the Constitution and quickly learned that there were three references to religion in that great document of liberty. The first, in the body of the original Constitution, declared that "no religious test shall ever be required" for holding office under the United States. Wow, is this really true? I wondered, then why hasn't there been a Jewish president? And why is there only one "Jewish seat" on the Supreme Court? It sure sounded to me like religious tests were being applied in fact, although it was unconstitutional to do so. This got me to thinking about the difference between the law as written and practiced.

I also discovered that the First Amendment, in addition to guaranteeing freedom of religion, had an awkwardly phrased guarantee which I did not understand: "Congress shall make no law respecting an establishment of religion." There were two words I didn't understand. What does "respecting" mean? I had always used it to suggest a positive attitude—respect—toward others. Clearly it had a different meaning in the First Amendment, something like "regarding." Second, what did the word "establishment" mean? I simply had no idea and so I began to do some research. The answer was anything but simple and the meaning of the term is still not completely clear to me after 60 years of thinking, writing and teaching about it.

So there was some upside for me in the words "under God" being added to our pledge. It not only got me thinking, it got me arguing with my friends and even with some of my teachers. It's an ongoing argument…

The downside, which was evident to me even back then, was that whatever the words prohibiting an establishment of religion meant, they seemed incomparable with compelling every school boy to declare his belief in a God inserted into the pledge by Congress. So, although I believed in God (or more likely never thought about any alternative), I decided never to say the words. I continued to recite the old pledge, confident that it was I, and not those who amended the pledge, who were being patriotic and faithful to the meaning of our Constitution. I guess I was an early Originalist in that regard, since my reading suggested to me that Jefferson and Madison would not have approved of making young kids declare a belief in God.[90]

Flashing forward a generation, my oldest son Elon, had a similar epiphany in 1970, when my family moved to California for a year so that I could take up residency in The Center For Advanced Study of Behavioral Sciences at Stanford. We enrolled our kids in a Palo Alto Public School and my 8 year old son Elon got into trouble for refusing to recite the words "under God" in the pledge. When he came home from school, I asked him how come he had just noticed the words under God, since his elementary school in Cambridge also required periodic recitations of the pledge. He told me that we were at war in Vietnam and he thought the words—pronounced with a Boston accent—were "under guard." It was only a California teacher writing the words on the blackboard that revealed to him that he was being required to take a pledge that included God. By this time I knew that the Supreme Court had ruled that a religious objector could not be required to recite the pledge, because, as the justices put it:

[90] Nor would the composer of the original pledge who was an early socialist.

HOUSE_OVERSIGHT_017388

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can…force citizens to confess by word or act their faith…"

Elon was excused from saying the words for the remainder of the year.

Elon suffered no adverse consequences from his religious dissent, but the same cannot be said for Susan Shapiro, a 17 year old high school senior in the Boston area. When she exercised her right not to participate in the pledge, her teacher said it was as if someone had spit on the Star of David. She was called names by fellow students and told to "go back to Israel." (She was born in America). I agreed to represent her and, after we threatened to bring a lawsuit; we got the school to permit her not to participate in the pledge and to inform the students that she was within her rights.

A few years later I was to become involved in a highly publicized case involving the right of a criminal defendant not to be discriminated against on account of his religion, even though he himself was accused of using his religion to defraud co-religionists. The case involved television evangelist Jim Bakker, who was married to the equally famous Tammy Faye Bakker. I was retained to argue his sentencing appeal, following his conviction for defrauding PTL ("Praise the Lord" and "People that Love") Club Lifetime Partners who had paid for homes in Heritage U.S.A.—a Christian family retreat—but were never able live in them. This is how the appellate court summarized the case:

> Bakker planned to finance these projects by selling lifetime partnerships [that promised] annual lodging in one of the Heritage Village facilities…Many of these partners drew on meager incomes to purchase Heritage Village lodging benefits. Appellant raised at least $158 million through the sale of approximately 153,000 partnerships with lodging benefits.
>
> Bakker promised television viewers that he would limit the sale of partnerships to ensure that each partner would be able to use the facilities annually. Appellant, however, oversold the partnerships…Bakker used relatively few of the funds solicited from the partners to construct promised facilities…Instead, Bakker used partnership funds to pay operating expenses of the PTL and to support a lavish lifestyle. This extravagant living included gold-plated fixtures and a $570 shower curtain in his bathroom, transportation in private jets and limousines, an air-conditioned tree house for his children and an air-conditioned doghouse for his pets. This combination of overselling partnerships and diverting partnership proceeds meant that the overwhelming majority of the partners never received the lodging benefits Bakker promised them.

After a lengthy and emotional trial, Bakker was convicted by a jury. The judge sentenced him to 45 years in prison. In imposing that lengthy sentence, the judge—the Honorable Robert Potter, known around the courthouse as "maximum Bob"—said the following:

> "He had no thought whatever about his victims, and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests."

HOUSE_OVERSIGHT_017389

Bakker wrote me a long handwritten letter from prison imploring me to join his appellate team and save him from a lifetime of imprisonment. There was not enough time before the appellate brief had to be filed for me to take over the entire appeal, but I was particularly appalled by the length of the sentence and the religiously discriminatory reason the judge gave for imposing it. I agreed therefore to brief and argue the sentencing issue on the appeal (a team of Texas lawyer had been retained long before to argue against the conviction).

This is how a New York Times journalist characterized the oral argument:

> Last June, barely a week before their brief was due, the Houston lawyers handling Mr. Bakker's appeal, Don Ervin and Brian Wice, learned that Mr. Dershowitz was joining their legal team. He was to handle only a small part of Mr. Bakker's appeal, concerning the 45-year sentence meted out by Judge Robert D. Potter. Mr. Dershowitz insisted he would remain in the background.
>
> But that, it turned out, was a bit like George Steinbrenner's saying "Yogi Berra is my manager for the rest of the year." In October, when the Bakker appeal was argued, it was around Mr. Dershowitz that everyone clustered…
>
> Even his co-counsel, two Texans schooled in a tradition of great oratory, were dazzled by what they saw in court. "It was kind of like watching a terrific maestro in front of an orchestra," Mr. Ervin said. Mr. Wice called the performance "mesmerizing" and added: "He looks like a schlep, wearing suits he could have bought in Filene's Basement, woolen socks, and shoes -- I don't know if they still call them Earth shoes. But the judges hung on every word he had to say and bought what he was selling."
>
> Nonetheless, Mr. Wice couldn't resist noting what he called Mr. Dershowitz's predilection for publicity. "I've discovered that the most dangerous place to be in the criminal justice system is not the Federal Penitentiary at Marion or the holding cell at the Tombs, but between Alan Dershowitz and a television camera."
>
> Mr. Dershowitz relished the chance to take on Judge Potter (nicknamed "Maximum Bob" for his harsh sentencing), with whom he'd tangled in a previous case. "This is a judge who doesn't understand the difference between a year and a decade, who always adds a zero to the sentence other judges would impose," Mr. Dershowitz said.

Jim Bakker did not have such nice things to say about his other lawyers:

> Alan Dershowitz did an outstanding job highlighting the errors in my case and in my sentencing. That same could not be said, however, of my Texas attorneys' attempt to contest the merits of the case. Their arguments were confusing and unconvincing. At one point they implied to the judges that I had not intended to defraud the PTL Partners, merely deceive them. "You can intend to deceive but not intend to defraud," my lawyer said. "It is not against the law in this context to deceive. Of course, I had intended to do

HOUSE_OVERSIGHT_017390

> not such thing—defraud or deceive the PTL Partners! That was the last day the Texas firm worked as part of our legal team.

We waited several months for the decision. Finally, it was released. The Court of Appeals ruled that the conviction was valid but the 45 year sentence was not. In vacating the sentence, the court established a powerful precedent against a judge using his own religious beliefs as a factor in determining the degree of punishment. This is what they said about the role of religion in sentencing:

> Courts have held that sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process. [W]e believe that similar principles apply when a judge impermissibly takes his own religious characteristics into account in sentencing.
>
> Courts… cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed.

The court vacated the sentence "with genuine reluctance" because they believed Bakker was indeed guilty:

> Yet, the fact remains that this case involves the explicit intrusion of personal religious principles as the basis of a sentencing decision. [O]ur review of the sentencing transcript reveals comments that are, in the end, too intemperate to be ignored. Because an impermissible consideration was injected into the sentencing process, we must remand the case [to a] different district judge to ensure that the ends of due process are achieved.

This was precisely the result we asked for: resentencing by a judge other that Maximum Bob, who surely would have imposed the same sentence without referring to his religion. The new judge eventually reduced the sentence to 8 years and Bakker was released after serving 4.5 years—quite a reduction from the 45 years originally imposed by Maximum Bob.

Following our victory in the Jim Bakker sentencing appeal, Tammy Faye Bakker declared the judicial ruling "a great victory for Christianity." I responded that "the fact that a Jewish lawyer helped bring that about must show that it was a great victory for all Americans." The New York Times reported further on her reaction to our victory.

> Tammy Faye Bakker says Mr. Dershowitz has singlehandedly restored her faith in lawyers. "Jim and I are really sold on him and think he's the greatest," she said. "He certainly is worthy of every penny he makes." (In fact, his bill was $20,000, contributed largely by the Bakkers' backers.)

HOUSE_OVERSIGHT_017391

> Mrs. Bakker has yet to make Mr. Dershowitz's acquaintance. But she said she went right out to watch "Reversal of Fortune" and added, "Every time he's on, I run to the television."

> "One of my biggest desires now is to meet him," she went on. "He's our kind of people, a real down-to-earth, nice man."

Eventually, I did meet her. She kissed and hugged me and repeatedly blessed me in the name of Jesus. When she kissed me, so much of her makeup came off on my face that it took me several minutes and some hard scrubbing to remove it.

Several weeks later, I received a gift in the mail from Tammy Faye. It was a Passover Haggadah—the prayer book that is read at the Seder. We have a large collection of Haggadahs, some dating back hundreds of hears, many with beautiful illustrations of the Passover story. At our ecumenical Seder, which usually includes several dozen guests of all religions—we once invited Anwar Sadat's daughter—we distribute the different Haggadahs among the participants, and each one reads a passage in the English translation. I try to make the passage selected for each guest relevant to their background. I purposely gave the Bakker Haggadah to a friend who reads very expressively and who focuses more on his delivery than on the content. He began to read about the reasons we eat matzo on Passover.

> "This is the bread of affection that the people of Israel had to eat when they fled from Egypt."

So far so good. But then, it went on to describe why matzo had small holes:

> "The holes in the matzo represent the wounds on the body of our Savior, Jesus Christ, who in his body was punctured during his crucifixion."

Not in the traditional Jewish Haggadah! Tammy Faye had sent me a Christian Evangelical rip-off of the Haggadah designed for use at Seders conducted by Jews for Jesus. I had perused it before distributing it to my friend to recite, so I knew what it contained. We all had a great chuckle at what Tammy Faye regarded as an appropriate gift for liberating her husband from bondage.

These stories and cases vindicating both freedom of, and freedom from religion, highlight one of the great ironies of the American experiment with separation of church and state. And it was surely an experiment. Ours was the first nation in the history of the world to separate religion and government, at least in theory. Our constitutional provisions remain among the strongest in the world. Yet we are the most religious democracy on the face of the earth. More Americans believe in God and go to houses of worship than in any other democracy. No Atheist and Agnostic can be elected to high office (though that was probably not always the case.) Indeed, in order to get elected, a candidate must loudly and repeatedly proclaim a deep belief in God and a strong commitment to "faith" (which has become the new political buzz word).

HOUSE_OVERSIGHT_017392

Is this an irony, or is there a causal connection between our constitutional separation of church and state and the high level of religiosity among our people? I believe the latter is the case.

The original theory behind the metaphor of "the wall of separation" was to protect the holiness of the church from the corrupting influences of the secular state. Roger Williams, who is credited with coining the metaphor, was a 17th Century Baptist minister in Providence, Rhode Island. He insisted that a "hedge or wall of separation between the garden of the church and the wilderness of the world" was necessary to protect religion, as well as to assure freedom of conscience. And this wall has worked wonderfully to do both.[91]

Churches are thriving in America, unlike in most European countries that have long traditions of established churches. When the state supports churches, resentment against government, which is inevitable, spills over to religion. Consider Israel, whose citizens are far more secular on average than Americans. Many Israeli Jews resent religion because the Rabbis have too much influence over marriage, divorce and other aspects of daily life. This turns people against religion. Israel does not have an established religion, despite its being a "Jewish state." Muslim and Christian Israelis, who comprise nearly a quarter of the population, have equal status and equal rights, or at least as a matter of law, but Conservative and Reform Jews do not. Within the Jewish religion, Orthodoxy is the established branch. This has caused enormous resentment—against both the state and the synagogue—by reform, conservative and secular Jews and have driven many of them away from religion. In the U.S., on the other hand, resentment against the government (Congress' approval rating is always quite low) does not translate into resentment against the churches. To the contrary, cynicism about politics, may well drive some people toward greater commitment to their churches.

I believe, therefore, that perhaps the single most important guarantee in our Constitution is one that is not explicitly enumerated: the separation of church and state. Although those words do not appear in either the body of the Constitution or in the First Amendment, there can be no doubt that the founding fathers constructed a system of checks and balances that required such separation. Without it, the church (representing organized religion) could not serve as an effective check on the secular excesses of the state; nor could the state serve as an effective check on the excessive involvement of the church in the business of governance and on the rights of religious and non-religious dissenters. The marvel of our unique system of checks and balances, is that is does not simply involve each branch of government—executive, legislative and judicial—checking on the others; it also encourages—through the freedoms guaranteed by the First Amendment—other institutions to serve as checks on the government. In addition to the churches (broadly defined to include all religious institutions), these include the media, the academy, the business community, and especially the "people" who have the right to vote, to assemble and to petition for a redress of grievances.

Just before the 50th Anniversary of the Declaration of Independence—the day on which two of its primary authors, Jefferson and Adams, both died—Jefferson wrote the following about the purpose of Declaration:

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[91] The irony is that the wall was essentially a contribution made by Baptists to America, is now being attacked by many Baptists.

HOUSE_OVERSIGHT_017393

> "May it [the Declaration of Independence] be to the world, what I believe it will be (to some parts sooner, to other later, but finally to all), the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessing and security of self-government. That form which we have substituted, restores the free right to the unbound exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimacy, by the grace of God.

Jefferson, who himself believed in the God of Deism—that is a non-Biblical, not Judeo Christian diety—saw the Declaration as freeing Americans (and hopefully the rest of the world) from the stifling influence of the church ("monkish ignorance and superstition") and encouraging "the free right to the unbound exercise of reason and freedom of opinion."

Even earlier, Jefferson, while President, had written to the Danbury Baptist Association, describing that the "act of the whole American people which declared their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof, [as] thus building a wall of separation between church and state."

Even earlier, while Adams was president and Jefferson Secretary of State, they jointly signed a treaty, ratified by the Senate, with the Barbary regime in Tripoli, that stated unequivocally that "the government of the United States is not in any sense founded on the Christian religion." (emphasis added).

It is difficult, therefore, for any reasonable person, especially anyone who gives weight to the original understanding, to dispute Jefferson's conclusion that the First Amendment built a wall of separation between church and state and that our state is not based on the Christian religion.

Despite this wall of separation guaranteed by our Constitution and despite the unambiguous statement in the early American treaty, approved by two of our most influential founding fathers, there are those who continue to insist that the United States is a Christian nation, as a matter of law. I became personally involved in this divisive controversy in 1988, when the Republican Party of Arizona proposed the enactment of a resolution declaring the United States to be "a Christian nation…based on the absolutes of the Bible."

The leader of the group (characterized by the late Arizona Senator Barry Goldwater as a "bunch of kooks") wrote to Justice Sandra Day O'Connor on the United States Supreme Court asking her to support their efforts.

> "Republicans are making some interesting advances in this heavily controlled Democratic area. Some of us are proposing a resolution which acknowledges that the Supreme Court ruled in 1892 that this is a Christian nation. It would be beneficial and interesting to have a letter from you."

HOUSE_OVERSIGHT_017394

Despite the crass partisan political objective of the undertaking and its utter incompatibility with the Constitution O'Connor had sworn to uphold, she agreed to help, writing the following letter for publication:

> "You wrote me recently to inquire about any holdings of this Court to the effect that this is a Christian nation. There are statements to such effect in the following opinions: Church of the Holy Trinity vs. United States; Zorach vs. Clauson; McGowan vs. Maryland."

Not only was O'Connor wrong to write any letter in support of this unconstitutional, partisan, kooky proposal, she was wrong on the law, wrong on the facts and wrong on her history. First of all, if this were a "Christian" nation, its form of Christianity would be decidedly Protestant. Catholics would be second class citizens. Indeed our Constitution, and the earlier Declaration of Independence, were designed, at least in part, to protect Americans from the influence of the Catholic Church, which was reviled by many of our founding fathers, including Adams and Jefferson. ("Monkish ignorance" was a clear reference to the Catholic Church.)[92] Second, there are no such "holdings." Third, the first case she cited (which had long ago been discarded, if not overruled) contained—in dictum—some of the most bigoted language in Supreme Court history by one of the most bigoted Justice in its history, David Brewer.

Brewer's dictum, in an obscure immigration case, declared "Mohomet" and "the Grand Lama" to be "imposters." In his other writings and speeches, he decried the evil of Mormonism and other non-Christian faiths. He was an anti-Catholic bigot and an anti-Semite, as well as a racist and segregationist. He believed that we were a white Protestant nation and he smuggled the concept of a "Christian nation" into dictum not even in a case that did not even raise the issue.

When, in 1892, Brewer wrote the disgraceful and bigoted opinion cited by O'Connor, the U.S. was, demographically, a white Protestant Christian nation. The nation's demography changed dramatically in the nearly a century between that decision and O'Connor's letter. And the law reflected that change.

Since 1892, the court has not referred to this nation as "Christian" or "Protestant." Indeed, the justices have gone out of their way to be inclusive. For example, when Justice William O. Douglas sustained a New York program permitting public school students to be released for an hour each week for religious instruction, he specifically gave as an example of religious accommodations "a Jewish student [asking] his teacher for permission to be excused for Yom Kippur." Yet this was one of the decisions miscited by Justice O'Connor as containing statements to the effect that this is a Christian nation.[93]

When her letter was disclosed, Justice O'Connor issued a statement regretting that it has been "used in a political debate," and the Supreme Court media office said that O'Connor "had no

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[92] Cite Jefferson

[93] In at least one, a justice said—in passing—that "we are a Christian people." But he then quickly added in the same sentence that we are a people who accord "to one another the equal right of religious freedom" (emphasis added). *United States v. MacIntosh*, 283 U.S. 605, 625. Justice Holmes, Brandeis Stone, and Hughes dissented. Justice O'Connor failed to mention this case.

HOUSE_OVERSIGHT_017395

idea" that the letter would be used politically. But that simply isn't true, since the request to Justice O'Connor—stating that it would be "beneficial" to have a letter from her as part of a Republican proposal to enact a Christian Nation resolution—made it clear that she was being asked to write her letter specifically for use in a political campaign.

When I got wind of Justice O'Connor's letter, I wrote a scathing op ed for the New York Times criticizing her judicial ethics as well as her miscitation of the law.

> Justice Sandra Day O'Connor has again deplorably allowed her name and judicial office to be used for partisan political purposes.
>
> In 1987, she agreed to conduct a "private briefing" in the Supreme Court for Republicans who contributed at least $10,000 to a political-action group. She canceled it after leading ethics experts publicly criticized her actions as violating the Code of Judicial Conduct - but not until after her name had been used in the fund-raising solicitation.
>
> Justice O'Connor recently complied with a request from an arch-conservative Arizona Republican friend who had asked her to write a letter in support of a proposed party resolution declaring the United States to be "a Christian Nation . . . based on the absolute law of the Bible."
>
> …

I then described what she had done and the phony excuse she had offered in defense: that she "had no idea" her letter would be used politically. My op ed concluded:

> Not only was Justice O'Connor's letter used in that [political] campaign, its miscitation of cases was relied on in the resolution enacted by the Arizona Republican Party. That resolution begins, "Whereas the Supreme Court of the United States has three holdings to the effect that this is a Christian nation . . . ." It then cites the decisions provided by Justice O'Connor and declares that we are "a Christian Nation," and that the Constitution created "a republic based upon the absolute laws of the Bible, not a democracy."
>
> Justice O'Connor has twice given aid and comfort to partisan Republican causes. Both times her regrets came too late and only after public criticism. She has twice allowed her name and judicial office to be used improperly. She has twice violated the Code of Judicial Conduct, which unambiguously directs sitting judges to refrain from political activity, including "making speeches for a political organization" and participating in political fund raising.
>
> A seat on the Supreme Court does not exempt a Justice from complying with the rules of the profession. Justice O'Connor must remember that her allegiances are no longer to a particular wing of the Arizona Republican Party but to all Americans, regardless of party affiliation, region or religion.

I was told by several law clerks that after my op ed appeared, she was deeply embarrassed by what she had done and has not repeated the errors of her way during her subsequent years of service on the Court.

HOUSE_OVERSIGHT_017396

Justice O'Connor was not, of course, the first (or the last) public office to use Christianity in the of partisan politics. The issue got so bad during the 1984 presidential race that Walter Mondale found it necessary to remind Ronald Reagan that in the United States the president, unlike the queen of England, is "not the defender of the faith" but rather the "defender of the Constitution."

In 2012, A Republican candidate for President, Rick Santorum, said that the concept of an absolute separation of church and state, as articulated by John Kennedy when he was running for president, "makes me want to throw up." Other candidates, though expressly themselves less graphically, have also railed against the separation of church and state. "Faith" has become synonymous with "values" in the minds of many although there is absolutely no correlation. Indeed, the "values" espoused by people who would impose their faith on others are highly questionable. They include denying gays the equal protection of the law, denying women (and young girls) the right to choose abortion, and sometimes contraception, even in compelling cases; and, often, other conservative political "values" that have nothing to do with religion, such as low taxes, the right to bear arms, the death penalty and widespread censorship. The debates over these issues, especially gay rights and the right to choose abortion, have become wedge controversies that are unduly influenced by the churches in violation of the spirit, if not the letter, of our Constitution.

The rights of gays to absolute equality

When I was growing up, it was impermissible to use any words that were demeaning to African Americans (who we called Negroes or colored), to other religions or ethnic minorities (except for the Germans and Japanese during World War II) or to women. But insulting gay boys (we had no idea there even were lesbians) was perfectly acceptable. Indeed, we commonly used "the F word" to insult non-athletic classmates or effeminate-looking boys. We never actually met a real live homosexual (at least to our knowledge) but we knew there was "something wrong" with anybody who was sexually attracted to people of the same gender.

Our bigotry was not religiously based, though we knew that the Bible prohibited sex between men (perhaps the Bible's authors, like us, had no idea there were lesbians). We just didn't like "homos." It was as simple as that. You really do have to be taught to hate (as said the words of a song from a show popular back in the day.) And we were taught to treat all people, except gays, equally.

It's very different among today's youth, at least in parts of the world that I frequent. Most young people I encounter can't even understand why anyone would discriminate against someone based on his or her sexual orientation or preference.

Today, the discrimination does seem religiously based, at least to a significant degree. The Bible is frequently cited as the authoritative source for condemning homosexuality, and the sanctity (a religious term) of marriage between a man and a woman serves as the primary basis for opposition to gay marriage.

HOUSE_OVERSIGHT_017397

Since my youth, the movement toward full equality for gays has made great strides, despite continuing religious objection from some church groups and some Orthodox Jews. The fact that many churches, as well as conservative and reform Judaism, support equality has muted the impact of the religious right somewhat on this issue. Before long, I predict, it will not be an issue for most Americans.

In 2003, during the beginning of the presidential election season, the Supreme Judicial Court of Massachusetts rendered the first-in-the-nation decision declaring it unconstitutional to limit marriage to heterosexual couples. This decision was truly a knife that cut both ways: it was a Magna Carta for gay and lesbian couples, but it was also a boon to social conservative candidates who could use it as an important part of their appeal to the majority of Americans who then believed that marriage should be reserved for heterosexual couples.

I decided to write an op ed that would seek to eliminate gay marriage as "a wedge issue" in the upcoming political campaign. In it, I argued that if marriage is indeed sacreda divine, a blessed sacrament between man and woman as ordained in the Bible, it would follow that the entire concept of marriage has no place in our civil society, which recognizes the separation between the sacred and the secular, between church and state. Just as the state has no role in baptisms, circumcisions or other religious rituals, it should play no role in sacred marriages.

The state is, of course, concerned with the secular rights and responsibilities that are currently associated with the sacrament of marriage (as it is with the safety of baptisms and circumcisions): the financial consequences of divorce, the custody of children, Social Security and hospital benefits, etc.

The solution I proposed is to unlink the religious institution of marriage -- as distinguished from the secular institution of civil union -- from the state. Under this proposal, any couple, regardless of gender, could register for civil union, recognized by the state, with all its rights and responsibilities.

Religious couples could then go to the church, synagogue, mosque or other sacred institution of their choice in order to be married. These religious institutions would have total decision-making authority over which marriages to recognize. Catholic churches would not have to perform or recognize gay marriages. Orthodox Jewish synagogues would not perform or recognize a marriage between a Jew and a non-Jew who did not wish to convert to Judaism. And those religious institutions that chose to perform or recognize gay marriages could do so. It would be entirely a religious decision beyond the scope of the state.

Under this new arrangement, marriage would remain a sacrament, as ordained by the Bible and as interpreted by each individual church. No secular consequences would flow from marriage, only from civil union.

In this way, gay couples would win exactly the same civil rights as heterosexual couples in relationship to the state. They would still have to persuade individual churches of their point of view, but that is not the concern of the secular state.

Not only would this solution be good for gays and for those who oppose gay marriage on religious grounds, it would also strengthen the wall of separation between church and state by

HOUSE_OVERSIGHT_017398

placing a sacred institution entirely in the hands of the church while placing a secular institution under state control. Roger Williams and Thomas Jefferson would surely have approved.

Although this proposal may sound radical, it does not differ fundamentally -- except for labels -- from the situation that exists in many states today. Throughout the United States, couples have the option of being married civilly by going to town halls or to a justice of the peace and simply signing a marriage certificate. They also have the option of going to a church, synagogue or mosque and being married in a religious ceremony. So most Americans already have the choice between a sacrament and a secular agreement ratified by the state.

All that would be different would be the name we give the secular agreement. The word "marriage" would be reserved for those who chose the religious sacrament.

Though some traditionalists would be certain to balk at an explicit division between marriage and civil union, a majority of Americans already agree that gay couples should be allowed to join in secular unions with the rights and responsibilities that generally accompany marriage.

I concluded my op ed as follows:

> So let each couple decide whether they want to receive the sacrament of marriage or the secular status of civil union. And let the state get out of the business of determining who should receive holy sacraments.

My column was widely circulated and generated an enormous debate. I was invited to appear on television and radio shows, where extremists on both sides pilloried me: gay activists for not going far enough; religious anti-gay activists for going too far.

Shortly after my column appeared, I received a phone call from the then Governor of Massachusetts, Mitt Romney, who told me that he found my idea interesting and asked me to draft legislation that he might consider proposing in order to break the deadlock. I drafted the legislation, but never heard back from the governor, who by the time I submitted it, had announced his candidacy for President of the United States. He was almost certainly fearful of the pushback he would get from the religious right—whose votes he needed to be nominated—if he were seen as favoring anything that even resembled gay marriage.

Since that time, several states have adopted gay marriage or civil unions and the trend is clearly in the direction of full equality for gay men and women. I predict, based on the reaction of my current students to this issue, that the next generation will not even understand why earlier generations took so long to recognize equality for gays.

A woman's right to choose abortion

As easy as the resolution of the gay marriage issue would be under our Constitution—full equality either in marriage or civil unions for all—that's how difficult it is to resolve the abortion issue as a

HOUSE_OVERSIGHT_017399

matter of Constitutional law. Politically I have always supported a women's right to choose abortion, since I do not regard an early term fetus as a human being for purposes of the abortion debate. For me the decision to abort is very much a matter of degree and the women carrying the child should have primary responsibility to make that decision. But as a matter of constitutional law, I find little basis in either the right of privacy or the right to equal protection that would grant a women the right to terminate her pregnancy, particularly as the fetus comes closer to viability. The law must always make arbitrary judgments—an 18 year old may vote but a 17 year old may not, a 34 year old may not run for president, but a 35 year old can—and the judgment as to when a fetus becomes a human being in highly arbitrary. Most legal systems establish exit from the birth canal as the moment of humanity but a 9 month old fetus in the womb is biologically indistinguishable from a fetus that has just exited the womb. (Indeed when kangaroos exit from the womb, it is only a temporary condition and the joey returns periodically to the mother's external womb for nourishment.) The fetuses is as viable at 9 months as at 9 and a half, but distinctions must be made by the law.

The question of when life begins is somewhat more arbitrary than the related question of when life ends. But even the latter question is subject to disagreement as the cases involving "pulling the plug" demonstrate.

The religious component in the abortion debate is quite pronounced. For a believing Catholic, and for some Protestants, life begins at conception. If I believed, as some do, that abortion is the killing of a human being with a soul, I would probably be marching in front of abortion clinics to stop the murder of innocent babies. The fact that I don't believe this is largely a matter of my upbringing, most particularly my religious training. It is not a matter of absolute "truth." Some scholars, believe that they can demonstrate, as a matter of philosophical truth, that the Catholic position is wrong. I think that is the height of arrogance. Nor am I convinced by the faulty argument, offered by some, that if Catholics really believed that fetuses were human beings, they would punish abortion by the death penalty and the fact that they don't proves, under this view, that they don't really believe that fetuses are human beings. This argument is preposterous on its face, for several reasons. First, some religious extremists do believe that abortion should be punished by death. Indeed, they have killed abortion doctors. Second, some Catholics are opposed to the death penalty even for murder. Indeed, that is the official position of the Vatican. Third, one can believe that abortion is murder and yet understand that there may be mitigating factors.

Following the Supreme Court infamous decision in Bush v. Gore, essentially handing the 2000 Presidential election to George W. Bush, I wrote a book (Supreme Injustice) in which I argued that "the seeds" of Bush v. Gore "were planted by the campaign to constitutionalize a woman's right to choose abortion."

I argued that the abortion issue is quintessentially political. It involves a clash of ideologies, even world views. Unlike the issue of equality for gays or state-enforced racial segregation, the controversy over abortion has no absolute right and wrong, either morally or constitutionally. Virtually everyone today acknowledges that segregation was both immoral and unconstitutional. All it took was a strong push by a unanimous Supreme Court to set in motion a process that was ongoing in most other democracies throughout the world, but that had gotten stuck in the United

HOUSE_OVERSIGHT_017400

States because the channels of democracy had been blocked by malapportioned legislatures and other perversions of the democratic process. Over a period of years, the Supreme Court placed its moral imprimatur on desegregation and eventually unblocked these channels of democracy. It worked – not perfectly, but perfection is rarely possible in a heterogeneous and divided democracy. A similar process is today underway with regard to equality for gays.

Abortion is different. The Supreme Court's decision, now more half a century old, changed few minds on this issue, because those who believe that abortion – or certain kinds of abortion – is tantamount to murder are not like those who believed that segregation was right. The former believe that they occupy the moral high ground. And they do, if their underlying premise – that a fetus is a human being – is correct. No rational argument, whether made by philosophers or Supreme Court justices, will ever disprove the truth of that *a priori* premise. Nor will experience alter it, unlike views concerning segregation or gay rights which have been markedly changed by experience.

Moreover, the nation was – and remains – closely divided about the morality of abortion, both in the abstract and under various circumstances. Advocates of a woman's right to choose abortion could have organized politically to win that right (at least for most women under most circumstances) in the elected branches of government. According to the ACLU:

> Between 1967 and 1971, under mounting pressure from the women's rights movement, 17 states decriminalized abortion. Public opinion also shifted during this period. In 1968, only 15 percent of Americans favored legal abortions; by 1972, 64 percent did. When the Court announced its landmark 1973 ruling legalizing abortion in *Roe v. Wade,* it was marching in step with public opinion.

But it is not the proper role of the Supreme Court to march "in step" with public opinion. That is the role of the elected branches of government. Instead of devoting all their resources to continuing the legislative and public opinion battle, the pro-choice movement devoted much of its resources to the litigation option, whose goal it was to get the Supreme Court to constitutionalize a woman's right to choose abortion. It worked as planned, thus sparing the pro-choice movement the difficult political task of organizing and fundraising on a state-by-state basis. The justices did the work for them, by simply striking down most abortion laws in one fell swoop.

The short-term consequences of constitutionalizing the abortion issue were powerful and positive for the choice movement. The long-term consequences were disastrous. *Roe v. Wade* provided the Religious Right and the conservative wing of the Republican Party one of the best organizing tools and rallying cries imaginable. The right-to-life movement was energized by this decision and became one of the most potent political forces both nationally and in a large number of states. At the same time, the pro-choice movement became lethargic, celebrating its great judicial victory and neglecting the hard work of organizing and fundraising – at least in the beginning. As the ACLU has put it:

> … the backlash was swift and fierce. Anti-choice forces quickly mobilized, dedicating themselves to reversing *Roe.* In 1974, the ACLU established its

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Reproductive Freedom Project to advance a broad spectrum of reproductive rights.

Litigation continued to be the weapon of choice in this battle.

Roe v. Wade helped secure the Presidency for Ronald Reagan, by giving him a "free" issue. It was free because he – and other "pro-life" Republicans – could strongly oppose all abortion without alienating moderate Republican women and men who favored a woman's right to choose but felt secure in the knowledge that the Supreme Court would continue to protect that right, regardless of what Reagan and others said or did. Abortion thus became the most important issue for right-wing religious zealots and a marginal issue for moderate Republicans who favored a woman's right to choose but who also supported the Republican economic and other programs. This helped to destroy the moderate wing of the Republican Party (the so-called Rockefeller Republicans) and drove former moderates such as the elder George Bush to the right. (He started as a pro-choice Republican and ended up as a pro-life Republican whose hands were tied by the Supreme Court.)

At bottom *Roe v. Wade* and *Bush v. Gore* represent opposite sides of the same currency of judicial activism in areas more appropriately left to the political processes. Courts ought not to jump into controversies that are political in nature and are capable of being resolved – even if not smoothly or expeditiously – by the popular branches of government. Judges have no special competence, qualifications or mandate to decide between equally compelling moral claims (as in the abortion controversy) or equally compelling political claims (counting ballots by hand or stopping the recount because the standard is ambiguous). Absent clear governing constitutional principles (which are not present in either case), these are precisely the sorts of issues that should be left to the rough-and-tumble of politics rather than the *ipse dixit* of five justices.[94]

There are, of course, considerable differences between *Roe v. Wade* and *Bush v. Gore.* No matter how critical one may be of *Roe,* no one can accuse the justices who voted for it of being politically partisan, as were the 5 Republican justices were voted to step the recount and hand the election over the candidate and party for whom they had voted.

Though equality for gays and the right of a woman to choose abortion are the prime wedge issues that today divide the religious right from the rest of the country, there are other issues that also divide the country along religious lines. Some involve religion directly, such as prayer in the public schools, the right of religious groups and persons to be exempted from laws of general application, and religious discrimination—in law or in fact—against atheists, agnostics or members of unpopular religions or "cults."

The difficult question of how to balance freedom of religion with the equally important freedom from religion—the two sides of the First Amendment coin—is never going to be neatly resolved in a pluralistic democracy; it is an ongoing tight rope walk that requires sensitivity from all sides. It also requires a Supreme Court willing to buck popular pressures in this highly sensitive area that the framers of our Constitution deliberately removed from majoritarian politics. Most

[94] Whether the same is true of the debate over capital punishment is a more complex issue, because of the unfairness and inequality in administering the death penalty.

HOUSE_OVERSIGHT_017402

importantly, it requires a collective decision by public officials of all political stripes to agree to stop running as defenders of the faith and to end the contest over who is more religious or committed to "faith." Religion and faith, as Jefferson recognized, are private matters and no one should be judged based on their "religious opinions, any more than [their] opinions in physics or geometry." With this in mind, let me end this chapter with my own "Ten Commendments" (a commandment is a cross between a "commandment" and an "amendment" that I would "commend" candidates for following:

1. Do not claim God as a member of your party or that God is on your side of an issue.
2. Do not publicly proclaim your religious devotion, affiliation, and practices, or attack those of your opponents.
3. Do not denounce those who differ with you about the proper role of religion in public life as antireligious or intolerant of religion.
4. Do not surround your political campaign with religious trappings or symbols.
5. Honor and respect the diversity of this country, recalling that many Americans came to these shores to escape the tyranny of enforced religious uniformity and, more recently, enforced antireligious uniformity.
6. Do not seek the support of religious leaders who impose religious obligations on members of their faith to support or oppose particular candidates.
7. Do not accuse those who reject formal religion of immorality. Recall that some of our nation's greatest leaders did not accept formal or even informal religion.
8. Do not equate morality and religion. Although some great moral teachers were religious, some great moral sinners also acted in the name of religion.
9. When there are political as well as religious dimensions to an issue, focus on the political ones during the campaign.
10. Remember that every belief is in a minority somewhere, and act as if your belief were the least popular.

HOUSE_OVERSIGHT_017403

Chapter 18: From Human Right to Human Wrongs: How the hard left hijacked the Human Rights Agenda

The United States Constitution guarantees equality under American law, but the vast majority of the world's population has no such legal protection. Human rights are not limited by geographic or political borders. They apply, at least in theory, to all human beings, regardless of nationality, race or religion. I have devoted much of my life to trying to turn theory into reality on an international scale.

I was brought up in the golden age of human rights. Our heroes were Eleanor Roosevelt, Rene Casin and Albert Schweitzer. Our great hope was the United Nations with its Universal Declaration of Human Rights. Our mantra was FDR's "Four Freedoms:" freedom of speech and expression; freedom of worship; freedom from want; freedom from fear.

The enemies of human rights were also clear: fascism, communism, racism, religious discrimination, McCarthyism, authoritanism, slavery, apartheid and other forms of oppression emanating from both the extreme right and left.

All good liberals—and my friends, neighbors and co-religionists were almost all good liberals—were kneejerk supporters of the human rights agenda? And why not? How could any decent person be opposed to the Four Freedoms and other universal human rights such as racial and religious equality, the ability to travel freely, the right to a fair trial and the ability of workers to join unions and collectively bargain for fair wages and working conditions.

We all admired the United Nations and looked to it as a guarantor of peace and a protector of human rights. And again, why not? It had been founded in the wake of the allied victory over Nazism by nations—mostly democracies—that had been on the right side of the war against Germany, Japan and other members of the Fascist Axis. One of the U.N.'s first actions was to divide the British mandate over Palestine into a Jewish and Arab state, thereby creating the conditions that led to the establishment of Israel. I vividly recall watching the U.N. vote with my father on a small black and while television and cheering when ____ cast the deciding vote in favor of the two state solution (that Israel accepted and the Arab states and Palestinian Arabs rejected.) In those golden years, there was no conflict between supporting the U.N. and supporting Israel, the only democracy in the Middle East.

My first confrontation with the United Nations

My earliest experiences in human rights (other than signing the petition to save the Rosenbergs, which earned me both the respect and the concern of my frightened parents, and my act of civil disobedience against the slave-owning King of Saudi Arabia, which nearly got me arrested) involved the United Nations.

When I was a junior in Yeshiva University High School, the United Nations came up with the idea of a universal calendar that would introduce a "bland day at the end of each year [that] would

HOUSE_OVERSIGHT_017404

disrupt the 7 day Sabbatical cycle."[95]

The Orthodox Jewish community was in an uproar about this well intentioned proposal, because it would change the natural order of when the Jewish Sabbath fell. Under the conventional calendar, the Sabbath corresponded with Saturday. Under the brave new world proposal, the Jewish Sabbath could fall on any day of the week. Jews (and Seventh Day Adventists) had fought hard to recognize Saturday as a day off from most jobs and school activities. The UN proposal would require Sabbath-observers to be absent from such activities when the Sabbath fell on a weekday.

At the time I was president of the "Inter-Yeshiva High School Council"—a group I had formed after the principle of my high school banned me from running for the presidency of the school's student body. I used the newly formed organization as the nerve-center for the campaign to stop the universal calendar. We did not consider the proposal to be anti-Semitic; it was motivated by benign universalistic aspirations. We regarded it as insensitive to the religious concerns of certain groups.

In an effort to broaden the opposition, I reached out to Seventh-Day Adventists (who joined our efforts), Muslims (who seemed less concerned about whether their day of rest corresponded with the UN's "Friday") and other religious groups. The result was a postcard campaign (I still have the postcard) in which we sent thousands of the following message—where I drafted—to the UN:

> Ambassador Henry Cabot Lodge
> United States Delegation
> United Nations, N.Y.
>
> Dear Sir:
>
> As a student of a Hebrew parochial high school in New York, I wish to express my opposition to the World Calendar Reform proposal soon to come before the United Nations. This proposal, which would move the Jewish Sabbath to other days of the week, would have disastrous effects on Jewish religious life, thus impairing the freedom of religion which we so cherish.
>
> Respectfully yours,
>
> Under Auspices of the Inter-Yeshiva High School Student Council

It was a modest effort by later standards: no marches, sit-ins or lawsuits. But it succeeded. The UN dropped the proposal and our small group got credit in the media. Here is how the New York Post—my community's "newspaper of record" in those days—reported our success beneath the headline, "Calendar Reform Tops Formosa Issue in Letters to U.N.:"

> "World Calendar reform, not Formosa, is the topic provoking most of the letters being received by Ambassador Lodge, chief U.S. representative at the U.N.

[95] Joseph P. Lash, *Calendar Reform Tops Formosa Issue in Letter to U.N.,* N.Y. Post, April 21, 1955, p. 34, quoting a U.S. note to Secretary General Dag Hammarskjold.

HOUSE_OVERSIGHT_017405

> Of the 328 pieces of mail addressed to Lodge during the first week in April, 209 expressed opposition to world calendar reform on religious grounds. These were the result of a postcard campaign instituted by the Inter-Yeshiva HS Council.

The article went on to point out that Lodge had also received letters from the Oklahoma students who favored the proposal, as did some legislators.

> However, the opposition of religious groups to calendar reform—and it came from all faiths—prevailed. The U.S. informed Secretary General Hammarskjold that it did not favor any action by the UN to revise the present calendar. 'Large numbers of the US citizens oppose the plan,' the U.S. note said. 'Their opposition is based on religious grounds…'"

We were thrilled that our campaign—involving hundreds not quite the "large numbers" reported—had succeeded. We regarded it as a victory for religious freedom. It persuaded me that even small efforts could have an impact on large organizations—a lesson that has stayed with me over my career. And it enhanced my admiration for the U.N., which had shown sensitivity to religious minorities.

During my high school years, my class made several visits to the U.N., where we watched the General Assembly in action. We debated whether "Red China should be admitted to the U.N." I took the affirmative side. Several of us joined "the United Nations Association," and we participated in "model U.N." sessions, playing the role of representatives from particular countries. No one could have predicted, in those days, how the UN would soon become an organization dominated by human rights violators and a bystander to, if not a facilitator of, genocide, terrorism and other human wrongs by so many of its own members.

What are human rights?

During my college and law school years, most of my focus was on domestic civil rights. I marched, attended rallies, trained for civil rights work in the South, and briefly traveled to points of confrontation in several southern cities, while carefully remaining out of harm's way.

After becoming a teacher and a lawyer, my involvement in the human rights movement broadened, both academically and politically.

In my academic work, I began to explore the meaning of the term "human rights," as contrasted with "civil rights," "civil liberties," and "political rights." To be an advocate of "human" rights meant to me going beyond one's particular group. A Jew who fights only against anti-Semitism is an advocate for particular rights, as is an African-American who struggles only against racism, a woman who only opposes sexism, or a gay person who limits his advocacy to gay rights. These are commendable activities, but they do not qualify as advocacy of human rights. Just as joining "The First Amendment Club" requires the active defense of expression one deplores, so too, joining "the Human Rights Club," requires an active commitment to the universal rights of all

HOUSE_OVERSIGHT_017406

people, even those you disagree with or despise. The membership roles of both "clubs" are, tragically, quite small under this criteria, though many claim their honorific mantles.

Being a member of the "Human Rights Club" does not require abstaining from advocacy for one's own group (however defined). But it does require more universal advocacy as well. The "motto" for the club might well be the famous dictum of Hillel: "If I am not for myself, who will be for me, but if I am for myself alone, what am I? And if not now, when?" I have tried hard to live by these words—which hang on the wall in my office—and to maintain my membership in the Human Rights Club, although my priorities have changed with shifting threats to particular groups over time.

As a young lawyer, I witnessed little threat to the Jewish community in America, despite lingering anti-Semitism in law firms, social clubs, and some universities and neighborhoods. I fought against these remnants of bigotry, but it was clear that the trend was in the right direction: top-down anti-Semitism and elite discrimination against Jews were on the way out. Jews did not need my help.

By this time, I had stopped being a strictly observant Orthodox Jew. My synagogue attendees had become episodic and my involvement in the Jewish community peripheral. The reason was my children. Many people became more religiously committed "because of the children." For me, it was the opposite. As my children got old enough to ask questions, I realized that I had remained observant only to please my parents. I did not want to impose that obligation on my children. I remained deeply Jewish in a secular sense—whatever that may mean—and my children were Bat and Bar Mitzvahed and attended Jewish Sunday School, but my life no longer centered around my identity as a Jew. Nor did my legal career.

Early in my legal career, my first wife, who was also an Orthodox Jew, and I were divorced. I assumed primary responsibility for the raising of our two sons. A decade after the divorce I met and soon married Carolyn, who was raised as a sometime Reform and sometime Conservative Jew in Charleston, South Carolina. Together we live a life dedicated to more secular Jewish values. I dedicated my first book about my brand of Judaism—Chutzpah—to Carolyn. Carolyn's family participated in the struggle for civil rights in Charleston, and we are both deeply committed to universal human rights.

In the early phase of my career, I didn't focus on Jewish rights or on Israel. There were bigger and more serious problems facing America, particularly with regard to race. There were also more serious problems around the world: Apartheid in South Africa; repression in the Soviet Union, China, South America and Saudi Arabia; an unjust war being fought by my own country in Vietnam. I threw myself into these causes (as well as into the worldwide campaign to abolish the death penalty).

HOUSE_OVERSIGHT_017407

The Vietnam War

During the height of the conflict over the Vietnam War, I represented numerous defendants, protestors and civil disobedients. I also advised lawyers who were suing the government in an effort to stop what they believe was an illegal war. The faculty of Harvard Law School was divided over the morality, legality and effectiveness of the war, and there were interesting discussions in the faculty lunch room involving such luminaries as Archibald Cox, Erwin Griswold, Abram Chayes and Paul Freund. I decided that these discussions should be shared with our students, and so I organized the first law school class on the Vietnam War. The debate over the war was a teaching moment and we had to take advantage of it. I prepared a set of legal materials and invited professors with different views to share their perspectives with the students. The course was a remarkable success. Students attended in droves, and the media covered the lectures. The New York Times story was headlined "400 Enroll in a Harvard Course on 'Law and the Lawyer' in the Vietnam War." It reported that:

> According to Prof. Alan M. Dershowitz, who conceived the course, more than a dozen professors have volunteered as teachers, including Prof. Derek C. Bok, the dean-designate of the law school.
>
> Professor Dershowitz said that the participating professors "reflect every view." However, he said that he "majority," including himself, were signers of a statement released last week in which 500 of the nation's law teachers called upon the legal profession to oppose the Johnson Administration's Vietnam war policy.
> Professor Dershowitz said he understood that the course would be the first of its kind offered in any law school in the United States. "It is our hope," he said, "that this will be a pilot and a model for other law schools throughout the country."
>
> Dr. Dershowitz said that the idea for the course grew out of the fact that "much student and faculty energy was being devoted to thinking about and writing about Vietnam, and the legal issues growing out of it."
>
> He said the course would not be "biased or political," but would "look at these issues in a detached, lawyer-like, scholarly way."…
>
> Mr. Dershowitz, whose specialty is criminal law, said he became involved in planning the course because "I'm very interested in legal education, and terribly concerned about law schools being at the center of contemporary issues."
> "Can you imagine a law school which is supposed to be dealing with the major issues of the day not teaching a course relating in some manner to the Vietnam War, which is the critical social issue of our time?"
>
> As evidence of the courses appeal, Professor Dershowitz said that the 400 registrations represented the largest enrollment for any course at the school, which has about 1,500 students.

HOUSE_OVERSIGHT_017408

> "It was all done with little publicity and little fanfare, and we gave only two days for registering," he said.
>
> The objective of the course, Professor Dershowitz said, would be "to assess the role of the lawyer, as professional and citizen, in both the domestic and foreign aspects of the conflict." He said the course would explore "the relevance of law to this country's involvement in Vietnam."[96]

Time Magazine began its story this way:

> "Viet Nam is the most significant social, political and legal issue of the day," said Harvard Law Professor Alan Dershowitz last week. "And a law school should be concerned with the issues of the day," Dershowitz had just finished giving the first class in a brand-new, ten-week Harvard course entitled "The Role of the Law and the Lawyer in the Viet Nam Conflict." It has no exam or grades, offers no credit, and involves a good deal of reading over and above the students' already heavy regular work load. But it has a record enrollment of more than 400—one-quarter of the student body—and is one of the most popular courses in the 150-year history of the school.
> The course will cover such questions as the international-law aspects of the war, the division of war-making responsibility between the President and Congress, free speech and dissent, the draft and the rights of an inductee, and the status of a conscientious objector to a specific war.

Lawyers who were contemplating legal action against the war sat in on the class and several faculty members, who were not involved in the teaching, attended as well. I received dozens of requests for copies of the materials from professors at other schools who wanted to offer the course to their students. For me, it was the beginning of a practice that I have followed throughout my teaching career: offering courses about highly relevant contemporaneous issues that respond to interesting teaching moments. Over the half-century of my teaching at Harvard Law School, I have offered a new course just about every year. Many of them have dealt with pressing issues of human rights generated by the conflicts of the day.

In addition to teaching courses I wrote article on human rights and brought lawsuits challenging human rights abuses. And I participated in political campaigns to end apartheid, the War in Vietnam and other human wrongs. My early work on human rights won me a coveted Guggenheim fellowship and other honors. It also earned me the media title "Global Watchdog."[97] In an article by that name, the reporter interviewed me about my definition of human rights:

> "I'm less concerned with causes than I am with concepts of equality, fairness, due process, civil liberties, and free speech…"

[96] Sunday New York Times, February 18, 1968.
[97] Harvard Law School Bulletin, Summer 1978

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> "I'm certainly a civil libertarian, although I don't like that term. I prefer to think of myself as an advocate for human rights…" Dershowitz's definition of human rights is uncomplicated. He applies to the world at large a "core concept of human rights"—everyone should be free to express opinions and views, to read what one chooses, to have some influence in the process of government, to leave one's country. One should be free from arbitrary arrest and trial, torture and execution.
>
> Wherever human rights are trampled, Dershowitz feels compelled to lend a hand, if possible. "I try hard to balance my attack, right and left—for every attack on the Soviet Union, there's one on Chile. For every attack on a right-wing repressive government, there should be an attack on a left-wing repressive government."
>
> Dershowitz's strong personal identification with human rights goes back to his roots. "There but for the grace of my great grandparents go I," he paraphrases. "If I were a 39 year old citizen of Kiev or wherever, I sure as hell hope I'd be a dissident and I suspect that there would be someone here trying to get me out."
>
> "If there is discrimination against anybody, there is discrimination against everybody," he says flatly, which explains his decision to defend John Lucido, a Catholic Italian lawyer, who filed suit against Cravath, Swaine and Moore, charging that the firm had failed to promote him to a partnership because of his nationality, his religion or both."
>
> Dershowitz loves to teach and has integrated some of his human rights experiences into a seminar which he taught this spring with Visiting Professor Telford Taylor '32, pioneer in the international protecting of human rights. The seminar taught future lawyers how to defend foreign dissident clients and how to promote human rights in other nations.
>
> "I think there are always between 30 and 100 students at the School who are really interested in these issues. That's not to say that all of them, or even half of them, will ultimately involve themselves in the human rights struggle but at least they will be in a position to make substantial contributions in the area during their career."
>
> This is one of the basic reasons for his remaining in teaching. As Dershowitz puts it, "In practice you can do a lot to implement human rights in this generation but in teaching you can both help this generation and help plant the seeds for progress later on."

Despite my deep involvement in human rights work, I wondered whether I was really having a discernable impact on the problems of the world. Unlike litigation in American courts, where the results are immediately evident, the impact of petitions, op ed articles, Congressional resolutions, and other conventional human rights activities on foreign countries tends to be less visible or immediate.

I will never forget one encounter that made it all seem worth the apparently unrewarded efforts. I attended a concern by the great Russian cellist Mstislav Rostropovich, several years after he left the Soviet Union. Since he had been a sometimes threatened advocate of human rights in

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Moscow, I wanted to meet him, so I stood in line waiting to shake his hand after the performance. When I introduced myself, he grabbed me in a long bear-hug. "You gave us hope," he told me. "We knew you were out there fighting for our rights, even thought we couldn't contact you. You made us feel safer."

I had no idea that Rostropovich or any of the other artists or dissidents whose rights we advocated, had ever heard of us, or had any idea of what we were doing on their behalf. Rostropovich's hug, and what he said, was more than enough compensation for all the pro-bono work we had done on behalf of dissidents and artists around the world.

I had become involved in the defense of Soviet dissidents after reading Elie Wiesel's eye-opening book "The Jews of Silence," which first alerted me to the plight of Soviet Jewish and non-Jewish dissidents. I traveled to the Soviet Union and other parts of Eastern Europe on several occasions during the 1970s and 1980s and filed briefs on behalf of dissidents Refusenicks and others. I have written extensively about this aspect of my human rights work elsewhere[98] and will not repeat it here. Suffice it to say that my unwillingness to limit my advocacy only to Jewish Refusenicks in the Soviet block caused a rift with some Jewish and Israeli organizations, but I insisted that human rights must extend to all who are oppressed or discrimination against.

One of my Soviet clients was Silva Zalmunsen, who after several years of confinement was finally released from the Soviet Gulag. When she finally came to America, I along with her other American lawyers arranged to meet her over lunch at Lou Siegel's, a kosher restaurant in Manhattan. It would be our first "reunion" – hopefully the first of many – with the clients we had never met. Our encounter was emotional and tearful. Knowing of Silva's love for all things Jewish, we decided to order a real old-fashioned Jewish meal for our Friday lunch. The first dish was cholent, a delicious concoction of beans, potatoes, barley, and a small amount of beef, cooked for hours in a savory sauce. When the cholent came, I turned to Silva and explained what it was – that it was a traditional dish served in Jewish homes on the Sabbath. She took one taste of it, and her face turned sad – and then she burst out laughing as she exclaimed, "Traditional Jewish food? This is Russian prison food! I've just been through eating food like this for four years!" Only then did we realize that the old-fashioned food, which was such a treat for us, was peasant food, designed to use the least amount of meat possible. The same economics that dictated the diets of our peasant forebears now determined the menus prepared by the prison authorities. We all had a good laugh, and I ordered a slice of rare roast beef for our guest.

I made several trips to the Soviet Union during that time. On one of them I met a young man who had been a dissident and refusenick but who had been drafted into the army because of his activities. He wanted to smuggle a message out in is own voice, using his broken English, to seek support from human rights organizations throughout the world. Tape recorders were not permitted in the Soviet Union at that time and it was illegal to smuggle out tapes. But he had managed to get his hand on a primitive cassette recorder and he brought me a copy of a Tchaikovsky tape that was being sold in the Soviet Union. In order to prevent re-recording over the tape, certain changes had been made in the cassette. My Soviet client knew how to override those changes and he managed to record his statement in lieu of the third movement of Tchaikovsky's Fifth. He told me that its always good to have the recorded statement in the

[98] [cite Best Defense, Chutzpah, articles]

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middle of the music, because Soviet authorities tend to listen to the beginning and end of any music tape to assure that it does not contain forbidden material. I managed to get his statement back to the United States. Shortly thereafter he was released and came to live in my home while he was trying to get into school here.

My interest in Soviet Jewry was stimulated by Elie Wiesel's wonderful book *The Jews of Silence*. But it became a passion only after a more personal encounter. In 1971, I was invited to become a fellow at the Center for Advanced Study in the Behavioral Sciences on the Stanford campus in Palo Alto, California. Forty fellows were invited from all over the world, to spend the year writing and thinking. This year for the first time, a fellow had been invited from Communist Romania, Michael Cernea. He was Chairman of the Department of Sociology and Anthropology at the University of Bucharest and an active member of the Romanian Communist Party. On the day before Rosh Hashanah, he invited me to take a walk with him through the woods. When we were away from any possibility of surveillance he told me that his real name was Moishe Katz, that he was a committed Jew, and that he desperately wanted to defect along with his family from Communist Romania and move either to the United States or Israel. He swore me to secrecy and asked if I would become his pro-bono lawyer in what would surely be a long-term activity, since his family was being held hostage back in Romania. I immediately agreed and invited him to my home for dinner that night, where we stayed up until dawn, listening to Jewish cantorial music, which he had not heard since his youth some thirty years earlier. Tears flowed freely from his eyes. Several years later, we were able to arrange for him and his wife to be out of the country at the same time, and they both defected, leaving his two children and his elderly mother behind. But within a year or so, with the help of Senator Kennedy and others, we managed to get the whole family out. We have remained close friends since that time.

Another close friend who started out as a client is Natan Sharansky, now a cabinet member of the Israeli government. When I represented him his name was Anatoly Sharansky and he was an imprisoned Soviet refusenick. His mother and wife asked me, along with my friend and colleague Irwin Cotler, now the Minister of Justice in Canada, to represent Anatoly on a pro-bono basis. We continued to be his lawyer for nearly nine years. We were not allowed to meet our client or even to communicate with him. For all we knew, he had no idea we were his lawyers. But we represented him vigorously in the court of public opinion as well as in the courts of the Soviet Union. We were also involved in proposed prisoner exchanges which included Sharansky, Nelson Mandela and several Eastern European spies being held by the United States. Neither Sharansky nor Mandela wanted to be part of any exchange for real spies, since they were political dissidents. It is interesting to note, a especially in light of Sharansky's high position in the Israeli government, that when Sharansky was first arrested, the Israeli government wanted to have nothing to do with his case, since they regarded him as a human rights dissident rather than as a prisoner of Zion. He was, of course, both. When he was finally released some of the very same people who fought hardest against Israel doing anything on his behalf were among the first to claim credit for his release.

I will never forget how I watched my client walk - - really bounce - - across the Glinicke Bridge and into the safety of the West. I knew he was well even while watching him on television. Shortly thereafter I met him in person for the first time. He threw his arms around me and whispered in my ear, "Baruch matir asurim," which means, "Blessed be those who help free the

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imprisoned." Several years later I was being interviewed on a television show and the host asked me what my biggest fee had been. He thought I would mention the Michael Milken or Leona Helmsley cases, but instead I said it was in the Sharansky case. He expressed surprise saying that he didn't know Sharansky had any money. I said he did not but that when he put his arms around me and gave me that hug and whispered those words, that was the biggest fee I ever earned.

Another "fee" for my work was the opportunity to speak in Carnegie Hall on behalf of Vaclav Havel and other dissident artists in 1991. Several Americans who had fought for the human rights of censored artists were invited to read from and discuss works banned by repressive regimes. I had been part of a team of lawyers assembled to help Havel and other Czeck dissidents get out of prison in the 1970s. The American readers included Garrison Keillor, Marvin Hamlisch, Peter Ustinov, William Warfield, Martin Garbus, and Maurice Sendak. I was honored to be included among them. My mother loved showing her friends the Carnegie Hall program, with my name listed as a "performer." She would tell them a variation of the old joke: A man asks a musician carrying a violin case, "How do you get to Carnegie Hall? My mother's answer: "Practice, practice, practice law, like my son."

My next encounter with Havel took place in Jerusalem during the celebration of Israel's 60th birthday. Havel, Sharansky and I were on a panel together discussing human rights. When it was over we got onto the same elevator. Remarkably, Mickael Gorbachev was also on the elevator. (I knew it sounds like the beginning of a bad joke: "Havel, Sharansky, Gorbachev and Dershowitz get into an elevator.") Gorbachev turned to me and said, "You're the big shot lawyer who tried to get these people out of prison. You did a good job, but I did a better job. I'm the one who got them out." We all laughed and Havel turned to Gorbachev and asked, "Why didn't you get us out sooner?" Gorbachev replied, "I'm not that good."

The struggle against real Apartheid

My interest in South Africa Apartheid began while I was editor-in-chief of the Yale Law Journal in 1961. An article was submitted on the legal structure of the apartheid system in the country. At that time very little was known about the legal aspects of this highly regulated practice, and this lengthy draft laid it all out. It was my job to edit it so as to make it comprehensible to an American audience. It was shocking to me that only a few decades after the Nuremburg Laws in Nazi Germany, a "civilized" country, with a British and Dutch heritage, could construct a system of laws based on overt racism and discrimination, under which racial classifications determined who could vote, hold certain jobs, live in certain areas, be treated in good hospitals, attend public events, enroll in schools and hold office. I was determined to help dismantle the system of apartheid and actively joined in the campaign against it. But there were limits to what I was prepared to do, and these limits brought me into conflict with some of the most ardent anti-apartheid activists. Most particularly, I was not willing to support the "blacklisting" or artists

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who had performed in South Africa. To me, this blacklisting constituted reverse McCarthyism, even if it is in the interest of a just cause.

I wrote an article in 1985 exposing and condemning this new liberal McCarthyism. It included the following:

…

> This time, blacklisting is being practiced in the name of a progressive cause—the antiapartheid movement.
>
> It turns out that the Register of Entertainers to be shunned is officially published by the United Nations Special Committee Against Apartheid "as a means to promote the cultural boycott of South Africa." It included the names of entertainers and actors who have performed in South Africa since 1981. Anyone whose name appears on the list is prohibited from performing at any function sponsored by the United Nations. Other organizations also use the U.N. blacklist to screen politically unacceptable artists.
>
> The introduction to the U.N. blacklist boasts that "a number of city counsels and other local authorities have decided to deny use of their facilities for entertainers" whose names appear on the blacklist.
>
> …
>
> No advance notice is given to persons who are to be blacklisted, and the list includes some performers who "were not aware of the cultural boycott."
> Among those currently on the blacklist are Ray Charles, Linda Ronstadt, Frank Sinatra, the Beach Boys, Cher, Goldie Hawn, Sha Na Na, Ernest Borgnine, and the British rock group Queen.
>
> The recent flap that publicized the existence of the U.N. blacklist involved a proposed concert to raise money for African famine relief. Among those volunteering to perform was the rock group Chicago. But Chicago was on the blacklist. And because of the absolute prohibition against using blacklisted artists at U.N.-sponsored events, plans for the concert had to be postponed. It is ironic that some black African children may die of hunger because of the U.N. blacklist.
>
> The American Civil Liberties Union recently complained loudly when the Boston Symphony Orchestra canceled a concert with Vanessa Redgrave because of her support for and complicity with…terrorists. Though no blacklist was published, the ACLU decried the "blacklisting" of Ms. Redgrave because of her politics as a violation of her civil liberties. I am waiting to hear from the ACLU on the U.N. blacklist.

I never heard from the ACLU, but I did hear from Woody Allen, to whom I sent my article because his film The Front had exposed the evils of blacklisting and he was also a strong opponent of apartheid. He wrote me that:

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> "On the face of it the issue certainly seems to me like blacklisting. I'm sure they make good arguments for it on the basis that a legitimate tactic of the United Nations is boycotting, but still I'm sure that if I examined it as closely as you have, I would find there would be no excuse for it. Thanks for keeping me informed. Best, Woody."

During the Apartheid regime, I was invited to speak at the Witwatersrand University in Johannesburg. Many in that university had been on the forefront of opposing Apartheid and I was anxious to lend support to these efforts by delivering a strong human rights message. When I appeared at the South African consulate in Boston to receive my Visa, the Counsel General was well prepared: he had on his desk the Yale Law Journal article I had edited. He told me that before he could consider my application, he wanted to see a copy of my proposed speech. I declined his request, citing freedom of expression. I did not receive the Visa and had to postpone my first visit to South Africa until after the end of apartheid.

I had hoped not only to speak against apartheid during my aborted visit to South Africa, but also to try to get to Robin's Island to meet with the imprisoned Nelson Mandela. I was working with Professor Irwin Cotler, with whom I had taught human rights at Harvard Law School, on a complicated legal plan to free Mandela.

Our plan began following the arrest of an East German professor in Boston on charges of spying for his country. I received a call from an East German lawyer asking if I could represent him or recommend a good lawyer who could. The East German lawyer—who was a well known and trusted "spy-swapper"—told me that his client was innocent, but that the East German might be willing to arrange a "spy swap" for my client Anatoly Sharanksy. I told him that my client wasn't a spy so a "spy swap" was off the table. He responded "neither is my client." He then proposed a possible "prisoner exchange, including prisoners who were accused of spying but were innocent." It was an interesting idea.

I then called my friend and colleague Irwin Cotler in Canada and told him of the call. He was, at the time, working on both the Sharansky and Mandela case, and he had previously sought my advice on the Mandela matter. He suggested that we inquire whether there were any South African spies in Soviet Block prisons, and whether South Africa might be willing to release Mandela as part of a prisoner exchange among several countries.

In the end, Sharansky was exchanged for the East German man (who was represented by other lawyers), but we learned from the African National Congress lawyers with whom we were conferring that Mandela refused to participate in any prisoner exchange, particularly one that involved anyone accused of spying. He wanted to be released on his own terms, even though his decision would require him to remain imprisoned until his own terms were accepted by the South Africa government, as they finally were in 1990.

My negotiations with the East German lawyer were shrouded in secrecy and had elements right out of a John Le Carre novel. We used code words over the phone and met in out of the way places at unusal times. He was a man of his word and could always be counted on to honor his commitments. After the fall of the Berlin Wall, he was indicted on an assortment of concocted

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charges and he sought my help, which I was pleased to give. Eventually, he was cleared of all charges and continued to practice law in the newly united Germany.

Human rights in Israel

A human rights case that surely tested my commitment to universal rights involved an Arab-Israeli who was accused by Israel of assisting terrorism. He was being held in administrative detention, instead of being formally charged with a crime. I was in Israel at the time writing a long article on the practice of administrative detention (or as Americans call it "preventive detention"). I was critical of the practice though I understood why some Israelis believed it was necessary to combat terrorism. After meeting the Israeli-Arab in the detention center and reviewing his case, I concluded that his detention was unjustified. I met with Israeli officials and urged them to reconsider his case. They did, and they released him. He moved to Lebanon where he became an active member of the more moderate wing of the Palestine Liberation Organization. To my knowledge, he has never engaged in any acts of terrorism.

I helped several other Palestinian prisoners and detainees as well. I also wrote critically of and litigated against several Israeli policies, including the use of unacceptable interrogation methods, the overuse of wiretaps, religious discrimination against women, and de facto discrimination against Israeli Arabs. Since the early 1970s, I have been a vocal and persistent opponent of Israeli settlements in the West Bank and Gaza. And after the war in Lebanon, I protested the use of cluster bombs that, though lawful, unduly endanger the lives of civilians. I have never believed that my strong, general support of Israel is in any way inconsistent with my opposition to, and criticism of, specific Israeli policies which violate neutral principles of human rights.

Human rights and wrongs in China

In 1979, Senator Edward Kennedy asked me to travel to China and report back to him on the condition of human rights. The cultural revolution was just ending, and the first sparks of freedom were being ignited at a place in Beijing called "Democracy Wall," where dissidents gathered and posted anonymous notes. I was to be one of the first human rights advocates allowed into what had long been a closed society. Senator Kennedy, with whom I worked closely on numerous human rights issues, was the key to why I was invited not only to visit prisoners and courtrooms, but also to lecture on criminal law in several of China's most important universities. Although I was invited to lecture exclusively on technical aspects of criminal law, in order to help China develop a modern penal code, I managed to smuggle some discussion of human rights into my lectures.

During my visit to several prisons, I learned about a legal provision that seemed unique to China. When the sentence of death was imposed for certain types of crimes, the condemned prisoner was sent to a particular institution to await execution. After about a year, half of the condemned would actually be executed, while the other half would be spared. All the condemned were competing against each other in a zero sum game, in which the stakes were life and death. The "winners" were selected not only on the basis of good behavior—needless to say, everyone in this high stakes game was on their best behavior—but also on their commitment to Maoism and their "worthiness" to live.

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I've been to many prisons and on numerous death rows, but I've never experienced so grim a place as this "life or death row," where every inmate saw every other inmate as a competitor in the quest to remain alive.

The warden invited me to play basketball with the inmates and I agreed. No one fouled me, trash-talked me or in any way misbehaved, as the warden watched, notepad in hand. I was conscious throughout the 30 minute game that anything a player did or didn't do could become part of their score of death—or life. I tried hard to make everyone look good in the eyes of the warden.

The changing consensus regarding human rights

By the mid-1970s, the consensus regarding human rights was beginning to change. Although the Soviet Union had long used the language of "human rights" (as well as the language of "civil rights") as a club against western democracies, few serious people gave this hypocritical ploy any credence. "There they go again" was the general response when Soviet diplomats at the United Nations postured against the imperfections of the United States, while their Communist masters locked up dissidents, made a mockery of justice,[99] and kept entire nations in subjugation behind an iron curtain.

By the early 1970s, however, the Soviet ploy was beginning to be expropriated by the hard left in the United States and Europe. Hard left intellectuals such as Professors Noam Chomsky of MIT and Richard Falk of Princeton were claiming that the United States was the worst human rights violator in the world.[100] Some hard left lawyers, such as William Kunstler, refused to say anything critical of the human rights records of the Soviet Union, China, Cuba or other "socialist" countries, while railing against the human rights violations of the United States and its allies. As I previously mentioned, Angela Davis, who I had helped to represent in the early 1970s, refused to speak up for Soviet dissidents and in fact supported Soviet repression of "fascist opponents of socialist democracy," i.e., dissidents and Refusenicks. Another client, Abby Hoffman, also turned against me. I was part of the legal team in the Chicago Seven case that grew out of demonstrations during the Democratic National Convention of 1968. Abby Hoffman, who was one of the defendants, had allegedly made some crude remarks about how his "Jew lawyers" cared more about Israel than America. I called him out on his comments in a brief note, to which he responded with an angry handwritten two page letter which included the following:

> "I never made a remark about my 'Jewish Lawyers.' I might have spoken more positively about the PLO but I would never make an anti-Semitic juxtaposition such as you think you heard. If you read my current autobiography you will see I flaunt my 'Jewishness' at every turn of the road."

At the time Hoffman penned these words, the PLO was a terrorist gang that was hijacking airplanes, murdering civilians and blowing up synagogues, and Israel had not yet established any settlements in occupied areas.

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[99] An old Soviet dissident joke went this way: The leader of Czechoslovakia asked his Soviet masters for money for a Department of the Navy. The Soviet replied, "But you're a landlocked country and don't need a department of the Navy." The Czech leader replied: "Well you have a Department of Justice."
[100] [get cite]

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At about the same time, another radical client fired me because he heard that I was a "Zionist" and he could have nothing to do with anyone associated with such a "fascist" cause.

Father Daniel Berrigan, a lapsed Catholic priest who had become the darling of the hard left as the result of his anti-Vietnam War activities, began to call both the United States and Israel "criminal" entities.[101] Chomsky notoriously defended the ruthless Cambodian dictator Pol Pot against charges of genocide, insisting that western media reports of millions of murders were typical exaggerations of horrors regularly but falsely attributed to Communist regimes. The National Lawyers' Guild, which had become the legal arm of the hard left, dismissed all accusations against Communist regimes as "red baiting." They also became the legal arm of anti-Israel extremists, including terrorists. They did not support these clients on grounds of human rights or civil liberties principles, but rather because they agreed with their politics. In 197__, I broke with the National Lawyers Guild, with which I had worked closely when it had been a neutral human rights organizations. In a widely read article in The American Lawyer, I told the sad story of the transformation of the NLG from a genuine human rights organization into an advocate for some of the worst human wrongs on the planet. This transformation presents in a microcosm the larger account of the hijacking of the human rights label and agenda by the hard left.

The National Lawyers Guild was established in 1937 as an antidote to the American Bar Association, which was then fighting the New Deal, excluding black lawyers from membership, and opposing the labor movement. The original guild was an amalgam of Roosevelt liberals, CIO labor leaders, black civil rights lawyers, and radicals of assorted affiliations and persuasions. It strongly supported Israel's struggle for independence and opposed the arms embargo against the Jewish state. Its membership over the years has included such distinguished lawyers as Thurgood Marshall, Arthur Goldberg, Ferdinand Pecora, Paul O'Dwyer, Louis Boudin, and William Hastie. During its early years, splits developed between the anti-Communist liberals and the radicals. But the guild survived and accomplished much good on the domestic front, including an excellent record of providing legal assistance to the civil-rights, labor and anti-war movements. In the late 1960s and early 1970s, at the height of the antiwar movement, the guild began to be taken over by younger, more militant lawyers from the New Left. As George Conk, an admiring guild historian and a former editor of the monthly Guild Notes, describes it: "At the Boulder [Colorado] convention in 1971, the young veterans of the antiwar movement found they had the guild in their own hands, and many older members withdrew from active membership." Law students and other "legal workers" were also admitted, thus strengthening the hold of the young radicals but reducing the percentage of actual lawyers in the guild to less than half. The guild no longer considered itself an alternative bar association but rather the prime organizer of "radical legal people" and the legal arm of the American radical Left.

> While all this was happening at home, the radical Left was beginning its campaign against Israel. In a highly publicized speech delivered on October 19, 1973—a speech that many people see as the original declaration of war by the radical American Left against Israel—the Reverend Daniel Berrigan described Israel as "a criminal Jewish community" that has committed "crimes against humanity," has "created slaves" and has espoused a "racist ideology" reminiscent of the Nazis, aimed at proving its "racial superiority to the people it has crushed." Berrigan also chastised the "Jewish people," whom he described

[101] [get quotes]

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as "so proud" and so "endowed with intelligence," but who "have in the main given their acquiescence or their support to the Nixon ethos" which has led to the death, maiming, and displacement of "some six million Southeast Asians." Berrigan referred to the ironic figure of 6 million as "one of those peculiar facts which must be called free-floating" and concluded with a veiled threat to both American Jews and to Israel: "To put the matter brutally, many American Jewish leaders were capable of ignoring the Asian holocaust in favor of economic and military aid to Israel … It is not merely we nor the Vietnamese who must live with that fact. So must Israel. So must the American Jews."

Reaction to Berrigan's polemic was swift and sharp, especially among lawyers who had represented left-wing causes and individuals. Battle lines were quickly drawn. Some, like William Kunstler, supported Berrigan. Others – among them lawyers who had represented Berrigan and Kunstler – were appalled at Berrigan's diatribe.

In 1970, the guild sent a delegation to the Congress of the International Association of Democratic Lawyers – an organization consisting largely of Communist lawyers from Eastern Europe and "progressive" lawyers from Western Europe. The International Association of Democratic Lawyers passed a resolution supporting Palestinian terrorism, characterizing it as "heroic" and "legitimate resistance and … the expression of a national liberation movement constituting an integral part of the world struggle for liberation against imperialism." The guild delegates were subjected to considerable pressure from the PLO to conform their organization's policy to the consensus of "democratic" and "progressive" lawyers. It agreed, therefore to commit "the resources of the organization to continuing and expanding our internal political education on the Palestinian question."

As part of this educational process, the guild subsequently decided to send what it called an objective delegation to the Middle East. The organizer of this "objective" group was Abdeen Jabara, the founder of the Association of Arab-American University Graduates and the editor of *Free Palestine*, a paper that justified the planting of terrorist bombs in universities and marketplaces. Jabara arranged for the funding of the three-week, ten-person trip and for its itinerary. The major funding for and sponsorship of this objective educational adventure came from none other than the "objective" Palestine Liberation Organization.

The grateful delegation showed its appreciation for the PLO grant by beginning its education in PLO camps and, according to one member of the delegation, limiting its interviews almost exclusively to PLO-approved Palestinians and Israeli anti-Zionists.

The resulting report contained few surprises: it presents a sordid caricature of Israel as a repressive totalitarian society which tortures, imprisons, and expels its Arab population without even a semblance of reason or justification. Nowhere in the report's 127 pages is there any discussion of the PLO terrorism that plagued the civilian population of Israel and the West Bank. Indeed, the single mention of terrorism that I was able to find in the report is a quoted reference to "acts of terrorism" by Israeli authorities against the peaceful Arab occupants of the West Bank.

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The resulting one-sided report, which violated all the rules of an organization that had long claimed to be a neutral advocate for universal human rights in the spirit of Eleanor Roosevelt, was according to Guild old-timers, designed as a litmus test for its Jewish members:

> "Basically … you had a situation where a bunch of Third World types wanted to ensure that the Jews in the guild – and the Jews were almost certainly a majority – would be forced to eat crow, to choose sides. The guild changed dramatically in the late 1960s and early 1970s, when the veterans of the early days were displaced by the veterans of campus unrest who had gone from SDS to law schools around the country. They're angry, and rigid, and there's no better test of their control of the guild than forcing the old-timers to grovel, and there's no better evidence of their own militance – if they're Jews – than toadying up to the PLO. Endorsing the PLO has become a litmus test for Jewish radicals."

I decided to devise a litmus test of my own to challenge the bona fides of the Guild's claim that it was still a neutral human rights organization. I called Professor John Quigley, the national vice-president of the guild. After learning that the guild had decided to send an observer to a trial of an alleged terrorist in Israel, I requested that the guild also send an observer to the Soviet trial of Anatoly Shcharansky. It was the belief of several experts on Soviet law that a request by the guild to send an observer to the Shcharansky trial could have had a unique impact on Soviet actions, since the Soviet Union has a close relationship with the International Association of Democratic Layers and its constituent members. Professor Quigley was extremely candid in his response to my request. He told me that he doubted the guild would be willing to send an observer to a Soviet trial, since the "reality" of the situation is that a considerable number of the guild members approve of the Soviet Union and would not want to criticize a Soviet judicial proceeding. In his written response, claiming that the guild could not act on my request in time for the Shcharansky trial, he put it somewhat differently:

> "The problem is that we do not approach matters such as this purely from a human-rights perspective. We regard it as well from the standpoint of the importance of focusing attention on human-rights violations in a particular country. With respect to the U.S.S.R., we have not had discussion or come to any decision about the appropriateness of focusing on human-rights issues there."

The only conclusion one can reasonably draw from the guild's reluctance to send observers to the Soviet Union, coupled with its willingness to send observers to Israel, is that the guild is as unwilling to criticize Communist countries as it is eager to criticize Israel and other Western democracies.

In my article I put the choice to the Guild:

> "If the guild decides to continue its foray into international politics, it will have to make a choice: either to perpetuate its double standard on human rights, which will surely alienate much of its support here at home for its domestic programs; or to report honestly on human rights throughout the world, which will surely alienate the PLO and the Soviet Union."

HOUSE_OVERSIGHT_017420

The Guild decided to abandon any pretense of reporting neutrally on human rights and has continued to serve only as the legal and political arm of the hard left. It has now lost all of its credibility as a human rights organization.

Nor was the Guild alone in shifting from "a purely human rights perspective" to a largely political perspective that used the label of human rights selectively against its ideological enemies. Other organizations which were founded on the principles of neutral human rights, such as Human Rights Watch,[102] the Carter Center and Amnesty International,

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[102] As an early supporter of Human Rights Watch and an admirer of its founder, I have taken upon myself the responsibility of monitoring its actions very carefully—of guarding the guardians. I was particularly critical of its reporting on Israel's war against Hezbollah in 20__, after Hezbollah fired thousands of rockets at civilian targets in the north of Israel.

I focused on the highly publicized "conclusion" reached by Human Rights Watch allegedly after extensive "investigations" on the ground:

"Human Rights Watch found no cases in which Hezbollah deliberately used civilians as shields to protect them from retaliatory IDF attack." (emphasis added)

After investigating a handful of cases, Human Rights Watch found that in "none of the cases of civilian deaths documented in this report [Qana, Srifa, Tyre, and southern Beirut] is there evidence to suggest that Hezbollah forces or weapons were in or near the area that the IDF targeted during or just prior to the attack."

No cases! None! Not one! That's what Human Rights watch reported to the world.

But anyone who watched even a smattering of TV during the war saw with their own eyes direct evidence of rockets being launched from civilian areas. Not Human Rights Watch. "Who are you going to believe, me or your lying eyes?" That's not Chico Marx. It's Human Rights Watch. Their lying eyes belonged to the pro-Hezbollah witnesses its investigators chose to interview—and claimed to believe. But their mendacious pens belonged to Kenneth Roth, HRW's Executive Director, and his minions in New York, who know how to be skeptical when it serves their interests not to believe certain witnesses. How could an organization, which claims to be objective, have been so demonstrably wrong about so central a point in so important a war? Could it have been an honest mistake? I don't think so. Despite its boast that "Human Rights Watch has interviewed victims and witness of attacks in on-on-one settings, conducted on-site inspections … and collected information for hospitals, humanitarian groups, and government agencies," it didn't find *one instance* in which Hezbollah failed to segregate its fighters from civilians.

In arriving at this counter-factual conclusion, Human Rights Watch willfully ignored credible news sources, such as *The New York Times*, *The New Yorker* and other sources.

After I exposed the double standard practiced by Human Rights Watch, its founder, Robert Bernstein, wrote the following in the New York Times.

As the founder of Human Rights Watch, its active chairman for 20 years and now founding chairman emeritus, I must do something that I never anticipated: I must publicly join the group's critics. Human Rights Watch had as its original mission to pry open closed societies, advocate basic freedoms and support dissenters. But recently it has been issuing reports on the Israeli-Arab conflict that are helping those who wish to turn Israel into a pariah state.

Israel, with a population of 7.4 million, is home to at least 80 human rights organizations, a vibrant free press, a democratically elected government, a judiciary that frequently rules against the government, a

HOUSE_OVERSIGHT_017421

> politically active academia, multiple political parties and, judging by the amount of news coverage, probably more journalists per capita than any other country in the world — many of whom are there expressly to cover the Israeli-Palestinian conflict.
>
> Meanwhile, the Arab and Iranian regimes rule over some 350 million people, and most remain brutal, closed and autocratic, permitting little or no internal dissent. The plight of their citizens who would most benefit from the kind of attention a large and well-financed international human rights organization can provide is being ignored as Human Rights Watch's Middle East division prepares report after report on Israel.
>
> Human Rights Watch has lost critical perspective on a conflict in which Israel has been repeatedly attacked by Hamas and Hezbollah, organizations that go after Israeli citizens and use their own people as human shields. These groups are supported by the government of Iran, which has openly declared its intention not just to destroy Israel but to murder Jews everywhere. This incitement to genocide is a violation of the Convention on the Prevention and Punishment of the Crime of Genocide."
>
> Only by returning to its founding mission and the spirit of humility that animated it can Human Rights Watch resurrect itself as a moral force in the Middle East and throughout the world. If it fails to do that, its credibility will be seriously undermined and its important role in the world significantly diminished.

[103] Amnesty International, which began as an organization dedicated to the freeing of political prisoners from repressive regimes and won the Nobel Peace Prize for its noble efforts, has now turned into a hard-left political lobby that elevates its ideology above its commitment to neutral advocacy for the victims of repression. Consider its 2005 report on rapes and honor killings perpetrated against Palestinian women by Palestinian men in the West Bank and Gaza. Such violence is a serious problem, especially in the Arab and Muslim world, because so few leaders within these groups are prepared to condemn it and so many even justify it as a necessary means of maintaining family honor and male dominance. The AI report documented honor killings of women who had been raped. In one such case a 17 year old girl was murdered by her own mother after she was "repeatedly raped by two of her brothers." In another case, a 21 year old "was forced to drink poison by her father" when she was found to be pregnant.

The AI report places substantial blame for these and other killings on Israel! Here is AI's conclusion, listing the causes of the violence directed against Palestinian women, presumably in the order of their importance: "Palestinian women in the West Bank and Gaza Strip are victims of multiple violations as a result of the escalation of the conflict, Israel's policies, and a system of norms, traditions and laws which treat women as unequal members of society." The "escalation of the conflict" (which AI blames primarily on Israel) and "Israel's policies" rank higher than the "norms, traditions and laws which treat women as unequal." The report asserts that violence against women has "increased" dramatically during the Israeli occupation and has reached "an unprecedented level" as a result of the "increased militarization of the Israeli-Palestinian confrontation." This is a deliberately false conclusion. In fact the number of such killings has gone down dramatically since the Israeli occupation. But if one were to believe the Amnesty International Report, it would be as if the West Bank and Gaza Strip had been violence free for Palestinian women until the Israeli Occupation.

Following the publications of the Amnesty International report, I spoke with Donatella Rovera, who is AI's researcher on Israel and the Occupied Territories and asked her to provide the data on which she had based her conclusion that violence against women had escalated to an "unprecedented level" during the occupation, and especially during its most militarized phase. I also asked her whether AI had compared violence against women in the occupied West Bank and Gaza with violence against women in unoccupied Arab-Muslim areas that have comparable populations, such as Jordan. Rovera acknowledged that AI could provide no such comparative data and confirmed that the report was based on anecdotal information, primarily from Palestinian NGOs. "We talk to anyone who would talk to us," she said. When I asked her for a list of the NGO's that were the sources of the information, she refused to provide them because "there are things we can simply not provide to outsiders." I assured her that I was not interested in names or identifying features, but only in statistical data regarding the

HOUSE_OVERSIGHT_017422

[103] have been hijacked by hard left ideologues who focus disproportionate attention on imperfect democracies at the expense of victims of far more serious human rights abuses by tyrannical regimes.

The worst offender in this inversion of human "rights" and "human wrongs" has been the U.N. When my mentor Arthur Goldberg was appointed as United States Ambassador to the U.N. in 1965, [check year] he asked me to help him in an informal capacity as an advisor on human rights and matters of international law.

I worked closely with him on a number of such issues, meeting with him regularly in New York. In 1967, following Israel's victory in the Six Day War, Goldberg asked me to consult with him on the drafting of Security Council Resolution 242 which sought to provide a framework for peace in that troubled part of the world. The Resolution, which was carefully crafted in diplomatic language—"U.N. speak"—called for Israel to return "territories" (not all territories or even the territories captured in the defensive war) in exchange for recognition by the Arab stated and secure borders. Israel accepted 242, but the Arab nations held a conference in Khartoum, where they issued their 3 infamous "no's." "No peace. No negotiation. No recognition." This led Israel's U.N. representative Abba Eban to quip that "this was the first time in history that the winners of a war sued for peace, while the losers demanded unconditional surrender." [get exact quote]

From that point on, the U.N. (most particularly the General Assembly, the Human Rights Council, Unesco, and several other agencies) began its downhill spiral away from neutrality and toward becoming an organization focused almost exclusively on the imperfections of democracies such as the United States and Israel, while virtually ignoring genocides and repressions by non-democratic nations.

The year 1975 was perhaps the Apex (or Nadir) of the inversion of human rights, especially at the United Nations. While Pol Pot was murdering millions, how did the world community react? Surely the murder of so many innocent people would prompt the United Nations to swift preventive action. And yet, just as it did during the Holocaust, the world community did absolutely nothing to prevent the atrocities. Indeed, not only did the United Nations take no

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alleged trends cited in the report, but she still refused to provide anything more than a recommendation that we Google "pretty much all the NGOs" in the region. It is impossible under these circumstances for any outside researcher to replicate AI's study and to confirm or disconfirm its conclusions.

The NGO Monitor, an organization based in Jerusalem which analyzes reports made by other NGOs, blasted the AI report on the ground that "Palestinian men are condescendingly excused from taking responsibility for their actions." This is true, as a careful reading of the AI report shows. Listen to the excuses AI provides: "Restrictions on movement and curfews which confine people to their homes for prolonged periods, and increased unemployment, poverty and insecurity, which have forced men to spend more time at home, as well as the increase in crowded conditions in the home, have contributed to the increase in violence against women, including sexual abuse, within the family.". By providing these "abuse excuses," AI places its own political biases ahead of the interests of the female victims. The NGO Monitor correctly characterized the amnesty report as based on "biased sources" and lacking in "credibility." It is also categorically false, as a simple matter of fact. But that doesn't matter to Amnesty International, because the counter-factual "increase" in honor killings after the Israeli occupation fits its ideological and political agenda better than the truth.

HOUSE_OVERSIGHT_017423

action, but its major bodies refused even to condemn the genocide until after the killing was completed and at least 1.8 million people lay dead. The General Assembly, for instance, did not mention Cambodia in a single resolution until November 1979—nearly a year after the genocide's end. Even then the resolution was framed in terms of sovereignty and did not mention specific human rights violations, let alone genocide.[104] Only in 1980, nearly five years after the atrocities began, did the UNCHR finally pass a resolution condemning the genocide.

The hard left was similarly uninterested in the Cambodian genocide. While millions were being murdered, many leftists dismissed the atrocities as western propaganda. Activists Gareth Porter and George Hilderbrnd wrote, "Cambodia is only the latest victim of the enforcement of an ideology that demands that social revolutions be portrayed as negatively as possible, rather than as a response to real human needs…." According to the pair, what "was portrayed as [the Khmer Rouge's] destructive backward-looking policy motivated by doctrinaire hatred was actually a rationally conceived strategy for dealing with the problems that faced postwar Cambodia." Noam Chomsky also dismissed the genocide, writing that "if Cambodian terror did not exist, the Western propaganda systems would have had to invent it, and in certain respects they did." He unabashedly wrote that blaming solely the Khmer Rouge for deaths from malnutrition and disease was as "if some Nazi apologists were to condemn the allies for postwar deaths from starvation and disease in DP camps."

Instead of focusing on the savage mass murder of more than a million civilians in Southeast Asia, the global community chose instead to use its limited time and resources to try to delegitimize Israel. Just a few months after the Cambodian atrocities began, the General Assembly adopted the most infamous resolution in its history, resolution 3379, declaring that "Zionism is a form of racism and racial discrimination." 72 countries voted in favor, including, ironically, Cambodia. 35 voted against and 32 abstained. This and other similar actions by the General Assembly led Abba Eban to proclaim that if Algeria offered a resolution than the earth was flat and Israel flattened it, it would pass 72 to 35, with 32 abstentions. The United States representative to the United Nations, Daniel Patrick Moynihan, fumed that "the United States rises to declare before the General Assembly of the United Nations and before the world that it does not acknowledge, it will not abide by, it will never acquiesce in this infamous act."

The result of this resolution was that "Zionists" were blacklisted and banned from speaking at several colleges and universities that had "anti-racist" speaking policies. Not a great victory for "human rights" or for freedom. In a world, where genocide, slavery, disappearances, torture, systematic rape, murder of dissidents and other grave violations of human rights were being routinely perpetrated by its member nations, Zionism and Israel became the number one enemy of the U.N., with more resolutions condemning Israel than all the other member nations combined.

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[104] The record of the UN Commission on Human Rights (UNCHR) on the matter is much the same. In March 1978 the United Kingdom petitioned the UNCHR to appoint a special rappourteur for human rights in Cambodia. Syria, the Soviet Union, and Yugoslavia blocked the move. Instead of appointing a rappourteur, the commission invited comment by the Khmer Rouge, referred the matter to a sub-committee, and (despite the ongoing genocide) delayed consideration of the matter until 1979. By the 1979 meeting of the commission, Vietnam had already invaded Cambodia and effectively ended the killings. Yet again, however, the commission delayed consideration of the Cambodia matter.

HOUSE_OVERSIGHT_017424

The Zionism-Racism resolution was followed by a deluge of anti-Israel sentiment in the General Assembly, the Security Council, and the UN Council on Human Rights. At the 1978 session, "several speakers drew a parallel between Zionism and apartheid," insisting that "those selective and racist regimes should be outlawed by the international community." In 1979, after the Cambodian genocide was already completed but before any major UN body condemned the genocide, there were more comparisons between Zionism and apartheid, with some delegates drawing a parallel "between Nazi policies against the Jews and Israeli brutalities against the people of Palestine."

When the General Assembly itself finally addressed the Cambodian genocide in a resolution, it did so in tepid terms compared to its treatment of Israel. The General Assembly simply noted "with great concern that the armed conflict in Kampuchea [Cambodia] and is seriously threatening the peace and stability of South-East Asia." In contrast, a resolution passed that same year "deplores the continued and persistent violation by Israel of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and other applicable international instruments, and condemns in particular those violations which that Convention designates as 'grave breaches' thereof."

True to form, Chomsky related Cambodia to Israel, inverting the actual seriousness of the human rights violations and asserting that "condemnation of Cambodian atrocities, covering the full spectrum with the exception of some Maoist groups, had reached a level and scale that has rarely been matched, whereas the situation of the Arabs under Israeli occupation (or indeed, in Israel itself) is virtually a taboo topic in the United States."

The Zionism-racism resolution was ultimately rescinded in 1991 by a vote of the General Assembly, but it continued to animate U.N. actions, especially by the "Human Rights Council" of the U.N. (previously known as the UN Commission on Human Rights), which in 2001 convened the first of several "Durban Conferences" against "racism, racial discrimination, xenophobia and related intolerance." Its primary, if not exclusive, focus was on Israel. It virtually ignored racial genocides, slavery and other obvious manifestations of racism and discrimination. The final preparatory session was held in Tehran. All Israelis and all Jewish NGO's were excluded.

According to Irwin Cotler, the former Attorney General of Canada, who attended the conference, the air was filled with hate speech such as "too bad the Holocaust was not completed." The conference became a "festival of hate such that we had not experienced anywhere at any time before." It was "a state sanctioned culture of hate" which, to Cotler, "is the most dangerous form of anti-Semitism that we are witnessing in the 21st Century." And all of this was done under the Aegis of the U.N.! Even the U.N. High Commissioner for human rights—Mary Robinson, no friend of Israel—was appalled at what she was witnessing. The Arab Lawyers' Union distributed a booklet of anti-Semitic cartoons that could have been published by Der Sturmer. The Jerusalem Post reported Robinson's reaction:

> "Waving a book of anti-Semitic cartoons distributed at the anti-racism conference in Durban, UN High Commissioner Mary Robinson - in a dramatic act of identification with

HOUSE_OVERSIGHT_017425

> the Jews vilified in the pamphlet - declared "I am a Jew" at an NGO dinner there Wednesday night."

The late Congressman Tom Lantos from California observed:

> "whenever the word 'Holocaust' was read during the plenary review of the combined text, one of the Islamic delegates—usually Egypt—intervened to change 'Holocaust' to 'holocausts.' Adding insult to injury, the same delegates requested that the phrase 'and the ethnic cleansing of the Arab population in historic Palestine' be inserted after the appearance of 'holocausts.'
>
> Each time…language on anti-Semitism and the need to combat it was raised in the plenary, the OIC states intervened to couple anti-Semitism with the phrase 'racist practices of Zionism,' or even more outlandish 'Zionist practices against Semitism"—a deliberate move to confuse the real meaning of anti-Semitism.

A second "Durban Conference" was held in Geneva in 2009. Although the U.S., Canada, Italy and several other countries boycotted what had by this time become clear would be another hate conference, I decided to travel to Geneva in an effort to restore the human rights agenda to its proper priorities, or if that wasn't possible, to expose the UN Human Rights Council for what it has become—an enemy of neutral and universal human rights. It would be an uphill fight because the primary speaker invited to address the second Durban Conference was Mahmoud Ahmadinejad, the Holocaust-denying President of Iran.

I worked with several genuine human rights organizations in an effort to shame the Human Rights Council into broadening its agenda to include the genocides in Africa and other serious human rights abuses around the globe. We brought real victims of human rights abuses from Rwanda, Darfur and other locations where genocides had been ignored, or even facilitated, by the U.N. We conducted a parallel human rights conference in which we took testimony from these ignored victims and witnesses, to whom the U.N. had refused to listen. I also delivered an address on the inversion of "human rights" and "human wrongs."

As it turned out, I was staying in the same hotel as Ahmadinejad. My wife and I were having a pleasant drink in the lobby bar, when Ahmadinejad and his entourage paraded through the lobby. He looked at us and smiled. I approached one of his handlers and introduced myself. I told him that I would like to challenge the President to a debate about the Holocaust. He asked, "where, at Harvard?" Ahmadinejad had previously spoken at Columbia University and I suspected that he might welcome an invitation from Harvard and the platform such as an event would accord him. I replied, "No, the debate should be at Auschwitz; that's where the evidence is." He said he would communicate my offer to the president, who, he told me, was on the way to a press conference on the Mezzanine floor of the hotel. I went to the press conference and tried to ask Ahmadinejad whether he would debate me at Auschwitz. I was immediately hauled off by the Swiss police, removed from the hotel and told I would not be allowed to return "for security reasons." I insisted that "security reasons" did not justify protecting the President from a hostile question, but they told me that my belongings would be removed from my room and my key changed. I

HOUSE_OVERSIGHT_017426

immediately called someone I knew in the Obama administration, who phoned the US Embassy in Geneva and I was allowed back in the hotel with an apology. The photograph of me being forcibly removed from the hotel was flashed around the world, with the following caption:

> "Harvard law professor Alan Dershowitz, is led away after declaring he planned to challenge Iranian President Mahmoud Ahmadinejad about his views on the Holocaust and Israel minutes before the meeting between Swiss President Hans-Rudolf Merz and the Iranian president in Geneva, Switzerland, on April 19, 2009."

The next day Ahmadinejad was scheduled to give his address to the Durban Conference. We were not allowed into the Chamber in which he was speaking, but were told to go to a special room where we could watch and listen to his talk. We assembled in that room and watched as Ahmadinejad was greeted with applause by many of the delegates. When he began to speak, we discovered that his words, delivered in Farsi, were not being translated to those of us in the separate room, but only to those in Assembly Chamber. This was not acceptable and so I marched to the Assembly Chamber and simply walked in. Several delegations were absent and so we simply took their seats. But not for long. As soon as Ahmadinejad denied the Holocaust, which he did near the beginning of his speech, I stood up and shouted "Shame" and walked out, passing directly in front of his lectern. Many others walked out as well, including several European delegations. Ahmadinejad's talk was a fiasco, and was so reported by the media. He had made a fool of himself, with little help from us.

The following year, the Durban Conference on human rights was once against convened, this time in New York. Once again, we convened parallel conferences. In my address, I made the following point:

> One important reason why there is no peace in the Middle East can be summarized tragically in two letters, UN. That building dedicated in theory to peace has facilitated terrorism, stood idly by genocide, given a platform to holocaust deniers, and disincentivized the Palestinians from negotiating a reasonable two-state solution.
>
> …
>
> How dare states such as Saudi Arabia, Cuba, Venezuela, Zimbabwe, Iran, Bahrain, Syria, Belarus and other tyrannies too numerous to mention -- but if you want to see the list, just go over to the next building -- read the list of nation states and you'll see more than half of them fit this definition of undemocratic tyrannies. How dare those tyrannies lecture Israel about human rights? How dare states such as Turkey, that have attacked their own Kurdish minorities and Armenian minorities, and Russia, which has attacked its own Chechnyan minority, how dare these warmongering countries lecture Israel about peace?
>
> How dare Norway with its long and sordid history of anti-Semitism and collaboration with evil, a history which tragically persists to this day, how dare Norway lecture Israel on equality? How dare South Africa, which continues to practice de facto, though not de jure apartheid, call Israel, which is far more integrated than South Africa, an apartheid state?

HOUSE_OVERSIGHT_017427

> Is there no sense of shame in that building? Has the word hypocrisy lost all meaning across the street? Does no one recognize the need for a single, neutral standard of human rights? Have human rights now become the permanent weapon of choice for those who practice human wrongs? For shame. For shame.

As I spoke these harsh words in the shadow on the U.N. building, I wondered what my mentor Arthur Goldberg, who left a lifetime job on the Supreme Court, to go to the U.N., would think of what I was saying. He always defended and supported me, but he loved and admired the U.N. I think he would have approved of the thrust of my talk, if not of every word, as he did when another one of his mentees, Daniel Patrick Moynihan, used powerful words to condemn the actions of the U.N.

If an organization—governmental or non-governmental—is to remain true to a genuine commitment to universal and neutral human rights, it must prioritize the use of its resources. "The worst first" must be its governing criteria. The "worst" has two major components. First and foremost is the nature and scope of the human wrongs: genocide, mass murder, widespread torture and mutilation of dissidents, rape as a policy, slavery, genuine apartheid and other comparable abuses. Second is the inability of victims to secure relief from the judiciary, from human rights groups, from the media and from other domestic sources. Failure to prioritize is a sure sign of bias and lack of neutrality. Today's U.N. and most "human rights" NGOs fail this test.

My defense of Western democracies, and most particularly Israel, against deliberately exaggerated charges regarding human rights, led to an offer that presented me with an existential challenge to my dual identity as an American and a Jew. In 2010, the Prime Minister of Israel, Benjamin Netanyahu, urged me to accept the position of Israel's Ambassador to the U.N. He told me that in order to serve in that capacity, I would have to become an Israeli citizen, though I could also retain my American citizenship. I realized immediately that I could never accept the offer, despite the reality that I would have enjoyed the job immensely. The idea of standing up against the hypocrisy and double standard of the UN appealed to me. But it was clear to me that I am an American, not an Israeli. For me to switch sides—even to a nation that is so close an ally to my own nation—would raise the spectre of dual loyalty that has been directed at Jews since Biblical times, when they lived as minorities in the lands of Egypt and Persia.[105]

After much discussion and arm twisting, I finally persuaded Netanyahu that if I accepted the position, it might be good for me, but it would not be good for American Jews or for Israel. So I declined, after promising the Prime Minister that I would be available, as an international lawyer and an American, to help defend Israel against unjust charges brought by international bodies such as the International Criminal Court, the International Court of Justice and various UN agencies. I will also continue to criticize Israel's human rights record when criticism based on a single universal standard is warranted by its actions.

[105] Quote Exodus and Esther

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Conclusion: The Second Six Million

The sad reality is that the inversion of the human rights agenda, especially at the U.N., has needlessly cost many innocent lives. Since the time the world promised "never again" at the end of World War II and built a structure and jurisprudence designed to fulfill that important promise, another six million innocent victims of preventable genocides have been slaughtered while the world once again stood silent.

Since the Holocaust, the international community has turned a blind eye as genocides across the globe claimed millions of innocent lives. Cambodia, Rwanda, and Darfur are just the beginning of the story. The UN has also failed to help desperate civilians in Burundi, the former Yugoslavia, Syria, and other countries. While ignoring the gruesome killings by the member states in its midst, the United Nations has focused its time and attention on a single country—Israel. The numbers are staggering. In the last eight years, Israel has garnered more than six times as many UN condemnatory resolutions than any other country in the world.[106] The General Assembly has called only ten special emergency sessions in its history, but six of them have been devoted to the Middle East's only liberal democracy.[107] Of course Israel has its shortcomings, but it deserves to be subjected to the same scrutiny as every other state, no more and no less.

The UN's obsession with Israel is not necessarily the only cause of its inaction on genocide, but it is certainly a contributing factor. Like all institutions, the United Nations has limited resources. When it dedicates so many of those resources to criticizing Israel it decreases its ability to respond effectively to genocide. It is important to realize that the sheer amount of time the UN spends chastising Israel in one-sided and repetitive resolutions is also time *not* spent on genocide. As the NGO UN Watch notes, "Diplomats at foreign ministries or UN missions have a limited amount of time to devote to any particular UN session. Because every proposed UN resolution is subjected to intensive review by various levels and branches of government, a direct result of the anti-Israel texts is a crippling of the UN's ability to tackle the world's ills."[108] What could have been if, *during* the Cambodian genocide, the General Assembly passed a single resolution on the atrocities instead wasting time debating whether Zionism was racism? How would the situation in Darfur have changed if, during its 2006-2007 sessions, the General Assembly once condemned the genocide in Sudan instead of passing 22 resolutions condemning Israel?

One might easily dismiss the UN's obsession with Israel, if the body's failure to stop suffering was not so serious and not so real. The UN could have intervened more quickly and vigorously and saved millions of lives in Cambodia, Darfur, Rwanda, the former Yugoslavia, Syria and numerous other places. It is a broken institution. Until it ends its obsession with Israel, the UN cannot be fixed.

It will remain the key perpetrator—through its actions and inactions—of the tragic inversion of human rights over the past 40 years.

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[106] Eye on the UN, http://www.eyeontheun.org/browse-un.asp?ya=1&sa=1&ua=1&s=0&tp=1&tpn=Resolution.
[107] American Jewish Committee, A Diminished Body: An Overview of the UN and Israel 5, http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/DIMINISHEWORLDBODYOVERVIEWUNISRAEL_2006.PDF.
[108] UN Watch, UN, Israel & Anti-Semitism, http://www.unwatch.org/site/c.bdKKISNqEmG/b.1359197/k.6748/UN_Israel__AntiSemitism.htm.

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While these premeditated and carefully organized killing sprees were taking place, the United Nations fiddled on about the imperfections of the United States, Israel and other western democracies. The real victims of this inversion have not been the western democracies that have been the focus of the U.N. condemnations. The real victims have been those willfully ignored by the U.N., which has used its focus on Israel and other democracies as an excuse—a cover—for its malignant inaction against horrible human wrongs committed by the tyrannical regimes that control much of the UN agenda and give themselves exculpatory immunity from any UN condemnations or intervention. "Never again" has been turned into "again and again and again." The label of "human rights" has been used to promote human wrongs. Our heroes—Eleanor Roosevelt, Rene Cassin, Albert Schweitzer—should be turning over in their graves, as the shields they constructed to protect the helpless from oppression and genocide have been beaten into swords to be used by the oppressors and genocidal killers.

I refuse to allow these human rights pretenders to hijack and invert the honorable agenda of neutral and universal human rights. I will keep struggling until my dying day to return human rights to its proper place in the international community.

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Conclusion—Closing Argument:

Looking back at my 50 year career and forward to the laws next 50 years.

As I begin my second half century of law practice and teaching, I look back with fondness, nostalgia and a heavy dose of surprise on my interesting life and career, as I look forward to my remaining years. Since I try to prepare my students to be lawyers over their entire careers, and since the career of a lawyer now extends to a full half century, I must always think ahead to what our legal system will look like when my current students end their careers.

I could not have asked more or better from my first half century. I have accomplished far more than I could ever have anticipated, especially in light of my undistinguished elementary and high school performance, and I have lived a more interesting life than I could ever have dreamed. I have surely lived the passion of my times and I've been very lucky, at least so far. (I don't want to give myself a "kneina hura."[109]) Like the fictional Zelig in Woody Allen's great film of that name, I was privileged to have been present—literally or virtually—at many of the most important legal and political events that transpired during my adult life. For some I volunteered, for others I was solicited. Sometimes I was a direct participant, other times an active observer and reporter. In this "closing argument" I will try to summarize my role in the important legal and political developments in which I participated. I will also speculate about what the future may hold for our system of laws and justice.

Oliver Wendell Holmes, Jr. viewed the role of the lawyer as a predictor of future legal decisions and trends.[110] But the Talmud cautioned that prophecy ended with the destruction of the second temple and that he/she who tries to prophecy the future is either a fool or a naïve. Or as a contemporary sage—Yogi Berra—put it: "Prediction is very hard, especially about the future." I certainly agree that prognosticating the future is a daunting challenge, but lawyers and law professors must confront that challenge, because one of the most important jobs we have is to identify trends and to anticipate significant developments, I will try, therefore, with these cautions in mind, to extrapolate about what a lawyer writing an autobiography 50 years from now might look back at and write about.

Before I summarize my past and speculate about the future, let me say a word about my present life. I remain extremely active in every phase of my career. Here is a summary of the week during which I wrote these words. The week of November 13 through November 20, 2011 was fairly typical of my life during my 74th year.[111]

On Sunday morning I was picked up by limo and taken to Bedford airport where I boarded a private 747 jet owned by Sheldon Adelson, reputed to be the richest Jew in history and among the handful of wealthiest Americans. The son of a Boston cab driver, Adelson has accumulated billions of dollars by building and running casinos in Las Vegas, Micow and Singapore. His jet,

[109] Yiddish corruption of the Hebrew for "evil eye."
[110] [CITE]
[111] More typical of spring than fall, when I teach.

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which was once owned by the Sultan of Brunei, is a flying mansion, equipped with a bedroom, several sitting rooms, a chef and other appertences of wealth and glamour. I spent much of the trip conferring with Sheldon and his wife, Dr. Miriam Adelson, who is an expert in addiction and the psychological problems associated with drug dependency. As we were about to land, I was invited into the cockpit where I saw the Hoover Dam and other interesting sights on the approach to Las Vegas. Upon arriving in Las Vegas I was taken to the Dr. Miriam and Sheldon Adelson Educational Campus and shown around the school that they built in a suburb of Las Vegas. Then I was picked up by Larry Ruvo, who wanted me to see the brain institute that architect Frank Grary had built in Ruvo's father's memory. Ruvo credits me with helping to get this project done, after the local university ran out of money and broke its agreement with him. I wrote a strong letter on his behalf, and the result was an arrangement with the Cleveland Clinic, one of the great medical institutions in the world. After touring the facility, I went to the Venetian Hotel where I spoke on behalf of the Adelson Day School and was honored with a beautiful plaque made from Jerusalem stone. The students of the school presented me with a book of drawings that the students had done in my honor representing their views of justice. (Later that week, I passed the book around to the college students in my seminar on morality.) At 10PM, I was taken to the airport where the Adelsons smaller jet—a gulfstream—was waiting to fly me back to New York where I arrived at 5:30AM.

Following a few hours of sleep in my New York apartment, I was picked up by a paralegal and driven to Rikers Island where I spent the morning conferring with my client Gigi Jordan, who is accused of murder. She had killed her autistic son and tried to kill herself after learning that her child had been repeatedly abused, both sexually and physically by his biological father, and after unsuccessfully seeking help from numerous government and social service agencies.

After returning from Rikers Island, I was driven to Brooklyn College, where my legal and personal papers—more than a million of them in 1600 boxes—were being opened for public viewing. I am contributing all of my papers to my alma matter. I made a talk about the papers and my experiences at Brooklyn College to a crowd that included my wife and sons, old friends, classmates, current and former faculty members, and current students. It was a thrilling experience for me to go back more than half a century to the college that meant so much to me and to express my appreciation to people who so influenced my life.

On Tuesday I appeared in New York State Supreme Court on behalf of my client Gigi Jordan and made arguments in preparation for her trial. Following that court appearance, I boarded the Acela train and went home for a good long night's sleep.

On Wednesday morning I met with the Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo, for breakfast. He had invited me to discuss with him a pending application of the Palestinian Authority to be recognized as a state by the International Criminal Court in order to bring charges against Israel for the war in Gaza and for building settlements in the West Bank. We had a long and fruitful discussion.

I then went back to the law school where I prepared for my first class of the day—a legal ethics course from 1 to 3PM. Before class I had a short lunch in the faculty dining room where I sat with an old friend, Michael Boudin, who is a judge on the US Court of Appeals for the First

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Circuit and an adjunct member of our faculty. The first half of the legal ethics class was devoted to discussing the difficult problem of what a lawyer should do when a client gives him physical evidence, the possession of which itself might be a crime. Such evidence might include videos of child pornography, stolen goods and other contraband. We considered a case where a legal aid lawyer had been told where his client buried the body of a college student he had murdered, but his murder was not known to her parents or to the police. We also discussed the Joe Paterno case that was then in the news and that raised questions regarding obligations to report serious misconduct. The second hour, prosecutor Ocampo made a brief appearance in the classroom, to discuss ethical problems faced by international prosecutors. The class ended with a discussion about the scope of confidentiality and what a lawyer should do if his client claims innocence and would like to testify as to his innocence, but the lawyer firmly believes that he is guilty.

Following that class I sent an hour preparing for my next seminar which is a class of freshman at Harvard College. The subject is "Where Does Your Morality Come From?", and we discussed the moral limits on spying and other forms of subterfuge directed against enemy countries.

Straight from class I went to the Huntington Theater where I had been asked to comment on a play that was opening there. The play was about the capture of Adolph Eichmann, and I spent about an hour on the stage speaking and responding to questions from the director and the audience about the legal issues growing out of the highly publicized capture and trial by Israel.

Thursday was essentially my day of rest. I spent the day writing several short articles and doing research and writing on several pending projects, including my autobiography. Thursday night was my only night of the week at home with my wife, and we spent it watching a dumb but entertaining movie called Crazy Stupid Love.

Friday began with my annual checkup at my doctor's office followed by lunch with Peter Norton, director of the Norton Antivirus Software. I met him and his wife Gwen for lunch at the Harvest, where we discussed, among other things, the use of computer viruses against the Iranian nuclear threat. After lunch, I received an email from a lawyer representing Saif Ghadafi, who had just been apprehended by the Lybians. He wanted me to represent Ghadafi in the International Criminal Court and to negotiate for him to be tried in the Hague rather than in Tripoli. I asked for more information before making a decision. I spent the rest of the afternoon working on writing projects, and then went back to the law school at 6:30PM for a Shabbat dinner sponsored by Chabad and the Jewish Law Students Association. I am faculty advisor to both of those organizations and I gave a brief talk at the beginning of the dinner. My wife and I then attended a concert at Sanders Theater.

At 5:30 on Saturday morning, I flew to fly to Washington DC to be a keynote speaker at an event sponsored by Iranian dissidents. The other speakers included former Secretary of Homeland Security, Tom Ridge, Former Chairman of the Democratic National Committee Howard Dean, former Congressman Patrick Kennedy and several other former and current government officials. I then took the train back to New York, where I was hoping to attend the Metropolitan Opera, but I was too tired and I went back to my apartment and ended the week by falling asleep at about 10PM. My wife was proud of me for acknowledging my limitations, saying that 5 years earlier, I never would have been willing to miss anything because of being tired. A friend, who is a

HOUSE_OVERSIGHT_017433

psychoanalyst, has labeled my affliction "FOMS"—"fear of missing something." I plead guilty to that diagnosis.

Nor was this event-filled week unusual. Two weeks later, my wife and I were off to Israel, where I received the Begin Prize" for my "contributions to the Jewish people," and gave several lectures in Jerusalem and Tel Aviv. During my visit to Israel, I flew to Paris for a talk and to the Hague on a human rights matter. Then back to Israel for a conference and meetings with the Prime Minister and other government officials. My granddaughter joined us in Vienna for a few days of opera and strudel, followed by a visit to Prague as guests of the U.S. Ambassador, a speech at a Czech university and the lighting of Chanukah candles at the U.S. Embassy.

I don't know how long I will be able to keep up this pace. I am now teaching only in the fall semester at Harvard Law School, though I generally squeeze 4 or 5 separate courses into that one semester—one large class, two seminars and one or two reading groups. We move to South Beach for the winter, where I write, lecture and consult on cases. I am trying to accept fewer commitments, but I find it hard to say no to interesting offers (FOMS?). I also cannot remain passive in the face of injustice and bigotry, which appear to be on the increase. I still love a tough challenge and welcome a good fight. I hate to lose and I never give up.

If past is prologue, my approach to life—living the passion of the times—will not change, but nature has its claim and physical energy inevitably abates and requires choices and priorities. My priorities will continue to be determined by the seriousness of the wrongs that need to be challenged by rights.

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Since the theme of this book is change—change in the freedom of expression, change in the way homicides are prosecuted and defended, change in the nature of media coverage of high profile cases, change in the uses and misuses of "human rights," change in attitudes toward race, change in the relationship between religion and government, and change in the way law is taught and learned—it is appropriate to end with changes I have experienced in my own personal and professional life over the years.

During each of my seven decades of adult life, I have undergone significant change, beginning in my second decade, when I was a teenager about to enter college, through my eighth decade as I approach retirement from Harvard. It is to these changes that I now turn.

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Summarizing my past: The major changes in my life

The questions I am most often asked by others—and sometimes by myself—are about significant changes in my life and why they occurred. Going back to my teen years, the question is why I changed, within a few short months, from a C and D student in high school to an A+ student in college and law school. The change was dramatic and sudden—literally over the summer of 1955, between high school and college. What happened in those two months to change me from being last, or close to last in a class of 50, to being first among the men (15 women were ahead of me)[112] in a highly competitive class of 2,000, and then first in a class of 170 even more competitive men and women (only a handful) at Yale Law School? Was it me who changed, or was it the schools?

It was both. I think I had begun to change during my last year in high school, but my reputation among the faculty was so firmly established and so negative, that teachers simply couldn't see past it. Even when I got A grades on the statewide Regents exams, the teachers gave me Cs and Ds as semester grades. My occasionally intelligent classroom comments were taken as 'wise ass" remarks. And some of my teachers even thought I must have cheated whenever I got a good grade on a test. So I doubt it was possible for me ever to shine in a high school where my favorite teacher insisted that I was "a 75 student" and would always be "a 75 student." (I didn't quite live up to his expectations, graduating with an average below 75).

Moreover, my high school was a Yeshiva—a "parochial school" and I am not a parochial person. I did not respect most of my teachers, and the feeling was obviously mutual. Creativity was frowned upon. Rote memorization was rewarded. And "respect" for "authority" was not only demanded, it was actually graded. I got a "U" for unsatisfactory. When I got to Brooklyn College, creativity was rewarded, rote memorization frowned upon, and respect was something to be earned, not merely accorded by the title of Rabbi. The same kind of creative and challenging answers that got me Cs and Ds in Yeshiva earned me A's in college and law school.

But there was more at work than a change of schools. I changed over that summer as well. I went to a new summer camp as an assistant counselor, where I excelled and received praise for my creativity as a song writer for "color war" and for my leadership skills. I had always been a leader, even during my darkest days in high school, but the school rejected my leadership, fearful that other students would follow me in my heretical ways. I always had an abundance of energy, but it was—in the views of my high school teachers—misdirected.

That summer in Camp Maple Lake, I received confirmation of my talents, and the result was heightened self confidence.

I also met a young woman and began my first serious romantic relationship, which culminated four years later in my first marriage. Suddenly, I was "talented," "attractive," and "accepted." It was a great send off to college.

[112] Because of the draft, men and women were ranked separately.

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I also had a bit of a chip on my shoulder and an "I'll show them" attitude toward my high school teachers, who told me I'd never amount to anything, and my principle, who persuaded Yeshiva College not to admit me. I was motivated and roaring to go.

In college, although I succeeded beyond my wildest imaginations, I also had deep-seated doubts about whether I was really as good as my grades. I had recurrent nightmares about failing exams and being exposed as a "phony." I also wondered whether Brooklyn College was easier than Yeshiva, because half the day was not devoted to religious studies. But I didn't let these doubts get in the way of my success. I loved Brooklyn College; and Brooklyn College loved—and still loves—me. (Yeshiva now loves me as well, bestowing on me an "Alumni of the Year" award and an honorary doctorate, reflecting some selective amnesia about our past unhappy relationship.)

Moving from my teen to my twenties, another question about change arises: why did I change—again dramatically and precipitously—from a strictly observant Jew, into a mostly non-observant secular Jew. Within a brief period of time, I transformed myself from an Orthodox Jew who put on Tfilin and davened every day and never ate anything—even a Nabisco cookie—that didn't have the magical U, into a secular Jew who went to synagogue only a few times a year and who did not keep Kosher (except in my home, so my parents could eat there).

These changes occurred in my middle to late 20s, and did not reflect any theological epiphany, but rather a rational decision to become my own person, rather than a follower of my parents' life style. It would have been easy for me to remain observant. By the time I was making the decision, my career was well established. I had been hired by Harvard as an observant Jew, and I could have remained observant with no adverse consequences (other than some silly questions from the Dean). Indeed, from a career perspective, there would have been a distinct advantage in remaining part of the Orthodox community. I would have been among the most successful Orthodox lawyers and professors in the world. Having given up Orthodoxy, I was just one among the thousands of highly successful Jewish lawyers and professors.

I often think about what my life, and that of my family, would have been like had I remained a member of "the club" of Modern Orthodox Jews. The "road not taken" often appears less bumpy than the road one actually traveled. But I have no regrets.

Many of my friends, who have remained Orthodox, do not understand my decision. They, like me, are skeptics and agnostics, but that has not stopped them from remaining observant. As one old friend put it: "the older I get, the less I believe, but the more I observe." They love the community of Orthodox observers and want to remain part of it. That requires complying with a set of rules—not believing a set of beliefs. Since I am very rule abiding in my secular and professional life, following the religious rules would have been easy for me, but I chose the road less traveled, at least for my Orthodox friends. And that has made all the difference, both for me and for my children—for better or worse. I simply did not want to impose my parents' rules on my children. My parents imposed their rules on me and my brother, and I wanted my children to be free to choose a lifestyle for themselves. Of course no one is entirely free from parental influences, and choice is always a matter of degree.

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In my thirties, I made another significant choice. Having spent my first 5 or 6 years at Harvard as a pure scholar, writing dozens of law review articles, two case books and hundreds of lectures, I was becoming restless. I wanted more action. I "think therefore I am" (even if Des Carte got the order right) was not enough. I wanted to do. "I do, therefore I am," is more consistent with my personality and energy level. But I also loved teaching. I didn't want to stop being a professor.

I also have always hated to choose among good things. My choice has always been to do everything—not to miss anything. ("FOMS" again! I am terminal!) I never want to miss anything. My wife always reminds me of the great Yiddish expression: "With one Tuchis (rear end) you cannot dance at two weddings." Maybe not, but there's no harm in trying. And why only two, if there are three. (My son Elon, a filmmaker, recently made a clever, short cartoon video, showing me breaking the Martha's Vineyard record by attending five parties in one night!)

And so, consistent with my lifelong aversion to choosing, I chose not to choose. I decided to remain a professor while also arguing cases and becoming deeply involved in causes.

The immediate precipitator of this change did not come from within me. It came from a tragedy that struck my 10 year old son Elon, who was diagnosed with brain cancer. I dropped everything I was doing and focused all my energy on getting him the best surgical and oncological care in the world. Following successful surgery at Boston's Children's Hospital, he had radiation therapy at Stanford Medical Center in California. Then it was time to wait. Waiting—not doing—is difficult for me. I simply couldn't concentrate on long term scholarly projects that had no deadlines. My mind wandered to my son and I could get no work done. I had to put on hold a major scholarly book project on the preventive state.

I decided that what I needed was short term projects with deadlines that required me to complete the work on schedule. Appellate cases fit the bill perfectly, and I began to take on criminal appeals.

When Elon was diagnosed, I had no money. My salary was meager and I had no outside income. I had to borrow money from Judge Bazelon to assure Elon the best care. I vowed that I would never again put my family in that position and I decided to try to earn additional income from cases. I took half my cases on a pro bono basis, but the other half earned me a nice outside income, which I invested cautiously. I remember vividly charging my first legal fee: $35 an hour. I couldn't believe anyone would be willing to pay me so much—almost 50 times as much as the 75 cents an hour I had earned as a babysitter and Bar Mitzvah tutor! Within a few years it was $75 an hour, then a hundred. My goal was to be certain that if Elon experienced a recurrence, I would have enough money to assure the best treatment without having to borrow. Fortunately, Elon has been fine, but the years go by awfully slowly when you have a child at risk for recurrence.

Once having dipped my toe in the water of practice, I wouldn't stop. I loved the challenge of the courtroom and took to it quite naturally. I've never looked back. Practice has made me a better teacher, and teaching has made me a better practitioner.

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In my 40s, I made another career change. I stopped writing law review articles and started to write books about law for a general audience. My first book, written in my early 40s, was The Best Defense, which became a national best seller and is still in print. It has been followed by 28 additional books, six of which became best sellers. My books have been translated into a dozen languages, and well over a million of them have been sold throughout the world. One of them, Chutzpah, was the number one best seller on The New York Times and other lists. My career as a popular writer of non-fiction and fiction has been gratifying, especially when readers tell me that my books have influenced their thinking and their lives. I think of my book writing as part of my job as a teacher, both to my Harvard law students and to my readers.

In my 40s, I also became a regular presence on national television, explaining the law and advocating civil liberties positions. I appeared frequently with Ted Koppel, Larry King, Katie Couric and other widely watched shows. As a result, I became something of a public figure (for better or worse.) I also met my second wife, Carolyn Cohen, and began to live a more stable and rewarding home life.

In my 50s, my life changed again. Because of my success as a lawyer, my media visibility and my books, I began to attract world famous people as clients. The nature of my practice changed considerably, and although I still took half of my cases without fee, the fees for my paying cases went up dramatically, and for the first time in my life I was relatively wealthy. My wife and I—who by this time had a daughter named Ella—bought a beautiful home in Cambridge and a vacation home on Martha's Vineyard. We began to collect art and to open our home to students and charity events. Shortly thereafter, my son Jamin married Barbara and had two children, Lori and Lyle, making me a relatively young grandfather.

Clients, including several billionaires, were flocking to me and I had my choice of cases. I tried to strike a balance among the cases I took, but the media focused only on my rich and famous clients. Suddenly I was a celebrity lawyer. I hated that designation, and it didn't accurately reflect my day-to-day work, but it stuck and my obituary will probably use the term, no matter when it is published.

My next career change took place in my 60s, when I began to devote considerable time and energy to the defense of Israel against efforts to demonize and delegitimize the Jewish state. As I entered my seventh decade and looked back on my life's work, I saw most trends moving in a positive direction: freedom of expression, though never secure, was expanding; science was playing more of a role in solving homicides that ever before, though the courts were not keeping pace with technological developments; racial, gender, religious and even sexual orientation, equality, though far from complete, was much closer to reality than when I was growing up. There was, however, one important issue that was moving in the wrong direction: the campaign to demonize and delegitimize Israel—being conducted by the strangest of bedfellows, the hard ideological left and the hard Islamic right—was crossing dangerous lines. Israel's imperfections (and what nation is anything but imperfect) was becoming the newest excuse for legitimizing the oldest of bigotries. The line from anti-Zionism to anti-Semitism—a line Martin Luther King warned about in a speech at Harvard shortly before his death—was being crossed. For the first time in my adult life, I was seeing an increase in the hatred of Jews.

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Moreover, the fervor in the hatred of Israel could not be explained in rational, policy terms. Israel, the "Jew Among Nations," was being treated by many on the hard left and on the Islamic right, in the way the Jewish people had been treated for millennia. This change took me by surprise.

In the conclusion to my 1991 book, Chutzpah, I predicted the end of mainstream, top-down anti-Semitism in America, and its replacement by anti-Zionism. I also predicted "a sharp decline in support for Israel among college and university students," who will be "tomorrow's leaders." I should have, but did not anticipate that the new anti-Zionism would morph into anti-Semitism, at least for some. I should have because the hatred of Israel by the hard left and the Islamic right was so irrational, so off the charts, so extreme, that it could be explained only by a hatred for Israel's Jewishness. A confrontation I experienced in 2004 was all too typical:

It took place in front of Faneuil Hall, the birthplace of American independence and liberty. I was receiving a justice award and delivering a talk from the podium of that historic hall on civil liberties in the age of terrorism. When I left, award in hand, I was accosted by a group of screaming, angry young men and women carrying virulently anti-Israel signs. The sign carriers were shouting epithets at me that crossed the line from civility to bigotry. "Dershowitz and Hitler, just the same, the only difference is the name." The sin that, in the opinion of the screamers, warranted this comparison between me and the man who murdered dozens of my family members was my support for Israel.

It was irrelevant to these chanters that I also support a Palestinian state, the end of the Israeli occupation, and the dismantling of most of the settlements. The protestors also shouted, "Dershowitz and Gibbels [sic], just the same, the only difference is the name"—not even knowing how to pronounce the name of the anti-Semitic Nazi butcher.

One sign carrier shouted that Jews who support Israel are worse than Nazis. Another demanded that I be tortured and killed. It was not only their words; it was the hatred in their eyes. If a dozen Boston police had not been protecting me, I have little doubt I would have been physically attacked. The protestors' eyes were ablaze with fanatical zeal.

The feminist writer Phyllis Chesler aptly describes the hatred some young people often direct against Israel and supporters of the Jewish state as "eroticized." That is what I saw: passionate hatred, ecstatic hatred, orgasmic hatred. It was beyond mere differences of opinion.

When I looked into their faces, I could imagine young Nazis in the 1930s in Hitler's Germany. They had no doubt that they were right and that I was pure evil for my support of the Jewish state, despite my public disagreement with some of Israel's policies and despite my support for Palestinian statehood.

There was no place for nuance here. It was black and white, good versus evil, and any Jew who supported Israel was pure evil, deserving of torture, violence, and whatever fate Hitler and Goebbels deserved.

To be sure, these protestors' verbal attack on me was constitutionally protected speech, just as the Nazi march through Skokie was constitutionally protected speech. But the shouting was plainly calculated to intimidate. An aura of violence was in the air, and had the police not been there, I would not have been able to express any views counter to theirs.

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As it turned out, I was not able to express my opinions anyway, even in response to their outrageous mischaracterization of my viewpoint or their comparisons of me to the most evil men in the world. When I turned to answer one of the bigoted chants, as I always do in these situations, the police officer in charge gently but firmly insisted that I walk directly to my car and not engage them. It was an order, reasonably calculated to assure my safety, and it was right.

The officer climbed into my car with me and only got out a few blocks away, when we were beyond the range of violence. The intimidation had succeeded. I had been silenced, and the false and horrible message had gone unanswered in the plaza near Faneuil Hall.

I have experienced similar hatred around the world: in California, Toronto, Trondheim, Cape town, London and Paris. I needed police protection—sometimes with shields and bulletproof vests—when I spoke about Israel. I never saw anything like this hatred directed at the South African Apartheid regime in the 1970s and 1980s. Even during the worst days of McCarthyism, there was nothing like this even directed at Stalin's Soviet Union or Mao's China. And there was nothing like this directed at the German Nazi regime or the Italian Fascist regime in the 1930s.

The hatred directed at Israel—calling it worse than Nazi Germany and Apartheid South Africa—is sui genesis. It is unprecedented on campuses around the world, and it was inevitable that it would cross the line into old fashioned and crude anti-Semitism, as it has done on many campuses and in many lecture halls.

I could not remain silent in the face of this dangerous phenomenon. I decided therefore to prioritize my legal and human rights work in defense of Israel and the Jewish community as long as this threat persisted.

I had wanted to write a book called *The Case For Peace*, in which I criticized both sides of the Arab-Israeli conflict for not doing enough to bring about a compromise peace. Instead, I decided to write *The Case For Israel*, in order to provide students with a factual basis for responding to the untruths that are rampant on campuses. The book became an instant best seller, both on campuses and around the world, where it was published in many languages. It helped change the terms of the debate on many campuses and it changed the minds of many people. One example is particularly gratifying. An Arab man named Kassim Hafeez wrote an article in October of 2011 entitled *From Anti-Semite to Zionist*. In it, he described his journey as follows:

> "Growing up in a Muslim community in the UK I was exposed to materials condemning Israel, painting Jews as usurpers and murderers. My views were reinforced when I attended Nakba Day rallies where speakers predicted Israel's demise.
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> My hate for Israel and for the Jews was fuelled by images of death and destruction, set to the backdrop of Arabic melodies about Jihad and speeches of Hizbollah leader Hasan Nasrallah or Osama Bin Laden.
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> There was also constant, casual antisemitism around me. My father would boast of how Adolf Hitler was a hero, his only failing being that he didn't kill enough Jews.

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> What changed? In Waterstones one day I found myself in the Israel and Palestine section. To this day I don't know why I actually pulled it off the shelf, but I picked up a copy of Alan Dershowitz's The Case for Israel.
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> In my world view the Jews and the Americans controlled the media, so after a brief look at the back, I scoffed thinking "vile Zionist propaganda".
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> But I decided to buy it, eagerly awaiting the chance to deconstruct it so I could show why Israel had no case and claim my findings as a personal victory for the Palestinian cause. As I read Dershowitz's systematic deconstruction of the lies I had been told, I felt a real crisis of conscience. I couldn't disprove his arguments or find facts to respond to them with. I didn't know what to believe. I'd blindly followed for so long, yet here I was questioning whether I had been wrong?
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> I decided to visit Israel to find the truth. I was confronted by synagogues, mosques and churches, by Jews and Arabs living together, by minorities playing huge parts in all areas of Israeli life, from the military to the judiciary. It was shocking and eye-opening. This wasn't the evil Zionist Israel that I had been told about.
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> After much soul searching, I knew what I had once believed was wrong. I had to stand with Israel, with this tiny nation, free, democratic, making huge strides in medicine, research and development, yet the victim of the same lies and hatred that nearly consumed me.

Not all people were so positively influenced, a woman in England asked the manager of a large book store for a copy of *The Case For Israel*. He responded, “there is no case for Israel.”

I have devoted much of my 7th decade to the defense of Israel (while continuing to criticize many of its policies, especially regarding settlements.) This has earned me the title of “the Jewish State’s lead attorney in the court of public opinion” and “America’s most public Jewish defender.” It has also earned me the title of “Ziofascist,” “Jewish Nazi,” “tool of the Likud,” and “Israel Firster.”

It is these latter titles that have brought about the most recent change in my life during my 8th decade. Until recently, I was always known as a liberal Democrat aligned politically with the likes of Senator Ted Kennedy, President Bill Clinton, Secretary of State Hillary Clinton, Senator Hubert Humphrey, Justices Arthur Goldberg and William Brennan, the Reverend Martin Luther King, and Judge David Bazelon. The organization with which I have been most closely associated has been the American Civil Liberties Union, on whose national and local boards I have served. The causes with which I have been most often associated were freedom of speech; opposition to the death penalty; due process for criminal suspects and defendants; the separation of church and state; racial, gender, religious, wealth and sexual orientation equality; and political accountability . Indeed, when I have been considered for judgeships and other government positions requiring Senate confirmation, I was generally regarded as “too liberal” to be confirmed.

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Today, my views on all of the above subjects have remained essentially the same, but because of my support, critical as it may be, for Israel, I am now widely regarded as a "conservative," a "right winger," a "sell out," even a fascist. Many college and university students have no idea of my views on the core issues that separate liberals from conservatives (inexact as those categories are). All they know is that is that I defend Israel, and that is enough for them to brand me as "politically incorrect" and worse. This is the way MJ Rosenberg, an anti-Israel blogger active in Media Matters, a Democratic think tank, absurdly put it:

> "Dershowitz is not a Democrat. The only issue he cares about—and the only issue he ever spouts off about—is Israel. Unlike most Americans, [say 99%], Dershowitz has no particular opinion on any issue that does not relate to Israel."

His obsession over Israel's imperfections has blinded him, and other of his ilk, to the fact that the vast majority of my books, op eds, cases and causes relate to civil liberties, criminal and constitutional law.

This last change is not one that I have brought about by changing my views or actions, as were the earlier changes. I have done nothing different. It is the world around me that has changed with regard to Israel, and attitudes toward me have changed because of this. I will continue to live by my principles. I'm probably too old and too set in my ways to change even if I wanted to, which I don't. I will not adapt my principles to changing times and attitudes, when I believe that these changing attitudes are wrong and bigoted. But I must recognize that the perception of me by many others is changing.

After I helped win the O.J. Simpson case, I thought that it would be that aspect of my career that would be the focus of my obituary. Now I think it will also be Israel. Since I'm never satisfied unless I get the last word, I penned the following letter to the editor to be sent following my death:

> Dear editor:
>
> I don't want you to think that I don't appreciate some of the kind words written about me in your obituary, but I had a policy throughout my life of setting the record straight with regard to things written about me, and I see no reason to allow my untimely death to change that. Your understandable emphasis on my high profile cases distorts my record by downplaying the numerous pro bono cases I handled on behalf of obscure and indigent clients. I made it a policy throughout my life to devote at least half of my professional time to nonpaying cases and causes.
>
> One such cause was the defense of Israel from unfair attacks, but I was not an uncritical advocate for the Jewish state. To the contrary, I was critical when criticism was warranted, as with regard to Israel's settlement policy. I supported Israel not despite my liberalism, but because of it—and because I have always defended just causes against unjust attacks.

HOUSE_OVERSIGHT_017443

> I tried to live my life based on principles and consistency. There were not always understood by those who disagreed with where my principles sometimes took me and who they led me to represent. That is why I have made it a policy to correct the record. I admit that I have always tried to get the last word. Hence this posthumous letter to the editor which I promise is my last word.
>
> Alan Dershowitz
> From I don't know where

I hope this posthumous letter to the editor isn't published for a while, but I suspect it will be relevant whenever my obituary appears. That's ok—as long as I get the last word!

HOUSE_OVERSIGHT_017444

4.2.12
WC: 191694

APPENDIX – VIGNETTES

Justice Harlen

HOUSE_OVERSIGHT_017445

4.2.12
WC: 191694

Henry Kissinger

HOUSE_OVERSIGHT_017446

4.2.12
WC: 191694

Opera Tickets

HOUSE_OVERSIGHT_017447

4.2.12
WC: 191694

Cardinal Glemp

HOUSE_OVERSIGHT_017448

4.2.12
WC: 191694

Israel Philharmonic

HOUSE_OVERSIGHT_017449

4.2.12
WC: 191694

Nevins

HOUSE_OVERSIGHT_017450

Prime Minister Benjamin Netanyahu

Among the public figures I have counseled is Israel's Prime Minister Benjamin Netanyahu. I had met Bibi when he was a student in Cambridge in the early 1970's. We got to know each other when he served in New York as Israel's representative to the United Nations. He has been to our home for dinner and we have been at his. Over the years, he has sought my advice on legal and governmental matters, but not on Israeli domestic politics, which he knows I stay out of.

Shortly after he first became Prime Minister, he invited me to his office on a Friday afternoon.

My wife, our daughter and I stood outside of the King David Hotel trying to hail a cab, but all the cab drivers were heading home for the weekend. It looked like we might be late for our appointment with the Prime Minister. Suddenly a car pulled up. It was the mayor of Jerusalem, Ehud Olmert, whom I knew. He rolled down his window and shouted, "Alan, you'll never get a cab on a Friday afternoon. Where do you need to go?" I told him and he willingly agreed to drive us there. As I began to get into his car, a cab driver pulled over and said, "I'll take them." Olmert replied, "No, no, it'll be my pleasure." The cab driver pulled his car in front of Olmert's, blocking it and shouting, "I don't try to run Jerusalem, why are you trying to be a cab driver? Stop taking business from me." Only in Jerusalem! I paid the cab driver what his fare would've been and took the ride with the mayor.

When I got to the Prime Minister's office, Bibi spent a few minutes with us and then invited me to his private office for a confidential meeting. He explained that this was one of the most secure locations in the world and that anything I told him would never leave the room. He then said, "There's been something I have been waiting to ask you." I expected him to ask my advice on some critical security or political issue, as he had in the past. I said, "Sure, ask me anything." He put his arm around me and whispered in my ear, "So, did O.J. do it?" I was taken aback but I quickly responded, "So, Mr. Prime Minister, does Israel have nuclear weapons?" Bibi looked at me sternly and said, "You know I can't answer that question." I looked back at him and said, "Aha!" Bibi understood and we both laughed.

Over the years I have advised Netanyahu on a variety of issues during his tenure as Prime Minister and between his terms. I do not share all of his political and diplomatic views, and he knows that, but he seems to value my judgment, as do several other Israeli political leaders to the left of him. They know I care deeply about Israel and will always give them my unbiased views.

Recently, Netanyahu made the following statement during a nationally-televised conference in Israel:

> "First off, I would like to congratulate the Globes Conference for its foresight in inviting Alan Dershowitz and I would like to say to Alan. Israel has no greater champion and the truth has no greater defender than Alan Dershowitz."

I was obviously flattered by his comment. Several hours later, I received a call from President Obama, who had apparently learned of Netanyahu's words. He said he valued my views because "you've always been straight with me over the years that we've known each other." He asked me

HOUSE_OVERSIGHT_017451

about the situation in Israel and eventually about Iran, and invited me to the White House for lunch to continue our discussion.

HOUSE_OVERSIGHT_017452

Getting back to my invitation to President Clinton to attend Rosh Hashanah services, this was not the first such invitation I had extended to a head of state. In 1990, I had invited Soviet President Mikhail Gorbachev to join me at Rosh Hashanah services in Moscow, where I had been invited to the Kremlin to speak at a conference on law and bilateral economic relations in September of 1990. It was a time of transition, but the Soviet Union was still in existence and Gorbachev was still running it.

Gorbachev attended the closing dinner, having just come from an emotional meeting of the Supreme Soviet at which he had sought emergency powers to confront the ongoing crisis. I introduced myself to him as he was eating dinner and we had a lengthy conversation in which I asked him to come with me to the synagogue and denounce anti-Semitism as Pope Paul had done when he appeared at the Rome Synagogue and deplored "the hatred, persecutions, and displays of anti-Semitism directed against the Jews at any time and by anyone."

Gorbachev smiled and asked me rhetorically, "Are you here to help bring down my government ?" He said he could not go to the synagogue but he promised me that he would condemn anti-Semitism. Shortly thereafter, he announced that "the Democratic Russian public denounces anti-Semitism and will do everything in its power to uproot the phenomenon from our society."

In 2008, I met Gorbachev again. This time, under the most unusual of circumstances. He was in Israel at the invitation of President Shimon Peres to help celebrate Israel's 60th birthday. I was there for the same reason. I had just appeared on a panel with Vaclav Havel and with Natan Sharansky, both of whom who had been imprisoned by Communist regimes, and both of whose cases I had worked on as a defense attorney. After the completion of the panel, in a remarkable turn of fate, the four of us ended up in the same elevator. (Sounds like the beginning of a bad joke: Gorbachev, Havel, Sharansky and Dershowitz meet in an elevator in Jerusalem…) Gorbachev recognized the three of us and turning to me said, "You're the big shot lawyer for all the dissidents." I extended my hand to him and reminded him of our meeting in Moscow. He then turned to Havel and Sharansky and said, "He may be a good lawyer but it was I who got you out of prison." I smiled and replied, "It's always more important to have a good judge than a good lawyer." Sharanky turned to Gorbachev and said, "Why didn't you let us out sooner?" to which Gorbachev responded, "You overrate my power." We all had a good laugh.

HOUSE_OVERSIGHT_017453

4.2.12
WC: 191694

Brooke Shields and her mother Teri

When Brooke Shields was 10 years old, her ambitious mother Teri signed a contract with an equally ambitious photographer to photograph Brooke naked, taking a bath. Brooke was paid $450 for the photo sessions by Playboy Press, and her mother signed a release giving the photographer the unlimited right to publish the photographs anywhere and at any time.

Seven years later, as Brooke was about the enter Princeton as a freshman, the photographer decided to exploit her fame by producing a calendar featuring naked pictures of the 10 year old. Brooke was upset that any such calendar would circulate among her fellow students at Princeton and would cause her great embarrassment.

She hired a former student of mine to try to negotiate with the photographer to buy back the rights, and if that failed, to try to prevent publication of the photographs. My former student sought my advice on the matter. I told him it would be an uphill fight to try to enjoin the publication of the pictures, because they were not obscene and because prior restraint is always disfavored by the law.

This was another example, this time of a celebrity mother, making a short term judgment to allow her young daughter to pose naked, without considering the longer term implications on her welfare. The only theory on which I thought she could possibly succeed was that Brooke's mother had no right to surrender her daughter's privacy and that Brooke, now approaching adulthood, should have control over her own image.

Ultimately the court ruled, in a bizarre opinion, that Brooke had essentially waived her right to privacy by allowing the photographs to be published earlier, and by pursuing a career in which she has relied on her sexuality for her success. The court put it this way:

> "Much of plaintiff's recent commercial activity upon which her fame is based has been far more sexually suggestive than the photographs which have been shown to the court. These photographs are not sexually suggestive, provocative or pornographic; they do not suggest promiscuity. They are photos of a prepubescent girl in innocent poses at her bath. In contrast, defense counsel have submitted numerous samples of sex-oriented publicity concerning plaintiff. Particularly notable is her widely televised sexually suggestive advertisement for blue jeans. Recent film appearances have been sexually provocative (*e.g., "The Blue Lagoon", "Endless Love".*). Plaintiff's claim of harm is thus undermined to a substantial extent by the development of her career projecting a sexually provocative image.

This reasoning fails to distinguish between a 17 year old and a 10 year old. The earlier photographs were taken of a 10 year old kid, whose mother controlled what she would do. Her recent appearances were made by a near-adult and were far more within her own control. The court simply ignored the argument by the 10 year old should not be bound by foolish decisions made by an ambitious mother when Brooke was too young to say no.

HOUSE_OVERSIGHT_017454

I believe that if this case were to come before a court today, in light of the new sensitivity toward child exploitation, the case would have been cited in favor of Brooke Shields. Eventually the case was settled and the calendar wasn't distributed to Brooke's Princeton classmates. Brooke Shields went on to a successful career as a multi-dimensional performer.

HOUSE_OVERSIGHT_017455

4.2.12
WC: 191694

Marlon Brando

I have a small apartment in New York, which my wife and I use for weekend trips to the Opera and other Manhattan events. On this particular weekend, I lent it out to my cousin and doctor, Harold Solomon. He called me from the apartment and said that while he was out, a message was left on the machine from a guy who did a pretty good imitation of Marlon Brando. He told me that the caller, spoofing the great actor, had criticized my diction on the outgoing message. I called my machine and immediately realized that it was Marlon Brando. I called him back and he asked me if I would help get his son Christian, who was charged with having shot and killed his half sister's lover, out of jail.

Christian Brando was originally charged with murder, after he shot his half sister Cheyenne's boyfriend. He claimed that Cheyenne had told him that the boyfriend, Dag Drollet, had physically abused her. Christian apparently confronted Drollet. Christian claimed that they struggled over his gun and that he never intended to kill him. The prosecution claimed that it was a cold-blooded, premeditated murder fueled by Christian's drunken state.

Marlon Brando asked me to work with Robert Shapiro to get his son out of prison as soon as possible. Brando blamed himself for his family problems and wanted to help as much as he could. He said he heard that I "could perform miracles" and he wanted my input. I tried to disabuse him of the notion that I could free his son immediately but promised to work as hard as I could with Shapiro. Eventually a plea bargain was struck and Christian pleaded guilty to manslaughter. He was released from prison after serving only five years, much to the chagrin of many in the public and the media. The story did not, however, have a happy ending. Cheyenne committed suicide in 1995 at age 25 and Christian died of pneumonia in 2008 at age 49.

Marlon Brando, who stage and screen presence was electric, was kind of boring and predictable when I met him. He had stereotypically "Hollywood" political views, conventional ideas and no sense of humor. He was accustomed to "yes men" agreeing with his every idea and didn't take criticism or disagreement easily. He loved his children but didn't seem to have any notion of how to relate to them. All in all he struck me as a rather pathetic figure, totally at odds with his public persona.

HOUSE_OVERSIGHT_017456

4.2.12
WC: 191694

Turning down Bobby Fisher

One celebrity whose case I turned down was the world champion of chess, Bobby Fisher. He was training for his world championship match at the Catskill Mountain Resort at Ground.., where my family and I were spending Passover. I received a note from Fisher asking me to meet with him. At the time he hadn't yet turned the corner into the anti-Americanism and anti-Semitism that characterized his later years. He was known then as a somewhat eccentric and brilliant chess player. Since he grew up in Brooklyn and went to high school right next to the Yeshiva I attended, I was anxious to meet him. He asked me to come to the bowling alley where he was strengthening his arms and hands.

When I got there he told me that he had heard that I was a good lawyer and that I was in the hotel and he wanted to ask my legal advice about an issue relating to whether he could copyright or trademark his chess moves. It was an intriguing question, and one that I would have been happy to research.

I told him that I would be willing to provide a legal memorandum to him on the subject, and immediately asked me whether I would be willing to do it without charge to him. I was certainly prepared to do that, but since my 10 year old son Elon was then learning how to play chess, I thought I would ask him for something in return. With a smile I said, "sure, I will provide you legal advice for free, if you would do me the favor of playing one quick chess match with my son Elon, and a second favor or not beating him in four moves (the minimum necessary for checkmate) but would extend it to six or seven moves." He looked at me sternly and said, "I'm not a circus performer. I don't perform for children. How dare you ask me."

I was shocked by his disproportionately response to my somewhat flippant request for a favor for my son. I looked him straight in the eye and said, "I'm not a circus performer either. I don't perform free legal services for ingrates who refuse to do a small favor for a young child whose learning how to play chess. Find another lawyer and pay him the going rate." He walked away. I walked away and I never saw him again.

I don't know whether the issue he wanted to raise has ever been definitively resolved, but I do know that I saw an early manifestation of what ultimately became Bobby Fisher's downfall.

HOUSE_OVERSIGHT_017457

Malcolm X at Harvard

Just weeks after I began teaching at Harvard, students from the Harvard Law Forum asked me if I would introduce the controversial Malcolm X. He had been invited to speak at the forum but no senior faculty member would agree to introduce him, and the rules of the university required that a faculty member perform this function. I readily agreed, despite my disagreement with many of Malcolm X's views, particularly with regard to the Middle East. He had just returned from a trip to Mecca and Medina, where he embraced Islam and began to say some pretty awful things about Israel, Zionists and Jews. But believing as I do in free speech, I agreed to facilitate his appearance, as long as the law forum did not limit what I could say in my introduction. They agreed.

I was polite in my introduction but somewhat critical. [find my introduction in the book Malcolm X Speaks at Harvard edited by Archie Epps]

As I introduced him I noticed that he was wearing what appeared to be a large camera case slung over his shoulder and covering his chest. I later learned that it contained a gun, and that the reason no other faculty member would agree to introduce him, and share the stage with him, was as much because his life was under constant threat, as because of his controversial views.

The event went smoothly. First Archie Epps—a distinguished African American Harvard Dean—made some introductory comments in which he sharply distanced himself from the views of Malcolm X. Then I made my somewhat more critical introduction. Malcolm X then proceeded to regal the crowd with his extreme views on black liberation.

Following the speech, we all went to dinner at a local restaurant. I was seated next to Malcolm X and we spent most of the dinner arguing about the Middle East. During the course of the dinner I asked him if he would be willing to travel to Israel. He said he was not, since he regarded it as occupied Muslim land, but he added, "I would be much safer in Israel than in any of the Arab countries I visited, and safer than I am here in the United States." Within several months of making that comment, Malcolm X was gunned down in Harlem.

Several years after Malcolm X was murdered, Dean Archie Epps edited a book entitled "Malcolm X speaks at Harvard." He included the speech that I introduced as well my critical introduction. But he excluded his own critical introduction. By this time, Malcolm X had become somewhat a martyr within the black community, and my critical views seemed somewhat out of place in the book so I called Dean Epps and asked him why he decided to include my critical comments but not his own. He responded, "That's the advantage of being the editor. You decide what stays in and what goes out."

HOUSE_OVERSIGHT_017458

4.2.12
WC: 191694

Martha Stewart

I knew Martha Stewart in law school. Her then husband was my classmate. When she got in trouble, she called me and we discussed her situation. She had been indicted for acts she was accused of committing after she retained top flight lawyers. She then hired another top flight lawyer, Robert Murcalo, to represent her. He did a terrible job and she was convicted. She went to jail largely as the result of the lawyers she had picked. By the time she called me, it was too late to do very much. She picked excellent lawyers for her appeal and I consulted with them, but the court affirmed her conviction and she went off to serve her relatively short prison sentence. She has now rebounded and her conviction will be a small footnote in her otherwise successful and productive life.

HOUSE_OVERSIGHT_017459

4.2.12
WC: 191694

Ronald Reagan slept on my shoulder

I was flying back from Washington, DC on Eastern Airlines. I was seated in first class and the aisle seat next to me was empty. A minute before the door closed, Ronald Regan was escorted onto the plane and seated next to me. He had just completed his terms as governor of CA and had not yet announced his candidacy for President of the US. His security people seated him and then left him to fly alone to Boston where he was to be met by other security people.

As soon as he sat down, he introduced himself and asked me if I lived in Boston. I introduced myself and told him yes. He then asked me if I was a friend of Senator Ted Kennedy. I told him I was. He said, "great American. Nice man."

We spent the next 15 minutes or so chatting about Boston politics. I told him I knew Jerry Brown from law school and he said, "Great American." We continued the talk until the plane reached its flying altitude. At that point, practically in mid sentence, Regan simply dozed off and his head landed on my shoulder, where it remained for the rest of the trip. When the pilot announced that we were approaching Boston, Regan immediately woke up and continued the conversation as if there had been no interruption. He offered me a ride downtown, to the hotel where he was speaking, but I told him I had my car at the airport. He was absolutely charming, but I had absolutely no thought that he might someday become the President of the United States.

HOUSE_OVERSIGHT_017460

4.2.12
WC: 191694

Kevin Costner

HOUSE_OVERSIGHT_017461

4.2.12
WC: 191694

Marsha Clark without underwear

Marsha Clark may not have been the most sophisticated prosecutor I ever encountered, but she certainly was among the most resourceful, employing everything she had to her advantage. In the OJ Simpson case, Johnny Cochran was about to make his closing argument. As we walked to the lecturn, Marsha Clark went over to him and whispered, "when you're up there, I want you think of only one thing: I'm not wearing any underwear." When Johnny Cochran told me this story, I was skeptical. So I called Marsha Clark and asked her. She told me, "Absolutely true." I asked, "which part of it was true: the fact that you told him you weren't wearing any underwear or that you weren't, in fact, wearing any underwear?" She replied, "That's one thing you'll never know."

HOUSE_OVERSIGHT_017462

4.2.12
WC: 191694

The case of the Vibrating Beeper

A guy I knew from Yeshiva called me one day to tell me that his son, a medical school graduate who was interning at a New York hospital, had just been suspended for masturbating in front of a nurse. His residency and medical career were in danger. The young man was engaged to a wonderful woman and my friend knew he could not have been guilty of this offense. When I met with him he explained that his fiancé would pick him up from work with her car after she completed work. She was to signal him when she was outside by calling his beeper. Because the hospital forbade use of the beeper for private calls, the young doctor always put it in his pocket on vibrate. One day when he was talking to a nurse, the beeper went off in his pocket. Fearful that she would see it, he fumbled around in his pocket to find the off switch. She misunderstood his actions and that of the vibrating beeper for masturbation.

I told him that he had to tell the truth, because the offense of using his beeper improperly was trivial compared to the offense with which he was charged. He agreed. He asked me to speak to his supervisor. I borrowed his beeper, put it in my pocket and went in to speak to the supervisor. At a prearranged moment, he phoned the beeper and it began to vibrate in my pocket. The supervisor saw my vibrating pocket. I quickly retrieve d the beeper and the case was over. Demonstrative evidence always works better than oral testimony.

HOUSE_OVERSIGHT_017463

4.2.12
WC: 191694

Robert Downey, Jr.

HOUSE_OVERSIGHT_017464

4.2.12
WC: 191694

Pierre Trudeau

When the Canadian government was confronted with terrorism from some people seeking independence for Quebec, Prime Minister Trudeau invoked an emergency law called "The War Measures Act" that authorized arrests without trial of dangerous people. The Prime Minister then convened a conference of Canadian experts to advise him about the implementation of this extraordinary law. We met at an isolated resort on a frozen lake. Among those in attendance were the Attorney General and Minister of Justice of Canada, Professors Irwin Cotler, and I (as the one non-Canadian)

HOUSE_OVERSIGHT_017465

4.2.12
WC: 191694

Moshe Katsav

President Moshe Katsav of Israel asked me to come to see him during the last year of his presidency. He asked me for advice—political and media advice rather than legal, since I am not an expert on Israeli law—about the sexual harassment charges he was then facing. He told me that he had been offered a deal by the prosecutor under which he would plead guilty to an harassment charge, and the prosecutor would not bring rape charges. I do not feel comfortable disclosing precisely the advice I gave him, even though it wasn't legal advice and even though I was never part of his legal team. All I can say is that if he had followed my advice, I don't think he would be in prison today.

HOUSE_OVERSIGHT_017466

4.2.12
WC: 191694

Dinner with President and Mrs. Ford

Several years before Gerald Ford died, he and his wife invited me to deliver a lecture in Palm Springs where they were living. They invited my son and me to join them for dinner before the lecture. We schmoozed about our common experiences at Yale Law School, our different party affiliations, and our mutual love for football and other sports. Then he asked me a question: "What do you think of Justice John Paul Stevens?" I responded that I thought he was one of the greatest justices in modern history, that he brought real common sense to the job of judging, that he was non-ideological and that he was a really nice man. He deemed and said, "appointing him was the second most important decision of my presidency." I asked him what the first most important decision was. He said, "The one that cost me reelection—the pardon of President Nixon."

HOUSE_OVERSIGHT_017467

4.2.12
WC: 191694

Rabin

HOUSE_OVERSIGHT_017468

4.2.12
WC: 191694

My only "crime"

I can think of only one crime that I may have committed in my life, and I know that if I had been tried for it, I would not only have been acquitted, but the jurors would have cheered me.

It occurred after my son, Elon, had serious brain surgery for a life threatening illness. He was 10 years old and the bravest person I ever met. Shortly after the surgery, he went back to work selling newspapers in the subway station at Harvard Square. One day two young hoodlums from Somerville beat him up, broke his tooth and stole the few dollars he had earned. A local policeman, Frank Burns, who knew Harvard Square like the back of his hand, immediately recognized the MO of the thugs and arrested the two youths ("youts"—remember My Cousin Vinny!)

Several days later, the two thugs came back to Harvard Square, robbed my son again and told him that unless he withdrew his complaint, they would throw him in front of a moving train. He called me and I ran to the square, where I saw the two thugs taking a victory lap. I approached them and I said I have only two words to say to you. I then mentioned the name of a man on whose case I was then consulting. Although the charge against him involved marijuana trafficking, the man himself was known to be a notorious hit man for one of Boston's most violent gangs. I told the two youths that if they ever came near my son again, I would tell my client and that my client would do anything for me. The two thugs got down on their hands and knees and pleaded with me not to tell my client what they had done. They never came back. I never told my client, indeed I had never met my client, and still haven't. I was just consulting with another lawyer on a constitutional issue related to the case. But simply mentioning his name terrorized the thugs. I'm not sure whether what I did was a crime. But I would do it again if anyone ever threatened any of my children.

HOUSE_OVERSIGHT_017469

4.2.12
WC: 191694

Jumping a mugger

When I was a young lawyer, I frequently took my kids to Boston Bruin hockey games, which were rough and tumble affairs, both on the ice and in the stands. At one game, a great lawyer with whom I have sometimes worked, Joe Oteri was sitting a row in front of me with his teenage daughter. During a break between period, Joe went out for a beer. An older teenage guy began to aggressively flirt with Joe's daughter. When Joe saw him touching his daughter in an unwelcome way, he grabbed him. Unbeknownst to Joe, the guy's friend was standing in back of him and raised his hand above his head about to hit Joe from behind. As soon as I saw this, I leaped over the seats and grabbed the guy from behind, preventing him from hitting Joe. The security came and quickly separated us. When Joe began to tell this story to anyone who would listen, it kept getting better and better. The final version had me beating up the two maulers and saving his daughter's life. Although the reality is that my heroism was quite limited and totally instinctive, Joe has never forgotten what I did and has always shown his appreciation.

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4.2.12
WC: 191694

How a frozen tongue saved me

There used to be a deli in New York that named sandwiches after famous people. My sandwich was "tongue on rye," which I took as flattering, especially since some of my friends had turkey or ham in their named sandwiches. Tongue was not only appropriate because I talk a lot but also because a tongue once helped me beat off a would-be mugger. I was coming from my parent's house in Brooklyn and heading back to school in New Haven on the New York subway. My mother, as usual, gave me some food to take back to school. It was a solidly frozen, humungous tongue. I didn't really want to take it, in part because it was so cumbersome to carry in the plastic bag in which my mother had placed it. As I got off the subway and approached the railroad station, a guy grabbed my briefcase and started to kick me. I swung my tongue at his knee, knocked him to the ground, grabbed my briefcase and escaped into the railroad terminal. Had the tongue not been frozen solid, who knows what would have happened?

Several years later, I was reminded of this event while watching an episode of _____, in which a wife kills her husband by hitting him over the head with a frozen leg of lamb. When a policeman comes looking for the weapon, the murderer serves him the leg of lamb, well done, and he eats the evidence. I too ate my weapon. It was delicious.

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4.2.12
WC: 191694

The case of the questionable antiques

My brother Nathan and I were retained to appeal the conviction of a Persian antiquities seller, who was charged with arranging the theft of his own antiquities. The story, which became a lead article in The New Yorker magazine, involved a man whose father had been the director of antiquities for the Shaw of Iran. When the Shaw fell, the son took the family's antiquities and opened a shop in London. The Metropolitan Museum in New York wanted to exhibit the antiquities, since the owner said they were pre-Mohammaden and therefore very valuable. The owner had an expert examine and certify them as pre-Mohammaden and they were then shipped to the museum. When they arrived in New York, they were stolen. The District Attorney charged our client with arranging for their theft, because, as the DA alleged, they were not really pre-Mohammaden and therefore considerably less valuable. The motive was to collect insurance based on the artificially-high British evaluation. When the client asked us to do his appeal, he offered to pay us in pre-Mohammaden antiquities. I responded, "Would you really want a lawyer who was foolish enough to accept pre-Mohammaden antiquities from a man charged with falsely dating them?" We agreed on a retainer and we won the case. Not only was the client totally reprieved but he even got his antiquities back. Shortly thereafter, he sent me a bonus for winning. Sure enough, it was an antiquity. I hope it's real.

HOUSE_OVERSIGHT_017472

4.2.12
WC: 191694

OJ's glove

I happen to be on the way to Australia to deliver a talk. There was a stopover in Los Angeles and I decided to pay a visit to the OJ trial. My usual role was to provide legal briefs and memoranda from my office in Cambridge on two or three occasions I appeared in court to argue motions, but these appearances were rare and episodic. On this day, I had no real business to conduct in the courtroom, but when my son picked me up at the airport, I suggested that we drop by and simply say hello to the legal team and OJ, and join the legal team for lunch. My son turned on the radio, which was carrying the trial live. The man on the witness stand was an expert in gloves, He was testifying in the most boring and tedious matter ever, about the stitching in gloves. We practically fell asleep in the car listening to the tedium. Elon begged me not to go to the courthouse and continue to listen to this boring testimony, but I insisted. Upon entering the courthouse I sat down next to the lawyers and my son sat in ….within 5 minutes of our appearance in court, Prosecutor Dardin got up and asked to have OJ try on the glove. It was about the dumbest ploy any prosecutor could have tried, especially since under CA law, he could have insisted that OJ try on the glove outside the presence of the jury, before he decided to conduct this experiment in front of the jury. But Dardin was not one for legal subtlety. OJ walked right in front of me, tried on the glove, and in the most dramatic moment of the most ___ month trial, walked in front of the jury and showed them that it didn't fit. He even "testified 'it's too small.'" [get exact quote]

Shortly after this dramatic moment, the lunch recess was called and I went to OJ's holding cell behind the courtroom. I told him that it was likely that they would ask him to try on the glove without the latex underglove he wore during the courtroom experiment. He assured me that it still wouldn't fit.

My grandmother would have said, "it was bashert"—that is ordained—that I would be in the courtroom just at the moment that led to the famous closing argument "If it doesn't fit, you must acquit."

HOUSE_OVERSIGHT_017473

4.2.12
WC: 191694

Singing with Vidal Sassoon

I was the guest speaker at a Hebrew University dinner honoring Frank Gary. Among the guests was the hair stylist Vidal Sassoon. The topic of my speech was the Middle East conflict. I was introduced to Sassoon by David Steinberg, the comedian. Steinberg said, "Did you know that Vidal Sassoon had fought for Israel during its War of Independence?" Sassoon added, "I was in the Palmach," which was the elite strike force. Sassoon simply didn't look like he was old enough to have participated in the 1948 war so I issued him a challenge, "Sing the Palmach song for me." Without a moment's hesitation, Vidal Sassoon started to belt out the anthem of the Palmach. Since I too knew the song, from my time at Zionist camp in 1948, I sang along with him. So here were these two old men singing "Mi mitula ad hanegev, rishonim tamud anachau tamid anu anu hapalmach." A crowd quickly gathered around us and the few people our own age joined in the singing. It was a wonderfully nostalgic moment for us all.

HOUSE_OVERSIGHT_017474

4.2.12
WC: 191694

David Merrick Adoption

HOUSE_OVERSIGHT_017475

4.2.12
WC: 191694

Shooting Foul Shots in the Boston Garden

HOUSE_OVERSIGHT_017476

4.2.12
WC: 191694

Throwing out first pitch at Fenway for my birthday and having sandwich named after you at Bleacher Bar

HOUSE_OVERSIGHT_017477

Years later, after Anatoly, now Natan, became a leading political figure in Israel, we were both invited to speak at the celebration of Israel's 60th birthday. Many world leaders were also invited. One of the events was held in the Inbal Hotel in Jerusalem.

I got into the elevator and by coincidence both Mikael Gorbachov and Sharansky got into the same elevator. Gorbachov recognized us (I had met him in Moscow during one of my human rights trips while he was the Chairman of the Communist Party and the head of state). He pointed at me and said to Sharanksy: "He's a good lawyer, but I'm an even better lawyer." Sharansky replied, "But he got me out of the Soviet prison." Gorbachov smiled and said "I got you out. He helped, but without me you would have sat longer." We all got a good laugh and shook hands.

HOUSE_OVERSIGHT_017478

4.2.12
WC: 191694

Claus Von Bulow

After we won the case, Claus and his then girlfriend decided to host a dinner party. I told them I would not come if it was a victory party, since I have a policy of not going to victory parties of criminal defendants. He assured me that it was merely a dinner for several interesting people. He told me among his other guests would be the novelist Norman Mailer and his wife. When the dinner began, Claus regaled everybody with stories from the trial and I explained why the evidence seemed to point to his innocence. About halfway through the dinner, Mailer grabbed his wife's arm and said, "Let's get out of here. I think this guy is innocent. I thought we were going to be having dinner with a man who actually tried to kill his wife. This is boring." In fact, many of my most exciting cases involved very boring people, though Claus was not one of them. When the movie came out, Claus refused to go to see it insisting that he would never watch Jeremy Irons play him. Several months later I was having lunch with Claus and his most recent girlfriend who I had never previously met. After about an hour of conversation with me, she turned to Claus and said, "Now that I've met Alan I believe that Ron Silver really didn't do him justice. He overplayed him." Claus immediately shook his head in agreement saying, "You're right my dear, I too think he overplayed him." This from a man who claimed he didn't see the film.

HOUSE_OVERSIGHT_017479

4.2.12
WC: 191694

The killing of John Lennon

Another death for which I have long felt some responsibility was the murder of John Lennon by Mark Chapman in 1980. Lennon was in the United States on that fateful day because I helped him avoid deportation back to England in 197_. Had our legal team not been successful in stopping the Nixon Administration's efforts to deport Lennon on trumped up allegations relating to his use of marijuana in England, Lennon would have been deported and banned from the United States. It is highly unlikely (though not impossible) that Chapman would have stalked and shot him on the streets of London or Liverpool, as he did on Central Park West in New York.

I was retained by an excellent deportation lawyer named Len Wildes to write a legal memorandum on the impropriety of the deportation request. (My fee was to be a record album signed by John Lennon: Lennon signed it; Wildes lost it; and my children nearly killed me!) We won the case and Lennon continued to live in Dakoda for the ___ years before he was killed.

His killer, Mark Chapman, had no money to hire a lawyer and so the court appointed a former student of mine and friend Jonathan Marks, to represent him. Marks is a brilliant and innovative lawyer who wanted to raise a defense based on Chapman's mental state. He asked me to consult with him on the case, but I didn't feel comfortable helping a defendant who had killed my former client. So I declined.

Several years later, I happened to run into Yoko Ono at an art auction. I told her how sad I was that we had won the deportation case, because if we had lost, John would still be alive. She became angry at what I had said: "Don't ever think that," she admonished. "Those ___ years were the happiest in his life and mine. He gave me John Ono. You did a good thing." She reached over, kissed me and thanked me. I still feel somewhat responsible for what happened on that awful day in front of the Dakoda.

HOUSE_OVERSIGHT_017480

4.2.12
WC: 191694

Mazoltuv Borukhova

In February 2011, I argued the appeal of Mazoltuv Borukhova, whose murder conviction became the basis of Janet Malcolm's best seller, *Iphigenia in Forest Hills: Anatomy of a Murder Trial*. Borukhova, a young doctor who recently immigrated from Bukhara in the former Soviet Union, was involved in a hotly contested divorce and custody suit with her dentist husband, who had also immigrated from Bukhara. Mazoltuv was accused of hiring a cousin from the State of Georgia to come up to Queens and murder her husband. She was convicted and sentenced to life imprisonment. The major issue on appeal was similar to the one that resulted in the reversal of Sandra Murphy's conviction, namely a hearsay statement, testified to by the murder victim's father, describing a statement allegedly made by the murder victim that suggested he feared being killed by his estranged wife. The court ruled that this statement should not have been admitted into evidence, but that the other evidence presented to the jury was so overwhelming, that the error of admitting the hearsay was "harmless"—that means that the jury would have convicted Borukhova even if they had never heard this inadmissible evidence. Appellate courts are not really in a good position to evaluate what a jury would have concluded if certain evidence had been excluded. The case is now on habeus corpus.

HOUSE_OVERSIGHT_017481

4.2.12
WC: 191694

Gigi Jordan

I am currently representing a woman named Gigi Jordan, who admittedly killed her 8 year old severely autistic child and tried to take her own life at the same time. There is considerable evidence that her child was being sexually abused by his biological father and Gigi was in great fear that her former husband was trying to kill her. If he succeeded, she believed that her autistic child would be left at the mercy of his sexually abusive father. Gigi decided that this horrible choice of evils required her to protect her child in the only way she knew how: by ending his life along with hers. We are in the process of preparing for her trial.

HOUSE_OVERSIGHT_017482

Leona Helmsley

Leona Helmsley was not a good client. She too was boring and rather stupid. She was called the queen of mean, and I can only disclose incidents that occurred in public. Here's one that shows how she earned her title. We were having breakfast in the dining room of her hotel, when a waiter brought me a cup of tea. She noticed, but I didn't, that a little bit of the tea had dripped onto the saucer. It was certainly no big deal. When she saw it she grabbed the tea and the saucer and threw it on the floor in the direction of the waiter, shattering it into many pieces. She then screamed at the waiter, "Now clean it up and beg me for your job." I simply walked away, not wanting to be associated with that kind of public rudeness.

When my daughter was born, Leona had her private jet fly a large stuffed bear to Boston, where it was placed in a limo and brought to our home. My daughter loved the bear and several years later had an opportunity to thank Leona for sending it. Leona replied: "It's stolen merchandise. I stole it from Donald Trump." She then explained how she had sold a hotel to Trump that included a pastry restaurant called Rumplemyers, which was decorated with large stuffed animals. The sale included the stuffed animals, but Leona took the bear, which belonged to Trump, and sent it to my daughter. I told Leona that I would either have to return the stolen bear or get Trump's permission to keep it. She said, "tell the Donald I stole it from him. See what he says." I told Trump. He laughed and said "I'm not surprised. Let your daughter enjoy the bear."

One day my brother, who was another of her lawyers, was invited to a birthday party at her house. He brought my mother along. Leona knew that my mother did not want to be confronted with the reality that my brother is not kosher outside of his house. My brother, sensitive to this, always eats only kosher food in her presence. He was on line with my mother at the buffet choosing among the smoked salmon and vegetables when Leona came over to my mother and brother and in her booming voice yelled, "In front of your mother you eat salmon. In front of me you eat lobster. Ha ha ha." It was entirely gratuitous, hurtful and all too typical.

Although my brother and I—who were her appellate lawyers—saved Helmsley several years imprisonment by winning the state appeal—Helmsley refused to pay our final legal bill. We should have demanded up front payment for all our services because she had a reputation for "negotiating" all of her bills. ("I'll give you 25 cents on the dollar. If you don't like it, sue me!") My brother eventually sued her but dropped the suit after she said she would spend "a large fortune beating him into the ground."

Once when we were waiting to go to court, Leona told me a joke about two competitive Russian neighbors who hated each other. One day, the first one tripped over a lamp and a genie popped out. "You get the usual three wishes, but here's the catch: everything you ask for and receive, your neighbor gets double." He asked for a thousand rubies, and the next day the neighbor boasted, "I got 2,000 rubies." He asked for a beautiful woman, and the neighbor bragged he got two women. Finally, in frustrations he asked the genie, "Would it be too painful to cut off one of my testicles?"

HOUSE_OVERSIGHT_017483

4.2.12
WC: 191694

That, in a nutshell, was Leona Helmsley. She cared more about hurting others than helping herself.

HOUSE_OVERSIGHT_017484

Being mentored by Elie Wiesel

Since the beginning of my career, Elie Wiesel—the world's most famous and influential Holocaust survivor—has served as a guide, mentor and friend. I have sought his advice on many issues, and he has sought mine.

As a professor of public law, I get to nominate candidates for the Nobel Peace Prize. In 1986, I nominated him. In my letter of nomination, I wrote the following:

> No one in the world today deserves the Nobel Peace Prize more than Elie Wiesel. Professor Wiesel represents the survivors of the most massive genocide ever perpetrated on a segment of humankind—with the implicit approval of so many bystanders. It is particularly disappointing that the Nobel Peace Prize Committee—which, because of its North European heritage, in some sense represents a portion of these bystanders—has never seen fit to recognize Professor Wiesel's contribution to peace.
>
> To understand Professor Wiesel's unique and immeasurable contribution to peace, one must only imagine how it might have been without a Wiesel. It is impossible to imagine the rage that must be continually experienced by direct and indirect survivors of the Holocaust. Other victims have responded by non-peaceful means—for example, the continuing violence of some Armenians against Turks. Jewish survivors have not. There has been no terrorism against innocent Germans—or even guilty Germans who live in luxury and sometimes in honor. For this alone, the Jewish survivors as a group deserve recognition for their contribution to peace.
>
> Professor Wiesel's role in helping to shape the attitude of the first and second generations of survivors is, of course, widely acknowledged.
>
> There are many excellent reasons for recognizing Professor Wiesel. But none is more important than for his role in teaching survivors and their children how to respond in constructive peace and justice to a worldwide conspiracy of genocide, whose complicitous components included mass killing, mass silence, and mass indifference. Professor Wiesel has devoted his life to teaching the survivors of a conspiracy which excluded so few, to reenter and adjust in peace to an alien world that deserved little forgiveness. He has also taught the rest of the world the injustice of silence in the face of genocide. Wiesel's life work merits the highest degree of recognition—especially from representatives of the world that stood silently by.

In an article several years later, I urged the Nobel committee to use Elie Wiesel as its model for selecting future Nobel Prize winners. This is part of what I wrote:

> Many of the Nobel Peace Prize winners were recognized by the Nobel Committee for their work on behalf of their own people: Most recent winners - Rigoberto Menchu of Guatemala, Aung San Suu Kyi of Burma, the Dalai Lama of Tibet, Bishop Desmond Tutu of South Africa, Lech Walesa of Poland - were honored primarily for

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> helping their own people, and they have continued to try to help their people.
>
> Elie Wiesel's work is far more universal. For example, those who have suffered most in the former Yugoslavia have been the Croats and the Muslims. It was they who Elie Wiesel risked his life to protect. Yet during the Holocaust, which took the lives of 6 million of Wiesel's people, the Croats were among the most barbarous hands-on perpetrators of genocide against Jewish babies, women and men. The Islamic world has been in conflict with Elie Wiesel's people over Israel, and many innocent Jews have been murdered by Islamic co-religionists of Muslims who have been terrorized in Sarajevo. Yet, Wiesel makes no distinctions based on religion, race, creed or even enmity against his own people. He will bear witness, even at the risk of his life, to the suffering of any human beings, so long as they are not the aggressors.
>
> To be sure, Elie Wiesel speaks up on behalf of his people as well, with a voice of unparalleled eloquence.
>
> …
>
> A great Jewish sage once wrote, "If I am not for myself, who will be for me? But if I am for myself alone what am I? And if not now, when?" Elie Wiesel lives by that tripartite philosophy. He is the voice of the Jewish people - their international moral spokesman. But he speaks not for Jews alone; instead, he can be counted to combat hatred and bigotry regardless of who the victims may be. And for Elie Wiesel, tomorrow is never an excuse for not acting today.

Over the years, we have worked closely together on issues relating to Soviet dissidents, the Armenian genocide, the massacres in Rwanda and Darfur, efforts to delegitimate Israel and other human rights concerns. I have sought his advice on many occasions, and it has always been wise and useful.

In 1982, Elie was asked to present me with the William O. Douglas Award by the Anti-Defamation League. In presenting the award, he paid me the highest compliment: "If there had been a few people like Alan Dershowitz during the 1930's and 1940's, the history of European Jewry might have been different." Although I have always believed that these words were highly exaggerated—no one could have stopped Hitler's maniacal determination to kill the Jews of Europe—I have tried to hold myself up to his expectations of me. I recall his words every time I think of slowing down or doing less to protect the victims of human rights abuses.

In 19__, Elie and his wife, Marianne, invited me to their home in New York for an intimate dinner with French President, François Mitterrand. Elie and his wife speak fluent French but I do not and neither did the two other couples at the dinner. Mitterrand spoke passable English but he insisted on conducting the entire conversation in French, with a British translator at his side. At one point, Mitterrand told a joke in French. None of the French speaking people at the table laughed. His translator then repeated it in English and everyone laughed hysterically. I asked Elie

HOUSE_OVERSIGHT_017486

whether the joke was funnier in English than in French, and he replied, "No, but Mitterrand doesn't know how to tell a joke, his translator does."

Recently, Elie had quintuple bypass surgery. I had lunch with him shortly thereafter, and all he could talk about was the future and how important it was to keep up the struggle for human rights. Elie Wiesel is truly one of the great men of the 21st Century. When I think of how close he came to not surviving, and when I think of how many other Elie Wiesels were lost in the flames of Auschwitz, I begin to understand the full horrors of the Holocaust.

HOUSE_OVERSIGHT_017487

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

SCOTT ROTHSTEIN, individually,
BRADLEY J. EDWARDS, individually, and
L.M., individually,

Defendant,
_____/

NOTICE OF FILING TRANSCRIPT IN SUPPLEMENTAL SUPPORT OF BRADLEY EDWARDS' MOTION FOR SUMMARY JUDGMENT

Defendant/Counterplaintiff, BRADLEY J. EDWARDS, by and through his undersigned attorneys, hereby gives notice of the filing of the transcript of the deposition of Scott Rothstein taken on June 14, 2012. Specific portions of the deposition on which Mr. Edwards' relies in support of his motion for summary judgment are highlighted.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list this 22nd day of June, 2012.

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

JEFFREY EPSTEIN,
Plaintiff,
vs. No. 502009CA040800XXXXMBAG
SCOTT ROTHSTEIN, individually,
and BRADLEY J. EDWARDS,
individually,
Defendants.
_____/

500 East Broward Boulevard,
Ft. Lauderdale, Florida
Thursday, June 14, 2012
9:14 a.m. - 12:37 p.m.

D E P O S I T I O N
Of
SCOTT ROTHSTEIN
(Via Video Conference)

Taken on behalf of the Trustee
pursuant to a notice of taking deposition

- - -

APPEARANCES:

LAW OFFICES OF TONJA HADDAD, P.A. by
Tonja Haddad, Esq.
Attorney for the Plaintiff.

ATTERBURY, GOLDBERGER & WEISS, P.A., by
Jack Goldberger, Esq.
Attorney for the Plaintiff.

SEARCY DENNEY SCAROLA ET AL, by
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Attorney for the Defendant, Brad Edwards.

MARC NURIK, P.A., by
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Attorney for Scott Rothstein.
(Appearing via Video Conference.)

U.S. ATTORNEY'S OFFICE, by
Laurence LaVecchio, Esq.
Attorney for the Department of Justice.

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
SCOTT ROTHSTEIN				
(By Ms. Haddad)	5			
(By Mr. Goldberger)	92			
(By Mr. Scarola)	121			

EXHIBITS

PLAINTIFF'S	FOR IDENTIFICATION
1	64
2	69
3	72

Thereupon:

SCOTT ROTHSTEIN,

was called as a witness and, having been duly sworn, was examined and testified as follows:

THE WITNESS: I do.

MS. HADDAD: Good morning, Scott. How are you?

THE WITNESS: Good morning, Tonja. How are you?

MS. HADDAD: Fine, thank you. It's nice to see you.

THE WITNESS: Good to see you, too.

MR. SCAROLA: Mr. Rothstein, I don't know that you and I have met. I'm Jack Scarola, I'm representing Brad Edwards and I know you know Brad who's to my immediate left.

THE WITNESS: Hey, Brad, how are you?

Jack, good to see you.

MR. SCAROLA: Thank you.

MR. GOLDBERGER: Also present is another Jack, Jack Goldberger, and I also represent Jeffrey Epstein. To my right is Darryn Indyke --

THE WITNESS: Good morning, Jack.

MR. GOLDBERGER: How are you today?

And to my right is Darryn Indyke, who is

Mr. Epstein's in-house counsel.

MR. INDYKE: Good morning.

THE WITNESS: Good morning, sir.

MR. NURIK: Good morning, everyone.

MR. GOLDBERGER: Hi, Marc, how are you?

MR. NURIK: Good. You'll be seeing my shoulder most of the day.

MR. GOLDBERGER: Okay.

DIRECT EXAMINATION

BY MS. HADDAD:

Q. Well, Scott, I know you've talked about this probably more than you even care to, but I'd like to start a little bit asking you about the scheme at your firm and how and when it started and things of that nature just very briefly because I know you've covered it many times.

MR. SCAROLA: It has been covered and protocol precludes asking questions that have already been answered and covering areas that have already been covered, so we do object.

MR. GOLDBERGER: Your objection is noted.

BY MS. HADDAD:

Q. When did this first start?

A. It started back in '05, '06. The question is a little bit vague for me because it started in a

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1 different form than it ended because it started as
2 bridge loans and things of that nature, and then
3 morphed into the Ponzi scheme. But you are looking
4 back into the 2005 time frame for the very beginning.
5 Q. The 2005 time frame, that's when the bridge
6 loans started?
7 A. I can't be certain exactly what we were
8 doing. I need to see all the documents to tell you
9 what we were doing at what specific point in time.
10 Q. What made you decide to start doing this?
11 A. I started doing it out of greed and the need
12 to support the law firm, which was having significant
13 financial trouble at the time.
14 Q. And in 2005 had you moved over to 401 yet or
15 were you still in the building where Colonial Bank
16 was?
17 A. I don't remember.
18 Q. Do you recall approximately how many
19 attorneys you had working for you when it started?
20 A. I do not. Between five and ten, Tonja.
21 Q. Was it before you started acquiring
22 attorneys like you were acquiring cars and watches?
23 MR. SCAROLA: Object to the form of the
24 question, vague.
25 THE WITNESS: Yes.

1 BY MS. HADDAD:
2 Q. Well, who were you partners with when it
3 first started?
4 A. Stu Rosenfeldt.
5 Q. Okay. Anyone else?
6 A. Susan Dolin, I believe. It was definitely
7 Stu Rosenfeldt, Michael Pancier, and Susan Dolin may
8 have been partners of ours at that time, I'm not
9 certain.
10 Q. Because if memory serves me correctly, you
11 went from being in the One Financial Plaza Building to
12 the building across the street, it was Rothstein,
13 Rosenfeldt, Dolin and Pancier; is that correct?
14 A. Yes.
15 Q. And it was some time later that you moved
16 into the 401 Building, correct?
17 A. You are skipping one step. I went from One
18 Financial Plaza to Phillips, Eisinger, Koss, Kusnick,
19 Rothstein and Rosenfeldt. Then Stu Rosenfeldt and I
20 broke off and formed Rothstein Rosenfeldt. And then
21 Rothstein, Rosenfeldt, Dolin, Pancier over at the
22 Colonial Bank Building. And then we took the space in
23 the 401 Building and eventually moved over there and
24 that's when the real growth started.
25 Q. And when you say, "that's when the real

1 growth started," do you mean both the scheme -- do you
2 mean the scheme and the firm or either one or both?
3 A. Both.
4 Q. Do you recall approximately when you took
5 the space in the 401 Building?
6 A. I do not.
7 Q. At the time everything imploded, how many
8 partners did you have at the firm, do you recall?
9 A. Are you saying partners and shareholders?
10 Because remember, we had both, two designations.
11 Q. I want to start with just attorneys that
12 had -- not in your firm name but named as "partner" on
13 the cards, for example.
14 A. I'd have to see a list of all the employees.
15 We had a bunch.
16 Q. Do you recall about how many attorneys you
17 had working there?
18 A. Approximately 70.
19 Q. In the year before, do you recall how many
20 you had?
21 A. I do not.
22 Q. So how many equity partners did you have or
23 shareholders? I'm not sure of the word that we are
24 using.
25 A. Actual shareholders, equity shareholders

1 were two, me and Stu Rosenfeldt.
2 Q. And everyone else was just a partner for
3 title purposes?
4 A. There were shareholders for title purposes
5 and partners for title purposes.
6 Q. If someone was called a shareholder for
7 title purposes then, did they get to receive any of
8 the funds? Were they shareholders receiving money or
9 they were not considered shareholders in that sense?
10 MR. SCAROLA: Objection to the form of the
11 question.
12 THE WITNESS: What kind of funds are you
13 talking about?
14 BY MS. HADDAD:
15 Q. In general from the firm. When you say
16 equity shareholders, I understand that's you and Stu.
17 What I'm saying is, if you had someone else that was
18 named as a shareholder, why did you call them a
19 shareholder as opposed to a partner?
20 A. It was a title of prestige and achievement.
21 Q. So it was basically an ego thing, it had
22 nothing really to do with the finances or hierarchy of
23 the firm?
24 A. They got paid more generally, but it did not
25 have anything to do with distributions.

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Q. When you were hiring and bringing in all these new attorneys, did everyone come in as a partner?

A. No.

Q. How did you decide who came in as a partner and who came in as an associate?

A. Depended upon their level of expertise, practice, book of business. It was a decision Stuart and I made together on a case-by-case basis.

Q. So you and Stu where the -- were in charge of hiring?

A. Stuart and I tried to consult on every hiring decision, yes.

Q. Did you guys also decide salaries?

A. I generally decided the salary and then let Stu know what I was going to do. And he would say if he thought it was okay or if he thought it was too much or too little, but I generally had free reign in that regard.

Q. Did someone's book of business directly correlate to the salary that you would offer?

A. That is a very broad question because it depends upon what other needs we had for that individual.

Q. What do you mean by "what other needs"?

A. Well, I'll give you a good example. My lawyer, Mr. Nurik, his salary was directly related to the fact that he was a great lawyer and had a solid book of business.

Q. Yes.

A. David Boden, on the other hand, was, as I previously testified, I don't know if you've had a chance to read the testimony, but David Boden was not only the general counsel to the law firm but he was also -- acted as my consigliere in a significant number of illegal operations and he was compensated significantly for that, if that helps you understand the difference.

Q. It does.

So, for example, when you were hiring former judges, let's use that as an example, Pedro and Julio, clearly they don't have a book of business coming in because they haven't had clients, but they may carry some sort of prestige or give some legitimacy, if you will, to the firm. How would you decide the salary for someone like that?

A. Stu and I would discuss it. It was more a market issue than anything else, how much are judges coming off the bench getting, how much business do we think they can generate.

Q. Would you need to look at someone's book of business if they were coming in just solely to be a rainmaker for the firm prior to hiring them?

A. I discussed it with them. There were not many people that I recall that I actually looked at their numbers. Once David Boden was working for me I had him check people's numbers, but I rarely looked. I took most people's words for what they were generating.

Q. My recollection is, you were always looking to bring in more people, to hire more people, some of us were somehow able to resist you while others were not. How would you decide who you were looking at to bring into your firm?

A. We were trying to develop, on the legitimate side of the law firm, we were trying to develop real talent, real practice groups. I mean, Brad is a perfect example, great lawyer, got a great reputation. You know, it was our hope that, you know, he was going to be one of the people to actually in some ways rescue the firm because he had a practice group that could generate substantial income. You know, on the legitimate side that's what we were trying to do, we were trying to find the best and the brightest.

Q. Okay. With respect to bringing people that

you thought could bring a book of business, you just said Brad, for example, that he had a legitimate practice group with a good book of business. How did you know that?

A. Everyone in the tort world that I had spoke to spoke extremely highly of Brad, not only people I already had working for me but other people that knew him. He was very -- came very highly recommended to us.

Q. Like who, for example?

A. We wanted him in there. We were trying to develop a significant tort group and we thought that he'd be a great part of it.

Q. Who besides Russ told you that about Brad?

A. It would have been other people in the tort group. I don't want to guess, Tonja, as to which other people told me, but it was -- well more than Russ.

Q. Was it people within --

A. Might have been people in politics that I talked to that knew him because we had significant input at the gubernatorial level with regard to tort reform and the like, and there were people there who knew who Brad was. It was more than one person that told us that.

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Q. Okay. When you were looking at people to bring in to the firm to legitimize, as you said. Your firm had a very unique area of practice and had a very unique environment to which to work. How did you know or how did you come to decide what people may or may not fit into that?

A. Okay. Hang on one second. I think you just accidentally misstated my testimony.

I was not bringing the people in to legitimize the law firm. I was bringing them in to the legitimate side of the law firm. The bulk of the law firm, despite the lack of financial success, was a large group of very honest, hard working lawyers trying to do their best in difficult economic conditions. There were some that were obviously not legitimate. And the way I decided to bring people in, again, it's really everything I just told you. Are you looking for how I brought people into the Ponzi scheme?

Q. No, right now I'm just asking about the firm because, as I said, it's a very unique way in which to practice and a very unique workplace environment with politics and restaurants and parties at your home and things of that nature. I'm asking, personality wise, other than the book of business, how did you decide on

people that would be a good fit?

A. I looked for people that were outgoing, that had the type of personality. On the legitimate side of the business, people that had charisma that were -- that could go out and hustle and try to develop a book of business if they didn't have it. And as one of the 50 percent of the shareholders of the firm I was trying to hire people I wanted to work with.

Q. Okay. When you would see people from whom you would offer jobs, for example, as you mentioned earlier with Brad and his practice, if somebody stated that people told you that he was a good lawyer, did you need to see him in action, so to speak, prior to your deciding to hire them or would you just take people at their word for it?

A. Some of people I saw in action; he wasn't one of them. Steve Osber is an excellent example of that. I hired Steve after he was beating the living daylights out of me on the other side of a case. And I certainly would ask around about the people. But the people that I trusted -- see, I can't remember. I think Gary Farmer was working for me before Brad, and if I'm not mistaken he would have been one of the people that I went to with regard to Brad because we were really developing that whole tort group around

that time with Farmer and Fistos and Jaffe and Mr. Edwards.

Q. Do you know where Mr. Edwards was working when you first learned of him?

A. I don't recall whether he was working for someone or had his own practice, I don't recall.

Q. When did you first learn about Brad?

A. I don't remember the time frame.

Q. Do you recall when you first met with him regarding a job?

A. No. The easiest way to figure that out is to go look at his personnel file, it will have the notes saying when he met with me the first time.

Q. You don't have any recollection of your first meeting with him?

A. No. As you know, I was hiring people left and right and I was also unfortunately very busy doing things I shouldn't have been doing, so I don't have a specific recollection of when I hired him. I barely have a specific recollection of when I hired me.

Q. But you did, in fact, meet with him?

A. I'm certain I met with him before I hired him. I can't imagine -- although I did hire people without meeting them. I did hire people based on other people's word, if they were people within the

firm that I trusted. Because I always said, I had a very simple, you lie or die by what you are telling me. If you are telling me this guy is good and he's not good, that's on you, it's going to hurt your income. So I used to tell my partner, people that were recommending people to me, don't sell me a bill of goods just to get somebody in here because if you do that it's going to come back on you, it's going to affect your income and your ability to grow in the firm. So with that admonishment, I might have very well hired someone sight unseen based upon what someone else told me.

Q. But you did meet with Brad you say before he came in to work?

A. Now that I'm saying it out loud, I think I did but really I'm guessing. I don't have a specific recollection of meeting him.

Q. Do you recall if you knew that he had worked as an assistant state attorney for a few years prior to doing tort litigation?

A. I don't recall that one way or the other.

Q. So you wouldn't have asked Howard Scheinberg or anybody about him before he came to work there?

A. I can't say that I wouldn't have asked because, like I said, I might have asked. But

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unfortunately, you are taking a little tiny spot out of a very, very busy time period in my life and in the life of the firm, so I can't tell you one way or the other.

Q. I know you had a lot going on, I'm just trying to see if you remember anything specific about this.

Do you recall what salary you had offered Brad to come join the firm?

A. I do not. You have to just try to differentiate that what I knew then is a lot different than what I know now so ...

Q. Meaning?

A. Obviously meaning that at the point in time that I was hiring him or maybe a year after, I would be able to tell you what I was paying him, but now it's insignificant. I don't remember how much I was paying him.

Q. Did you learn about his book of business or know what kind of cases he was bringing in prior to hiring him?

A. I do know that he -- I discussed either with Russ, well, I know with Russ, and perhaps some other people, I knew about the Epstein case.

Q. What did you know about it?

A. Epstein was a billionaire.

Q. Okay. Did you know anything about the legitimacy or illegitimacy of the claims prior to knowing he was a billionaire?

A. I knew what I was told. I didn't check it out myself, but I trusted the people that told me.

Q. And who told you?

A. The only person I remember discussing it with, as I sit here today, is Russ Adler. But if Farmer and Jaffe and those guys were with me at the time, I likely would have discussed it with them as well.

Q. So were you aware of this case before you made an offer to Brad to join the firm?

A. Yes.

Q. You said you didn't -- I don't want to misquote you. You said you heard about it from other people, but you didn't do anything to know that personally. Was that before you made the offer of employment?

A. I made the offer of employment based upon what other people had told me about Brad.

Q. About Brad and his book of business or just Brad and his legal skills?

A. Okay. When I say Brad, I mean Brad and his

A. I knew that it was a significant case of potentially significant value against an extremely collectible pedophile, for lack of a better word.

Q. So was that case your primary motive in bringing Brad into the firm?

A. I doubt it. I mean, I can't tell you one way or the other, but I doubt that I would bring him in just for one case because what if the case fails, then I'm stuck with a lawyer who can't do anything, you know.

I'm not saying, Brad, that you couldn't do anything, I'm just saying that if I only relied on one case, then if I bring a lawyer in for one case and one case only, what do I do with him when the case is over.

Q. How did you know that this case would be a collectible case then?

MR. SCAROLA: I'm going to object to the form of the question because it misstated the prior testimony. The prior testimony was not that it was a collectible case but that it was a case against a "extremely collectible pedophile."

BY MS. HADDAD:

Q. What made you think that this case had any financial value?

book of business and his legal skills.

Q. Okay.

A. And his ability to generate business in the future.

Q. You stated that you believed that you first heard about these cases from Russ and then perhaps from Brad. Once Brad was at the firm, did you keep up with these cases, these Epstein cases?

MR. SCAROLA: Excuse me, I'm going to object to the form of the question. It is an inaccurate reflection of the prior testimony. It has no predicate. There was no reference about having heard about these cases from Brad. The names mentioned were Adler, possibly Farmer, possibly Jaffe.

BY MS. HADDAD:

Q. Once Brad started working at the firm, you've already testified you already knew about these Epstein cases, correct?

A. Yes.

Q. How did you keep abreast of these cases?

A. I didn't.

Q. You didn't know anything about them?

A. I didn't say I didn't know anything. I said I didn't keep track of it.

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Q. You didn't keep track of it?
A. I did not keep track of it. From time to time Russ and the other guys in the tort group would tell me what was going on in certain cases, but until I made a decision to utilize that file for an illegal purpose related to something illegal that I was doing along with my co-conspirators, I just assumed my lawyers were going to work the case and eventually it would hopefully work out well for the law firm.
Q. At your firm, when e-mails would go out to attorneys at RRA or all attorneys at RRA, were you part of that e-mail group?
A. You are talking about all staff?
Q. No, all it says is attorneys at RRA.
A. It's the e-mail group "attorneys"?
Q. Yes.
A. Yes, I'm a part of that e-mail group.
Q. And I appreciate that you were very busy and may not have read all of them, but you did receive those e-mails when they would go around?
A. Yes, and I tried my best to read them.
Q. Okay. At what point did you decide to use this case to further your Ponzi scheme?
A. I don't remember the date, but I can give you the circumstances, if you'd like.

Q. Please do.
A. The Ponzi scheme was running very low on capital. My co-conspirators and I needed to find a new feeder fund, new investment sources. We had a couple of very large, significantly wealthy potential investors out there. I was looking for something that would have been very attractive. We had had a lot of inquiry during the due diligence period with these people that were doing due diligence on the putative cases that we were selling. And when I thought about the Epstein case, realizing that it was a substantial actual file in the office, I came up with the idea that if I created a fake confidential settlement circling around -- based upon this actual case, they would be able to increase the level of due diligence that I was able to offer to my potential investors.
Q. How did you know this was a substantial file in your office at that time?
A. Again, through the people I spoke to in the office.
Q. Such as who?
A. Again, same people, Adler, Farmer, Jaffe, Fistos.
Q. You never spoke to Brad about this case?
A. I didn't say that, but I had a lot more

interaction --
Sorry, Tonja, I didn't mean to speak over you.
If you talk to the people in the firm, if they are honest with you, they'll tell you my interaction was far more significant with Russ Adler, probably more so because he was a co-conspirator of mine. My interaction with Russ was far greater by many, many percents over my interaction with Brad, and then you go down the line. I had more interaction with Mr. Farmer than I did with Mr. Fistos, more interaction with Jaffe than I did with Mr. Edwards, and so on.
Q. Russ was the head of your tort group, right?
A. Yes.
Q. So these cases fell under the tort group; is that correct?
A. Yes, it fell under the -- fell under Russ' purview ultimately, yes.
Q. And Brad was a partner at your firm during the time these cases were there, correct?
A. I believe that was his title. He was either partner or shareholder. I don't think we had made him a shareholder yet.
Q. But he wasn't coming in as an associate,

correct?
A. To the best of my recollection, no.
Q. So you stated that you learned this case was -- I don't want to misquote you and listen to a long speaking objection, but what did you call this case?
MR. SCAROLA: Who wants the quote?
THE WITNESS: It was a substantial case with a -- what I perceived to be a highly collectible pedophile as a defendant.
BY MS. HADDAD:
Q. Right. How did you know at the time when you said these investors wanted to investigate and you said you were going to create a fake settlement, how did you know that this case was the case that you could use?
A. From talking to all the people that I just said, Adler, Fistos, Jaffe, Farmer, Mr. Edwards, to the extent that I spoke to him about it.
Q. Did you speak with Mr. Edwards about the case?
A. I don't have a specific recollection one way or the other. I remember speaking to him at least briefly the day or the day of or the day before the actual investor's due diligence was going on as to

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what was going on. And I may have spoke to him, I know I spoke to Russ, but I may have spoke to him as well within a couple of days just prior to this due diligence because I was trying to at least get some information in my head that I could use when I was creating this story for the investors.

Q. Scott, what's Q-task?

A. Q-task is a web based software system that I had invested $7 million in.

Q. And what was the purpose of this internet system?

A. To be able to communicate in a secure fashion and in a unique group fashion about specific files.

Q. So forgive me, we all know I'm not good with the computer. That was something that would be useful within a law firm, why?

A. Because it allowed you to create groups and have both general and private chats, organize data in a very unique fashion. That was, at least to our way of thinking, would have been very, very helpful in the law firm setting with multiple practice groups.

Q. Did you belong to any groups on Q-task?

A. I'm certain that I did. I don't remember which groups I belonged to. I never got into the full

use of it. I tried to, but again, I was very busy doing other things. But I know that Mr. Adler's group used it extensively.

Q. Because it was your firm and, as you said, you invested $7 million in it, did you have the ability to access a group if you wanted to?

A. Yes. And if I couldn't, I could get Russ to give me access.

Q. So you didn't necessarily have to be invited into the Q-task group for you to be able to utilize or view the communications within it?

A. No, that's not true. I actually had to be invited, that's what I was telling Russ to do, is to have me invited.

Q. But I'm saying, the lawyers wouldn't have to personally invite you, you can get someone within your firm to give you access maybe without the lawyers knowing?

A. No, I think it might have had a, quote, unquote, confidential, super secret viewing capability, but I don't recall it having that, and I'd have no need to utilize that. Just invite me into the group and let me see what's going on.

Q. Okay. I know that you are or were a very hands-on person within certain of the practice groups

and with that, with the Q-task and the e-mails, did someone assist you with reviewing everything and letting you know what was going on within the groups?

MR. SCAROLA: Excuse me, I'm going to object to counsel's testimony. Object to the form of the question as leading.

THE WITNESS: I really don't even understand the question.

Can you try to rephrase it for me, Tonja?

BY MS. HADDAD:

Q. Of course, I would.

Did you keep abreast of everything that was going on in every practice group or was someone through Q-task and e-mails, for example, or was someone giving you information keeping you posted on what was going on within the practice?

A. Well, as part of the tort group I had a pretty good idea of what was going on there all the time just because of the significant amount of interaction, both legitimate and otherwise, that I had with Russ Adler, so I was probably more up-to-date on that group than any group other than the labor and employment group, again, because I had such significant interaction with Stu Rosenfeldt, both legitimately and illegitimately, so I knew what was

going on in that group.

I tried, as best as I could, given my time constraints, to stay on top of what was going on, you know, throughout the firm. But I relied on other people like Debra Villegas and Irene Stay and David Boden, Les Stracker to the lesser extent, to monitor what was going on in the different practice groups and keep me up to speed.

Q. Was there audio and video surveillance throughout the entire firm or only within your office?

A. No, through the entire office, not in the individual offices.

Hang on. Not in the individual offices but throughout the general office space.

Q. So in 2009 how many floors did you have?

A. Three, I think.

Q. And do you recall approximately how many attorneys you had working there at that time?

A. Approximately 70.

Q. And when you say "not the individual offices but the other areas," do you mean -- would that include conference rooms?

A. I didn't have surveillance in the conference rooms.

Q. So can you please tell me exactly where you

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had audio and/or video surveillance? We'll start with audio.

A. I don't have a specific recollection of every place I had video and audio, but it was in -- I had it set up so that in all of the common areas, including our shareholder's lounge, we had -- I had audio and video capabilities.

Q. When you say "capabilities," does that mean you didn't always turn it on or you just turned it on when you felt like it?

A. I turned it on when I felt like it, when I felt like seeing what was going on. I sometimes left the screen up because I had four computer screens on my desk, I sometimes left the screen on with the video of the reception area and some other general areas. But unless I wanted to see what was going on or listen to what was going on, I didn't turn it on. It would have been too distracting.

Q. Did the attorneys know that this surveillance existed?

A. You can see it in the -- it wasn't hidden, you can see it. There were globes up in the ceiling all over the office.

Q. Did you have -- you said -- you didn't answer this, you said you didn't recall. Did you have

any surveillance in the conference rooms?

A. No.

Q. Other than the common areas you just went over, in the hallways and the reception -- did you have it in the hallways, is that a common -- do you deem that a common area?

A. All the hallways pretty much with the exception of a few blind spots, I can see all the hallways.

Q. And this was on all three floors?

A. Yeah. For some reason I think we might have taken some space on a fourth floor, but I could be mistaken. But yes, on the three floors that we actively had a significant amount of space on, I tried to have surveillance on all the common areas of all that space.

Q. And what floor was Mr. Edwards' office on?

A. I don't recall.

Q. Did you have the tort group all together or was it divided up?

A. Except for Adler, Adler was on with -- near me, down the hall from me. The rest of the group was all together. I think they were on -- let's see. There were people up on 22. I was on 16. He must have been on the other floor that we were building

out, because I remember building out space and I remember Jaffe and all those guys moving into that space.

Q. If you were building up that space, do you recall when you put the surveillance in there?

A. It would have been while they were building it out or shortly thereafter.

Q. During 2009 it seems that you hired lots of former law enforcement people to work at the firm. Why were they people you wanted to hire?

A. Severalfold. I had a significant amount of illegal activity going on with various law enforcement agencies throughout South Florida and hiring people from former law enforcement assisted me in engendering support and camaraderie with the law enforcement that I was actually utilizing in illegal activities.

Q. So you are saying --

A. Secondarily, I wanted to have a very strong investigative team, ultimately, to do both legitimate and illegitimate things for the law firm, and hiring former law enforcement was the best way to do that. I was hoping to actually ultimately create a group. Ken Jenne and I had talked about that extensively.

Q. Why did you hire Ken Jenne?

A. Prior to Ken going to prison, he and I were

very friendly and he was extremely friendly with someone that was very close to me, Grant Smith. During the time that he was down in FDC Miami, I went down to visit him. And after speaking to him and after speaking to Grant, I told him, because he was talking to me about how many people had turned on him and abandoned him. And I told him that when he got out of jail that he had no worries, that I would give him a job.

Q. And what --

A. And that was the primary reason -- that was my primary reason for hiring him.

Q. What was it you were hiring him to do exactly?

A. Ultimate the goal was to head up on investigative arm within RRA, within the RRA entities.

Q. Well, while he was there, since that didn't happen, what was his obligation to the firm day-to-day?

A. He handled firm security issues and he did handle overseeing certain investigative things. We had an alcohol and beverage group that was forming and he was overseeing that. He was helping me find new people to staff it, that kind of thing.

Q. Did you have a lot of interaction --

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A. He had had significant -- as you know, he also had significant political connections and everyone who is not living under a rock knows I was doing everything I could to garner significant political power.

Q. I think many people miss your parties.

But, with respect to Mr. Jenne and his political connections, were you hiring him to utilize him with respect to any of the police department investigations? You had stated earlier you had dealings with police departments. I don't want -- again, I don't want to put words in your mouth. You said you had dealings going on with various police agencies?

A. I had -- I mean, we had a criminal defense section in the law firm, so we had legitimate dealings with law enforcement. But I also had significant illegitimate things with law enforcement that had nothing to do with Ken Jenne.

Q. And how about with respect to former FBI agents you were hiring?

A. They were all people that were operating in a legitimate fashion within the law firm.

Q. In what role was that?

A. The investigative roles and the alcohol

beverage roles and anything else Ken or other staff could think of to have them do.

Q. Let's talk about the investigative roles for a minute.

What kind of investigations were these teams running?

A. I do not know. You have to speak to lawyers that were actually utilizing them. I put it out there and Ken put it out there, that they were available to lawyers in the firm for use like in-house investigators. And what people did with them ultimately was up to them.

Q. Were they on salary or were their costs and fees associated with utilizing them within a specific practice group?

A. They were all on salary with me. The ultimate goal was to have it as a separate entity that could bill the law firm and have the clients at least defray some of the cost. I don't recall whether or not we ever got to that level or not.

Q. With all that in-house police action, why did you have police security surrounding you all the time?

A. I guess the best answer was I was paranoid, but I mean -- that's the simple answer to it. You

know, having -- there were mixed reasons. For example, I -- are you talking about my Fort Lauderdale police detail?

Q. Yes. You had it at the office and at your home, correct?

A. Yeah. There's a myriad of facts that motivated me to do that. One was that I really wanted the security for the office. Two was, I was paranoid and this is in no particular order. Three was the Melissa Lewis murder that shook the entire law firm and shook me terribly. I didn't want that to ever have to happen again. And four was, I wanted -- the more law enforcement you have around, the more legitimacy it adds to you and your appearance to the community. So there were a multitude of reasons.

I mean, I hired certain law enforcement to work for me that were just friends of mine that were -- that needed additional money, so I wanted to make sure that they had money, both guys that did the illegal stuff for me and guys that didn't do anything illegal for me.

Q. Let's go back to the Epstein case and when you decided to utilize it -- to use for the investors for your Ponzi scheme.

Do you recall approximately when it was that

these investors were coming that you decided to use the files?

A. My best recollection it was in 2009, sometimes after April of 2009, but I don't have a specific recollection beyond that.

Q. What makes you think it was after April of 2009?

A. Because, to the best of my recollection, the Clockwork Group came in towards the middle of 2009. When I say Clockwork, that's an umbrella term that I use to mean the Von Allmen, AJ Discala, and other investors that came in through that feeder fund.

Q. So that was around April 2009?

A. No, it was after, to the best of my recollection. I mean, you can tell because all you have to do is look and see when the first, very first Clockwork investment is. Actually, you can pinpoint it even closer. Look for the very first settlement deal that we did that was related to the Epstein case, within 60 days prior to that would have been when I was meeting with those due diligence people, 30 to 60 days before that.

Q. So when you decided to use that case, take me through exactly what you did to familiarize yourself with that case.

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A. I talked to Russ Adler. I may have talked to some of the other lawyers. I flipped through certain boxes in the file.
Q. How did you get the boxes?
A. I asked someone to bring them to me.
Q. Do you know where those files were stored?
A. I do not.
Q. So you flipped -- sorry, please continue. Flipped through some files?
A. I flipped through some files. I had the files in my office. The day that the investor group came in, I actually had Ken Jenne and some others actually bring me some more of the boxes actually into my office while the investors were there. I already had some of the boxes with me.
Q. You say "Ken Jenne and others," who were the others to whom you are referencing?
A. I don't specifically recall who carried them in. I was very focused on my investors at that time.
Q. Were any of the lawyers present with you when you were meeting with these investors?
A. During the actual meeting with them, no. I recall that some of the lawyers may have met some of the investors, but I don't recall who.
Q. Do you recall approximately when that

happened?
A. No, it's the same dates that I was giving you before.
Q. Okay. So you had, to further your Ponzi scheme, you had to familiarize yourself with this case so that you could speak intelligently with the investors; is that correct?
A. Well, sort of because most of what I told the investors was all things that I was creating as I went.
Q. About this particular case, the Epstein case?
A. Yes, from an investor -- you have to understand how the inner working of the Ponzi scheme were crafted but --
Q. Please tell me then.
A. I'm telling you -- hang on. From an investor's standpoint, the investor is simply looking for is the case believable. And once they get past that, is it of such case -- excuse me, is it of such a nature that it is possible to be generating a significant amount of settlement dollars. And then after that, their concern is simply on the due diligence side of making sure we actually have the money, that the documents pass -- the documents

unrelated to this case, documents related to the settlements. Other than proving the existence of the case, there's very little an investor, at least from my end, investigates into the actual case. It was more after having the case exist and not caring about really what was going on in the case other than a lot of money was going to be collected.
Q. Well, with respect to showing them that the case existed and that there was a likelihood of a possibility of a payday at the end, how did you convince them of that? What did you use to convince them of that?
A. I did two main things. One, I put the boxes in my office while they were there. I told them to specifically look at a couple of sheets of a flight manifest that was in the file that Russ had shown me. And I told them that it would be a breach of attorney/client privilege for them to look at the file, but that I was going to step out for a while and leave them there with the boxes, wink, wink, and that's what I did. I stepped out, I let them look at whatever they wanted to look at. I came back in, they were satisfied that it was a real case and I was off and running.
Q. And these were the real legitimate files for

this case; is that correct?
A. These were the legitimate files, yes.
Q. Nothing had been created at this time for them to look through?
A. I didn't add anything to the case files. The case files were significant enough by themselves.
Q. Do you know how long they were in your office; days, weeks?
A. The people or the boxes?
Q. The boxes.
A. The boxes were in there probably a little more than a week. I don't have a specific recollection.
Q. Okay. Did you ever go through them?
A. Yes, I flipped through them at some point in time.
Q. And what do you recall about what you saw in the cases? Do you remember anything?
A. I remember seeing the flight manifest. I don't recall seeing anything else. I'm sure I looked at other things, but again, for my purposes it was insignificant to me because the actual content of the boxes was not necessary in the sale of the fake settlements.
Q. Why was the flight manifest so interesting

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to you?
A. Because of who was on it.
Q. Who was on it?
A. I don't recall, but I do recall saying to the investors -- I recall having a conversation prior to the investors coming in with Russ Adler and Russ had told me that Epstein had flown Bill Clinton on his plane, had flown Prince Andrew on his plane. And I don't remember whether that was on any of the flight manifests or not, but I left that to the investors' imagination as to what they were being told about Mr. Epstein and these other famous people that were cavorting with Mr. Epstein and let them look at the file.
You have to understand from an investor's perspective -- hang on. From an investor's perspective the only thing that matters to the investor is that it's a real case and that they can verify that real dollars are being paid. The fact that it was a real case was evident, I had a lot of boxes with real pleadings in it and a lot of other information in it. The fact that there was real money being paid was a fiction that was created by me and my co-conspirators, everyone from bankers, to computer people. So the actual role of the case, and I want to

make sure you understand this, the actual role of the actual physical case in the Ponzi scheme is, from my perspective, minimal. It was just another vehicle for me.
Q. After that initial meeting with the investors where they looked at the file, what happened with respect to their desire or lack of desire to invest?
MR. SCAROLA: Excuse me. I'm going to object to the form of the question, it assumes facts not in evidence. There's been no testimony that the investors actually looked at the files, only that they were given the opportunity to look at the files.
BY MS. HADDAD:
Q. Was your video surveillance on when you left the investors alone in your office?
A. No, no, I didn't have cameras in my office. I didn't let people look in my office when I was in there, that would have been bad.
Q. So you left them alone in there?
A. Yes.
Q. Do you recall for approximately how long?
A. No more than 20, 30 minutes. It was a short period of time.
Q. When you went back in what happened?

A. I went back to selling the Ponzi deal.
Q. And did you sell it?
A. I believe I did. You'd have to look at the actual settlement documents to see if I put one together for that, but I'm pretty sure we did.
Q. Do you recall if the investors asked you for any additional information or any additional documentation?
A. I don't recall one way or the other.
Q. After this initial meeting with the investors, did you give any direction regarding this particular case?
A. To whom?
Q. To any of the attorneys working on the Epstein case.
A. No. I didn't interfere in how they were running their cases. They were far more experienced than I was in that type -- in handling that type of case. As a matter of fact, I was practicing very little real law at this point in time. I wouldn't have had time to tell them or to get involved.
Q. Did you ever keep up with this case after this initial meeting with the investors?
A. I'm certain that I talked to Russ Adler about it from time to time, but my main focus by this

point in time in 2009 was the Ponzi scheme.
Q. Did you try to sell this particular settlement to any other investors?
A. I don't recall one way or the other.
Q. Okay. Did you ever have any conversations with any of your investors about this Epstein case?
A. I don't recall one way or the other.
Q. I notice there's been a privilege log produced with respect to e-mails. There seems to be quite a bit of communication between you and Ken Jenne with the topic being the Epstein case. Do you have any recollection what that would be about?
A. I don't. As I sit here today, I don't have a specific recollection of having significant e-mail contact with Ken Jenne about the case. But if you are telling me I did, I'll accept that, but I don't recall what it was.
Q. Earlier you had stated that when you were hiring good attorneys such as Mr. Edwards, looking at their book of business was -- I don't want to put words in your mouth -- it was the legitimacy of the practice, it would bring in legitimate money to the practice, is that what you were hoping to do?
A. Earlier when I testified I specifically testified that I personally did not look at most of

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their book of business. This being said, I was bringing in legitimate lawyers to form legitimate practice groups to practice legitimate law, having nothing to do with the Ponzi scheme.

Q. During the year 2009, were there any, to your knowledge, any big settlements of any cases at RRA?

A. To the best of my recollection, no. We had a dismal year.

Q. The year 2009 was just dismal across the board?

A. Some people did better than others, but yes, overall it was for a firm of 70 lawyers, it was dismal.

Q. So there were no big wins coming into the firm as far as a financial windfall other than from your other businesses?

A. The only significant capital coming into the firm was money my co-conspirators and I were stealing.

Q. Was there any particular practice group that you can remember that had a particularly non-dismal year in 2009?

A. Mr. Nurik had a good year.

Q. Do you recall what the gross revenue was from legitimate sources in 2009?

A. It was somewhere between eight and $10 million, probably right around the nine million mark.

Q. Do you know what your --

A. On its best day.

Q. What was your overhead for salaries in 2009, do you recall?

A. I don't have a clue.

Q. Was it more than you brought in legitimately?

A. With what I was paying in salaries, I'm -- I mean, I'd be guessing. If it wasn't more than, it was certainly close to it.

Q. That's just salary, that's not talking about anything else, rent, overhead, things of that nature?

A. That's correct.

Q. Who was paying for the investigations of the cases that were going on in 2009, the deposition costs, the filing of complaints, and things of that nature? Where did that money come from from your firm?

A. It varied from case to case.

Q. For the tort group?

A. It was fronted by the law firm for the most part.

Q. For the most part.

What wasn't fronted by the law firm?

A. I recall there being a couple of agreements that various tort lawyers had with certain clients where they were going to assist in helping to pay the costs. All the other costs would have been paid by the law firm, both through legitimate and illegitimate means.

Q. So when you say by "illegitimate means," where would the illegitimate means money come from?

A. It came from the Ponzi scheme, and all the tentacles of the Ponzi scheme, other illegal activity.

Q. Such as?

A. Things I was doing with law enforcement, things I was doing in politics, things that I was doing with organized crime, things I was doing with politicians, judges, other lawyers, bankers, business people, things of that nature, I'm sure there's more.

Q. Do you recall if any of these Epstein cases underwent significant investigation while the cases were at your firm?

A. I'd be guessing. I don't remember.

Q. There was a meeting in 2009, July of 2009, and it appears from the e-mail communications that it was for everyone in the firm to attend and it was

regarding the Epstein case. In fact, there was an Epstein conference room that was reserved for it. Were you present at that meeting?

A. I may have been.

Q. Do you recall?

A. I don't recall one way or the other.

Q. You don't recall it.

Do you recall anything about the Epstein case in July of 2009?

A. I do not. Do you have something that might refresh my recollection?

MS. HADDAD: Can we just take a five-minute break right now?

THE WITNESS: Sure.

MR. GOLDBERGER: Thank you.

MS. HADDAD: Thanks.

[Short recess taken.]

BY MS. HADDAD:

Q. Scott, I was asking you before we took the break about a meeting with respect to the Epstein cases. There was a 159-page privilege log filed, which I'm sure you don't have and are not aware of. But in it there are many, many e-mails to both attorneys at RRA, yourself, and Mr. Nurik regarding the Epstein litigation. And all this resolved in July

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of 2009 about the Epstein meeting and some additional investigation into the Epstein case.

Does that refresh your investigation as to when you met with the investors in the Discala/Clockwork Group?

A. It does not. The best thing to refresh my recollection as to when I met with them would be to see the deal documents.

Q. Okay. I unfortunately don't have those.

Do you recall if you took Discala and his other investors to a football game in 2009?

A. Sure, I did.

Q. Okay. Would that be around the time you were trying to get them to invest in the case?

A. It would have been around the time I was trying to get them to invest in general. It's may have been around the time that I was showing them the Epstein file.

Q. Did you show them any files other than the Epstein file?

A. I may have. I don't have a specific recollection one way or the other.

Q. You testified earlier that you had over a dozen boxes brought to your office that were related to the Epstein case.

MR. SCAROLA: Excuse me, counsel. Counsel, there has been no such testimony.

BY MS. HADDAD:

Q. You said there were several boxes brought to your office by different people. You don't recall who that is; is that correct?

A. Yes, I had some boxes already in my office and I had Ken Jenne and some other people bring some others. I don't remember how many boxes.

Q. Was it more than three?

A. Sure, it was more than three boxes, yes.

Q. Was it more than 10?

A. I don't believe so, no.

Q. You stated that you looked -- I don't want to put words in your mouth. What did you look at specifically in that case?

A. Other than looking at the flight manifest that Russ Adler told me to look at, I have no specific recollection as to what I looked at in that file.

Q. Do you know if there was more than one case being prosecuted by your office against Mr. Epstein?

A. To the best of my recollection there were -- it was multiple plaintiffs.

Q. Okay. Do you recall if those cases were pending in state or federal court?

A. I don't recall.

Q. Did you check?

A. I don't remember one way or the other. It was insignificant to me.

Q. Well, then explain to me. You testified earlier that what was important to the investors to see is that there was a real case, correct?

A. Yes.

Q. What did you look at or show them -- what did you look at, first of all, to see if it was, in fact, a real case?

A. I knew it was a real case.

Q. How did you know?

A. Because my lawyers told me it was a real case. I believed them.

Q. What lawyers told you that?

A. I already told you it was a mixture of Russ and Jaffe and Fistos and Farmer and Mr. Edwards. I mean, I knew it was a real case. We had all these boxes, we had people really working on the file --

Q. How do you know --

A. -- or they were pulling a hell of a scam on me. Not that I didn't deserve it but ...

Q. How did you know, you just said you knew people were working really hard on this case. Who do

you know was working on the case?

A. The only people that I knew for certain were working on the case was Brad Edwards and Russ Adler was doing his supervisory schtick, whatever that was. But other than that, I don't know which other lawyers were assisting Mr. Edwards. I didn't get involved at that level.

As far as the Ponzi scheme goes, the only thing I cared about, Tonja, was being able to show the investors that this case that I was utilizing to steal a significant amount of money from them was a real case. That's all I cared about.

Q. That case came into your office through Mr. Edwards, correct? He brought it with him when he came to RRA?

A. Yes.

Q. He was lead counsel on the case, correct?

A. I assume he was lead counsel. I never checked to see if he listed himself as lead counsel.

Q. Do you know if any additional complaints were filed while the case was at RRA?

A. I have no idea one way or the other.

Q. Did you ever instruct, in furtherance of your Ponzi scheme, Mr. Edwards or anyone in that litigation group to file additional complaints?

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A. No.
Q. Who is Cara Holmes?
A. Who is who?
Q. Cara or Cara, C-a-r-a, Holmes?
A. To the best of my recollection, she was a former FBI agent or maybe IRS agent. I don't know. She was a former federal agent.
Q. Did you hire her to work for you?
A. It was either IRS or FBI.
Q. Did you hire her to work for you?
A. Yes, I hired her at the suggestion of Ken Jenne.
Q. For what purpose?
A. To work in the group that he was overseeing.
Q. So what did she do for RRA while she was there?
A. I don't remember.
Q. Did you ever mention her to your potential investors from the Clockwork group?
A. It's a possibility because, as I was building the Ponzi scheme, I frequently referred to the fact that we had former state and federal law enforcement working for us and on our investigative teams. It added legitimacy to the Ponzi scheme.
Q. Didn't you tell investors that she could

hack into a computer as part of her skills?
A. I certainly may have. I told the investors a whole host of lies about what was going on about with case and what people could do and did do.
Q. Did you ever personally utilize Cara Holmes' skills in any of your cases?
A. I don't remember.
Q. Were you handling any cases during the 2009?
A. I was overseeing cases in 2009, but my involvement was mostly supervisory. I was handling very little that was legitimate at that point in time.
Q. Were you legitimately, when I say "legitimately," were you invited into Q-task on any particular cases that you can recall?
A. I'm certain I was. I don't recall one way or the other.
Q. Do you recall if you were involved in Mr. Epstein's case on Q-task?
A. I may very well have been, but I don't have a specific recollection one way or the other.
Q. Do you know who invited you in?
A. I have no idea if I was invited in. And if I was invited in, I have no idea who invited me.
Q. Once you decided to use this case in your Ponzi scheme, did you go into Q-task to look at the

case or any communications --
A. I may have.
Q. Do you recall when that --
A. I may have.
Q. Do you recall when that may have happened?
A. I do not.
Q. Do you recall the first time you looked at the flight manifest to which you referenced earlier?
A. Prior to the investors coming in. I don't remember the date.
Q. Did you instruct anybody, to further your Ponzi scheme, to investigate or check into anyone whose name was listed on the flight manifest?
A. I may have, but with this clarification. If I instructed someone to look into something, I did it without that person knowing that I was involved in a Ponzi scheme or that what they were doing was illegal and it was just to get me additional information to help with my sale of the fake settlements.
Q. So it was to further your --
A. So I may have asked someone -- I may have asked someone to get me some additional information, but as I sit here today, I don't recall ever asking anyone to do anything on the file that was for the purpose of furthering the Ponzi scheme, other than

perhaps getting me a piece of information that I needed.
Q. I'm going to try to refresh your recollection as to whether or not you attended those meeting in July of 2009. And it appears that in between the dates of July 22nd, 2009 and July 24th, 2009, there was a number of communications through e-mail by and between yourself, Mr. Adler, Brad Edwards and Ken Jenne regarding an Epstein meeting that was going to be taking place. Do you remember that at all?
A. I think what you are referring to, and I'm not certain, but I think that what you are referring to is me making sure that the file was in the condition in which I wanted it at the time the investors were coming in. I don't think it had anything to do with the actual functioning of the Epstein case. I think it had to do with my illegitimate purpose. That's the best of my recollection, but if you have documents or something that you can show me, that would be helpful.
Q. We are not privy to all of the e-mails because they've been alleged as privileged or work product, so I unfortunately can't show them to you. But according to the privilege log between

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July 22nd and 23rd there were numerous e-mails sent about the meeting. It was almost an all-hands-on-deck type meeting where everybody needed to attend. It was labelled the Epstein meeting with an Epstein conference room reserved.

A. Yes.

Okay. What's your question and I will tell you.

MR. SCAROLA: First I'm going to object to counsel's testimony, but let's hear the question.

BY MS. HADDAD:

Q. The question is, does that refresh your recollection as to whether or not this meeting took place?

A. To the best of my recollection, I actually had introduced some of the investors to some of the people working on the Epstein case, and that is likely the meeting that you are referring to. But for the life of me, I don't have a specific recollection of it.

Q. But it could be the meeting where you introduced the Epstein litigation team to your Ponzi investors?

MR. SCAROLA: Excuse me, I'm going to object to the form of the question. It misstates the

prior testimony. It has no predicate.

BY MS. HADDAD:

Q. That could have been the meeting in which you introduced the Ponzi investors to people working on the Epstein case?

MR. SCAROLA: Excuse me, counsel. The testimony was that there may have been a meeting at which investors may have been introduced to some people working on the Epstein file. And your efforts continuously to mischaracterize the prior testimony are highly improper. I object.

BY MS. HADDAD:

Q. Scott, did you or did you not say that you introduced some of the investors to some of the lawyers on the Epstein case?

A. No, I actually said, Tonja, that I may have. I have a recollection that I may have based upon you just refreshing my recollection, but I just do not remember one way or the other. This was, in the scheme of what I was doing, insignificant. I was simply trying to establish to the investors that this was a real case, with real potential, with real lawyers working on it. Other than that, it was of no interest to me.

Q. How else would you convince them? You've

mentioned letting them look through the litigation boxes, you've mentioned the meeting. What other way would you have convinced them that it was a real case?

A. I mentioned letting them look at boxes, what they did when I was out of the office, that's -- I don't know because I couldn't see what they were doing. Number two, I may have introduced them to people in the office. Number three, I'm certain that when the people brought the boxes to my office I introduced them to whoever was carrying the boxes. And number four, the rest of it would have been all stuff I created in my imagination because, again, it was the sale of something that didn't exist. This was not settling. There was no real settlement money. There were no real settlement documents. I even manufactured, I think, the actual plaintiff, because I don't recall even knowing the plaintiff's real name or if I did it was of no significance to me.

Q. How would you have manufactured a plaintiff's name, would you have created additional documents to further your Ponzi scheme using Mr. Epstein as the defendant?

A. No.

Q. How would you --

A. The name just would have appeared on the

confidential settlement agreement.

Q. Would they have already seen the documents at that point?

A. I can't tell you one way or the other what they had seen, because I don't know what they actually looked at.

Q. Forgive me, you've now confused me so I'm just going to ask you for some clarification.

You used a legitimate case and created fake settlement documents, correct, in the simplest sense?

A. If this culminated in an actual sale of a fake settlement, then the answer is yes.

Q. So it was a real case with a real plaintiff and real defendant, just a fake settlement document?

A. No. Let me see if I can clarify this for you. Over 90 percent of the settlements that I sold, the fake settlements, were completely fictitious?

Q. Right.

A. A very small percentage of them were based, at least in part, on some type of real litigation that either had occurred or was currently occurring. I utilized the Epstein case to bolster the visual for the investors that a real case existed. Because as these were being sold to more sophisticated investors, the questions kept coming up, was there -- how do we

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1 know this is a real case? So I was finally able to
2 say this is how you know, here is a case file. I may
3 have, I don't remember specifically one way or the
4 other, but I may have utilized actual plaintiff names
5 from the cases filed, but I may have made them up. I
6 have no specific recollection one way or the other. I
7 was totally geared toward simply getting the investor
8 money into the Ponzi scheme.
9 Q. Were you aware that the day after this
10 meeting took place on July 24th, 2009, a new federal
11 complaint was filed against Epstein with one of the
12 same plaintiffs that was already pending in state
13 court?
14 A. I don't know that I was aware of that or
15 not. If they were filing it, someone may have told
16 me. I don't recall one way or the other.
17 Q. Did you ask anyone to file it to further
18 your Ponzi scheme?
19 A. No, I don't remember doing that.
20 Q. Do you recall any situation where you --
21 A. You do realize -- Tonja, hang on. I just
22 want to make sure this record is clear. Other than
23 Russ Adler, the people that were involved in the
24 Epstein case had absolutely nothing to do with the
25 Ponzi scheme.

1 Q. Directly?
2 A. Or indirectly. They had nothing to do with
3 it.
4 Q. Yet the file was used for you to further
5 your Ponzi scheme. I'm not saying that they gave it
6 to you to use for the Ponzi scheme, I'm asking, you
7 used their case. I'm not -- the question is you used
8 the case?
9 A. I took advantage of some good, innocent,
10 people for my own and my co-conspirator's illegal
11 purposes. Mr. Edwards is one of them, and for that I
12 am sorry, Brad.
13 Q. Did you ask anyone involved in the Epstein
14 case to file a federal complaint?
15 MR. SCAROLA: Objection, repetitious.
16 THE WITNESS: Without seeing a document,
17 Tonja, I can't tell you one way or the other. I
18 don't want to -- I do not want to guess. If you have
19 an e-mail where I'm saying to someone, file a federal
20 case, then obviously I did. But I have no specific
21 recollection of that.
22 BY MS. HADDAD:
23 Q. You do have a document with you, it's marked
24 for you, it's Bates stamped. It begins at EP 081 and
25 goes through through 264.

1 A. Hold on one second.
2 Okay. What number am I looking at?
3 Q. It's a very large document. It's begins
4 with Bates Stamp Number 081 and ends with 264.
5 A. It's in the computer, hold on a second.
6 I have that in front of me.
7 Q. Do you see the date on that complaint
8 stamped?
9 A. I do.
10 Q. And there's -- give me one second, Scott,
11 sorry.
12 What was the date that complaint was filed?
13 A. What's the last page of the complaint,
14 what's the Bates number?
15 Q. The last page is 234. I'm sorry, 263 would
16 be the last page of the complaint.
17 [The Complaint referred to was marked for
18 identification as Defendant's Exhibit 1.]
19 MR. SCAROLA: You may want to call his
20 attention to the filing stamp on the first page.
21 MS. HADDAD: I did. I guess he didn't hear
22 me.
23 THE WITNESS: I'm sorry.
24 MS. HADDAD: It's stamped on the first
25 page.

1 THE WITNESS: Hang on, the complaint is
2 dated July 24th, 2009. It was entered onto the
3 docket on July 27th, 2009.
4 MR. SCAROLA: Do you have another question?
5 MS. HADDAD: I thought he was still looking.
6 Scott, are you done looking?
7 THE WITNESS: Yes, one second.
8 MS. HADDAD: That's what I thought.
9 THE WITNESS: No, hang on one second. It
10 shows the stamp on the first page says July 24th,
11 2009. The filing say electronically filed July 24th,
12 2009. There's an entry onto the docket on July 27,
13 2009, and the complaint is signed July 24th, 2009.
14 That's all the dates I have.
15 BY MS. HADDAD:
16 Q. Okay. And back on Bates Stamp Page Number
17 263, who's the attorney that filed this complaint?
18 A. I don't know if that's his signature, but
19 the name is Brad Edwards.
20 Q. Okay. And does that e-mail --
21 A. With the squiggle on top of it.
22 Q. And does that e-mail address look like the
23 correct e-mail address for RRA?
24 A. It is.
25 Q. So that is, in fact, a legitimate e-mail

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1 address from your firm; is that correct?
2 A. Yes.
3 Q. And were you filing any cases back in 2009
4 in federal court? Do you remember how PACER works?
5 MR. SCAROLA: Which question would like
6 answered?
7 THE WITNESS: I don't remember.
8 MR. SCAROLA: Objection, compound.
9 BY MS. HADDAD:
10 Q. Do you remember how PACER worked when you
11 were filing a case, Scott?
12 A. I actually never actually did the actual
13 electronic filing procedure. I had people that did
14 that. I knew that we could file electronically.
15 Q. Do you know the purpose of your using your
16 e-mail address when you were filing electronically in
17 federal court?
18 A. I guess so you can get a receipt, but I have
19 no idea.
20 Q. Did you ever receive an e-mail from federal
21 court in your e-mail address that showed that a
22 document had been filed with the stamps that you see
23 on the top of that one?
24 - MR. SCAROLA: Counsel, are you
25 attempting --

1 THE WITNESS: I don't know one way or the
2 other.
3 MR. SCAROLA: Are you attempting to
4 establish that that complaint was filed in federal
5 court by Brad Edwards?
6 MS. HADDAD: I'm asking him if he recalls
7 the way it's drafted and why.
8 MR. SCAROLA: Just ask your question.
9 MS. HADDAD: I'm asking a question. If you
10 have any objection, please lay it on the record.
11 MR. SCAROLA: No, what I want to do is try
12 to save some time. If what you are trying to
13 establish is that Brad filed the complaint in federal
14 court on July 24th and used the PACER system, you
15 don't need to ask any more questions about that, it
16 happened.
17 MR. GOLDBERGER: We appreciate that, but
18 when we depose you we'll ask you that question. But
19 we are deposing Rothstein right now so let her ask
20 her questions. Don't do this speaking stuff, let her
21 ask the questions, okay?
22 MR. SCAROLA: Maybe.
23 MR. GOLDBERGER: Okay. Go ahead, Tonja.
24 BY MS. HADDAD:
25 Q. Scott, did you ever get e-mails like that

1 from federal court?
2 A. I'm certain I did, Tonja. I don't have a
3 specific recollection of getting the one pertaining to
4 this. I don't even know if they sent it to me. I
5 would imagine they'd send it back to Mr. Edwards.
6 Q. The filing attorney?
7 A. I suspect, unless the PACER system is
8 registered on my name, then maybe it comes to me, but
9 I am completely guessing.
10 Q. But based upon the e-mail communications of
11 July 22nd and the meeting occurring on July 23rd, this
12 complaint was filed the day of this meeting; is that
13 correct?
14 A. Okay. But here is the problem with your
15 question, I don't remember whether or not there
16 actually was a meeting. I said there may have been,
17 and I don't have an independent recollection of this
18 being filed. I do not have an independent
19 recollection of whether I told someone to file this.
20 And for the life of me, this I am certain of, if I
21 told Mr. Edwards to file a complaint in federal court,
22 if there wasn't a legitimate reason for him to do it,
23 he wouldn't have done it.
24 Q. Do you recall if this federal case was filed
25 when you decided to use the case for your Ponzi scheme

1 and show it to your investors?
2 A. It may have been filed around that time,
3 because I haven't been able to establish the exact
4 time. It also certainly may have been utilized by me
5 to further the Ponzi scheme. Also, I don't have an
6 independent recollection of that either. Without
7 seeing e-mail traffic, I can't tell you one way or the
8 other exactly what was going on at that time.
9 Q. Well, then I'll point you to another e-mail
10 which is marked as EP 001.
11 MR. EDWARDS: Let me see it.
12 MS. HADDAD: I sent a copy to your office.
13 MR. SCAROLA: He would like to see a copy
14 now. Thank you.
15 [The E-mail referred to was marked for
16 identification as Defendant's Exhibit 2.]
17 BY MS. HADDAD:
18 Q. Were you able to find it, Scott?
19 A. Got it. Yes, I have it.
20 Q. You have it, okay.
21 You said Cara Holmes used to be an FBI
22 agent, correct?
23 MR. SCAROLA: No. What he said is --
24 THE WITNESS: FBI or IRS.
25

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BY MS. HADDAD:
Q. Or IRS. We'll use the blanket term federal agent. Is that a fair assessment?
A. Yes.
Q. Thank you.
Do you recall when you hired her to work for you?
A. I do not.
Q. Was it in 2009?
A. I don't have a recollection one way or the other.
Q. Okay. Have you ever seen this e-mail before?
A. I saw it when I was reviewing your exhibits. Before that I have no independent recollection of having seen it. I'm not copied on it so ...
Q. Did you ever have any communications with Ms. Holmes about people that were close to Mr. Epstein?
A. I do not remember.
Q. You stated earlier that you knew that Mr. Epstein was a wealthy man. Is that a fair statement? You called him "collectible," was that because he had money?
MR. SCAROLA: He called him a billionaire

too.
MS. HADDAD: Billionaire.
THE WITNESS: I knew he was a billionaire.
BY MS. HADDAD:
Q. Do you have any independent recollection in the month of July 2009 of this case being intensified in any way such as going after those close to Mr. Epstein?
A. I don't remember that one way or the other.
Q. If you knew that Mr. Epstein was a billionaire, do you have any recollection of asking someone to investigate those close to Mr. Epstein to further your Ponzi scheme?
A. I don't have an independent recollection of that one way or the other.
Q. Do you recall if you ever directed the depositions to be taken of the people who were listed on the flight manifest that you saw?
A. I don't recall one way or the other. I may have told the investors that I was going to take the depositions without ever intending to take them, but I don't recall one way or the other.
Q. Are you familiar with a gentleman by the name of Mr. Rodriguez, Alfredo Rodriguez?
A. No.

Q. Never heard that name before?
A. Alfredo Rodriguez?
Q. Yes.
A. It's not ringing any bells to me.
Q. Do you remember hearing at your office with respect to Mr. Epstein's case that one of his former employees was willing to come forward with a big book of names?
A. I don't remember that one way or the other.
Q. You have no recollection of that.
Do you recall anyone approaching to ask if the office can purchase this book?
A. I don't recall that.
Q. Do you recall instructing any of the attorneys in your office to get an opinion from Kendall Coffey whether or not they can legally and legitimately purchase this book?
A. I don't recall that one way or the other.
[The Complaint referred to was marked for identification as Defendant's Exhibit 3.]
BY MS. HADDAD:
Q. Okay. I'm going to direct your attention to what's now Bates stamped as EP 002, which I'm sure you haven't seen before since you just said you didn't know who he was, but I'll give you a minute to look

over it.
A. This is rather long. Do you want to direct me to a specific portion of it?
Q. Sure. If you look at the Page Bates Stamp EP 004, Paragraph 5 and 6.
A. Okay. I read number five.
Q. Would you please read number six as well?
A. Okay.
Q. Does this refresh your memory as to whether or not anyone ever asked you in your office about purchasing a book?
A. It does not.
Q. Do you know that the cooperating witness was an attorney who worked for you at your firm?
A. I did not know that until you just said it right now.
Q. According to Paragraph Number 5, "The deposition of this Mr. Rodriguez occurred on July 27th, 2009;" is that correct?
MR. SCAROLA: Is it correct that that's what it says? I'm going to object to the form of the question, it's vague and ambiguous.
BY MS. HADDAD:
Q. That's what's listed in the federal complaint, correct?

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A. What does it say? Say it again.
Q. It says, "The first deposition occurred on July 27th," correct?
A. Yes.
Q. Some three days after the federal complaint was filed, correct, that we referenced earlier?
A. That's correct.
Q. And Paragraph 6 clearly delineates that in August 2009 a phone call was received by the cooperating witness that explained that this Mr. Rodriguez had a list of other purported victims or contact information for people who Mr. Edwards could also potentially bring lawsuits for -- on behalf of; is that correct?
A. I don't know one way or the other. You know, Tonja, just so this record is clear, you know, as I'm sitting here, I have a vague recollection of perhaps Ken Jenne coming, talking to me and telling me that someone in my office was going to cooperate with someone in this investigation. But for the life of me, I can't be certain of that. So much time has passed, but as I'm reading this, and it could be completely unrelated to this, I just want to make sure the record is a hundred percent clear, it's possible that Ken Jenne discussed that with me, but I don't

know who it was.
Q. You are testifying that you didn't know it had anything to do with the Epstein case, as you sit here now, you don't remember?
A. No, no, I don't have a specific recollection, and I want to just make sure so I answer all your questions completely, is that as I'm sitting here my recollection was refreshed that I have a vague recollection of having a conversation with Ken Jenne about the fact that someone in our office was going to cooperate as a confidential informant for some law enforcement agency, I just can't remember if it was the Epstein case or not.
Q. Do you recall what you said to Mr. Jenne about that?
A. No. What I just related to you is all I remember. And I'm not even sure it had anything to do with this.
Q. Who's Wayne Black?
A. Who?
Q. Wayne Black.
A. Sounds like the name of someone I hired, but I could be mistaken. I don't recall.
Q. Okay. You don't recall ever meeting Mr. Black?

A. I may have. I don't recall one way or the other. You have something that might refresh my recollection?
Q. Do you know what he does for a living?
A. I do know the name. Sounds familiar to me, but I can't recall one way or the other who he was or what he did.
Q. Did you instruct your office to begin investigating Mr. Epstein's pilot or his airplanes?
A. I do not recall one way or the other.
Q. You did testify that the flight manifest was the one document you recall for sure looking at in Mr. Epstein's case; is that correct?
A. Yes.
Q. And if it did, in fact, contain the names that you are purporting that it claimed or that you knew of, that would be something that would be juicy for the investors to further your Ponzi scheme that it was a collectible case; is that true?
A. I'm sorry, you have to repeat the question, Tonja. I don't understand what you just asked me.
Q. If these big names were on this list, as you seem to recall they were, that would be most helpful to you and your Ponzi scheme investors in convincing them it was a big case, right?

A. If they were on there, or if I lied to them and told them they were on there, or if Adler told me they were on there and I repeated, all those things would have been helpful to the Ponzi scheme.
Q. You stated earlier that you -- the only thing you looked at was the flight manifest because you were told to look at it. Is that still true?
A. That's not what I testified to. I testified that I flipped through other parts of the file and that I didn't remember what I had flipped through. I remember looking at the flight manifest because Mr. Adler told me about it.
Q. You said that you met these investors in your office, but there were no cameras in your office, correct?
A. I didn't have cameras specifically in my office.
Q. You had these investors in your office for this particular Epstein case?
A. Yes.
Q. Do you recall if it was during work hours or after work hours?
A. I do not recall.
Q. Typically when you were meeting with your potential Ponzi investors, did you meet them during

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work hours or after work hours?
A. Both.
Q. Did you always meet with them in your office or did you do it more socially down at Bova or elsewhere?
A. Both.
Q. But with this particular case, do you recall meeting them at least one time in your office where they could look through the files?
A. Actually, that group of investors were looking at a lot of different cases or at least multiple different cases that we were attempting to lure them into the Ponzi scheme utilizing, so I met with them on multiple occasions, both in my office and at restaurants.
Q. Who is Mike Fisten?
A. Mike Fisten was a law enforcement officer of some type that I hired.
Q. Why did you hire him?
A. He was a Ken Jenne suggestion.
Q. And were you hiring him to start up your company with Mr. Jenne, as you indicated earlier?
A. I don't recall what the purpose of hiring him was. It had nothing to do with what Ken Jenne was doing for us.

Q. So what did he do at RRA?
A. My best recollection is that he had been a former ADT officer and so it would reason that he would be working in our alcohol beverage practice that we were establishing.
Q. Do you know if he ever did any work for your firm as an investigator?
A. He may have. I don't have a specific recollection one way or the other.
Q. Did you ever speak to the press about the Epstein case?
A. I don't have a recollection one way or the other.
Q. Did you ever have Kip utilize the Epstein case to put any publicity or spin out there with respect to the case?
A. I don't have a specific recollection of that one way or the other.
Q. Did you ever instruct Brad or Russ to talk to the press about the case? We'll start with Brad then Russ.
A. I do not specifically recall getting involved at the publicity level of that case. I don't have a recollection one way or the other.
Q. Would that publicity have been good for your

Ponzi scheme investors?
A. Not really.
Q. Would it have given more legitimacy to your allegation that it was a good case in which they should invest?
A. In the way that I was selling the Ponzi settlements, it would have likely been overkill.
Q. So did you ever instruct them not to speak to the press about the case?
A. I don't recall that either one way or the other.
Q. If it had gotten out there that the cases had not, in fact, settled, as you were claiming when you were selling the settlement, would that have hindered your case, your Ponzi investor's case?
A. Not really because they would have no way of knowing if I had created a fake plaintiff's name. I mean, there could have been something in the news that -- and I don't know that there was -- there could have been something in the news that says none of this settled. And I just simply would have created a fake name with my co-conspirators, created a fake set of settlement documents and handle it that way.
Q. Did you know where Mr. Epstein lived?
A. I only knew that he was from Palm Beach,

other than that, no.
Q. Okay. In 2009, did you ever have any firm meetings?
A. Of any type?
Q. Of any type, in general, firm meetings.
A. I'm certain I did.
Q. Do you recall about how many?
A. I do not recall.
Q. Did you ever have any partner meetings?
A. Yes.
Q. Do you recall how many?
A. I do not.
Q. Do you recall how many partners you had at the firm in 2009?
A. I do not.
Q. Do you recall how many fundraisers you had at your home in 2009?
A. I do not.
Q. More than 10?
A. I'd be guessing, Tonja.
Q. Okay.
A. It's easy enough to check, there's state and federal records of all that stuff.
Q. In 2009, did you still require the attorneys from your firm to attend the fundraisers you would

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have?
A. You said "still require," which would have meant that I testified --
Q. Sorry.
A. -- previously that it was requiring them.
Q. Did you require attorneys at your firm to attend your fundraisers?
A. I asked them to, I urged them to, I tried to cajole them into coming, but it wasn't an absolute requirement.
Q. Do you recall between April and July of 2009 how many fundraisers you would have had?
A. I do not.
Q. Did you have fundraisers anywhere besides your home in 2009?
A. I probably did, but I don't recall without seeing the documents. If you have the invitation or the e-mails, that would help me.
Q. Did you hold fundraisers at your office in 2009?
A. I may have. That wouldn't have been unusual, but I don't have a specific recollection.
Q. Did you ever meet any of the plaintiffs in the Epstein case?
A. I don't have a specific recollection of

that.
Q. Do you recall ever revving copies of e-mails from Mr. Jenne with respect to the plaintiffs in the case that the subject matter would say "information we need to use"?
A. I don't recall that one way or the other. It's certainly possible.
Q. Do you recall ever reviewing anything that was titled "causes of action against Epstein"?
A. I do not have a specific recollection of that one way or the other.
Q. Do you recall ever reviewing with Mr. Jenne or any other investigator in your firm any information regarding Mr. Epstein's house staff or airplane staff?
A. I do don't recall that one way or the other. I may have, I may not have.
Q. Who is Bill Berger?
A. A former Palm Beach judge that we hired.
Q. Okay. What was his role at your firm?
A. He was a shareholder.
Q. What kind of practice?
A. Litigating cases.
Q. What kind of practice did he litigate? What kind of cases did he litigate?
A. I don't recall specifically.

Q. When did you hire him?
A. 2008 or 2009. I don't have a specific recollection.
Q. If you hired lawyers who didn't have a book of business, what kind of practice did they do at your office?
A. It depended upon the lawyer. I would have tried to get them to work with other lawyers in an area that they either were proficient in or wanted to become proficient in.
Q. Okay. You had a meeting at your office during which you were asking about information regarding referring attorneys, attorneys who had referred business to the firm. Do you know what I'm talking about? I believe it was back in December of '08 or early 2009.
A. The way you are characterizing that meeting, I had a lot of meetings like that.
Q. What was the purpose of those?
A. You are going to have to be more specific for me, Tonja.
Q. Let's start generally then. What was -- you said you had many meetings like that. Tell me what these meetings were for?
A. Making sure that we were maximizing

generation of business into the law form.
Q. What kind of business, legitimate business or the other --
A. Legitimate business.
Q. Sorry, I couldn't hear you.
A. Legitimate business. The general meetings that you are discussing, that was legitimate business.
Q. So there was a meeting for all attorneys to attend regarding generating business, those meetings were for the legitimate business?
A. If it was addressed to all attorneys, yes.
Q. Okay. And if an e-mail went out to all attorneys, did paralegals and support staff get it as well or was it just directed to the attorneys?
A. Certain support staff probably were on that list, like my CFO and COO, and perhaps my IT people, but it was general for the attorneys.
Q. With respect to your IT people, did you have the capability to review e-mails and internet activity of all of your employees?
A. I did.
Q. Including attorneys?
A. I did.
Q. Did you ever utilize that tool?
A. Very infrequently. It was a pain because I

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had to have Curtis Renie or Bill actually come into my office, set up a special icon to allow me to do that. It was a real pain, so it was rare.

Q. Who else attended the meetings that you had with the Clockwork group with respect to the investors in the Epstein case?

A. There were multiple meetings with what I'll call the Clockwork investors at various points in time. A variety of people came in and out of the meetings. Some of the meetings occurred down in Bova. Other people came up to the meetings. Some of the meetings involved Michael Szafranski, our fake independent verifier. Some of the meetings may have involved bankers and the like. I cannot tell you specifically who was at those meetings.

Q. The specific meetings that we are talking about with -- where you left the boxes at your office, do you recall who else was there with you at that meeting?

A. I only remember there being a handful of people from the investment group and myself. I don't recall -- and I remember the guys bringing the boxes the down, but they didn't stay for the meeting. There may have been other people there, I don't recall one way or the other who it was.

Q. If the expenditures were being made on a case that were substantial, did you have to approve them or did you have a specific practice for them?

A. The head of a practice group could basically approve them but Irene, our CFO, would generally run them by me before she actually cut the check. If I wasn't around she'd run it by Stu.

Q. So as the equity partners you had the authority to make the determination what funds could and could not be expended?

A. As the shareholders, as the two 50 percent shareholders, we controlled the finances.

Q. And if Irene was coming to you to tell you what the funding was for, to get approval rather, would she tell you specifically what the funding was for or just tell you "we need $100,000"?

A. No, if it was a substantial expense --

Q. Tell me what you deem as substantial.

A. That would have been -- substantial to me would have been based upon how much money we had in our coffers at the time. So, if it was one of those periods of time where we had 20 or $30 million floating around the law firm, Irene probably would have just written a check without even letting me know we were writing it. If it was one of those times

where we owed 20, $30 million in Ponzi payments out and she needed to write a check for even $5,000, she probably would have checked with me on that. So substantial and whether or not she would have checked with me depended upon the circumstance at the time.

Q. You stated earlier, and I think I'll get this quote right, that 2009 was a dismal year; is that correct?

A. For the legitimate law firm business, it was a dismal year.

Q. So in the months immediately preceding the dissolution of RRA, July to October of 2009, what would you consider a substantial expense that had to be approved?

A. It would vary literally from day-to-day.

Q. Do you have any independent recollection of how you were doing in, say, July 2009?

A. The legitimate business was always doing poorly in 2009, as far as I was concerned.

Q. So would you have --

A. The Ponzi scheme had its moments of significant wealth and significant poverty, so it varied from time to time. It was a daily thing. Sometimes it was hourly. It just depended upon what was coming in and what needed to go out.

Q. So would you have to utilize the illegitimate funds to fund the legitimate cases at times?

A. Yes.

Q. And that varied daily you said?

A. Well, all the money was commingled together, so we used whatever funds were in there to fund both the legitimate and the illegitimate financial requirements of the firm, the Ponzi scheme and other legitimate and illegitimate things that were going on.

Q. If an outside agency or investigator was being utilized for a case and they needed a signed retainer agreement with your firm, would you have to approve that?

A. It would depend upon the significance of the expense. I didn't necessarily get involved in every retention of every expert in every case.

Q. Okay. So it would depend on the cost or the nature of the case?

A. Who the lawyer was, their level of expertise, all things of that nature.

Q. If it was this gentleman who you have no recollection of meeting, Mr. Black, and the attorney was Mr. Edwards, was that something you needed to look over?

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A. Did Wayne Black work for Ron Cacciatore?
Q. Are you asking me --
A. I'm asking anyone in the room who wants to talk to me.
Q. I love to talk to you, but I don't know the answer to that question. He might have. Brad might be able to tell you.
MR. EDWARDS: No.
THE WITNESS: When you said Wayne Black's name again and that I hired him to do something, I seem to think that he may have been associated in some way with Mr. Cacciatore, but I'm not sure one way or the other. I don't remember whether or not I met Mr. Black, it's possible I did, it's also possible I did not. And I don't have an independent recollection of retaining him to do anything or whether I was part and parcel of the decision if we did, in fact, retain him, whether I was part and parcel of the decision to retain him.
BY MS. HADDAD:
Q. Traveling out of state for depositions for the particular cases, did you have to approve that?
A. It would depend upon who the lawyers were, the significance of the expense. It would have been case by case. I certainly would not have been

approving or disapproving Mr. Nurik's travel, Mr. Rosenfeldt's travel, Mr. Boden's travel, Mr. Lippman's travel. That was their own thing.
If a younger lawyer like a Shawn Birken came to me and said he need to travel out of state for something, if it was just for a deposition, I wouldn't have gotten involved in that unless he was telling my CFO, Ms. Stay, that he wanted to fly first class and stay in the Ritz Carlton, then I would have gotten involved. But other than that, no. The firm was too big for me to get involved on a daily basis with all that stuff.
Q. If Brad had to go out of state to take a deposition, you wouldn't be the person to approve or disapprove that?
A. Russ Adler would have handled that. And if there was an issue, Russ would have come to me. And I don't know what the relationship was specifically between Brad and Russ, but it's certainly possible that Brad just was going to go do what he needed to do to properly handle the case and I would have trusted him to do that.
MS. HADDAD: Can we just take a second. We are going to take a minute, okay?
THE WITNESS: Sure.

[Short recess taken.]
FURTHER DIRECT EXAMINATION
BY MR. GOLDBERGER:
Q. All right. Mr. Rothstein, Jack Goldberger, I'm going to ask you some questions now. You testified that you knew Jeffrey Epstein was a billionaire. You did testify to that today, correct?
A. Yes.
Q. Okay. Tell me how you knew that. How did you know that Mr. Epstein was a billionaire?
A. Russ Adler told me. I looked him up on the internet.
Q. What did you look on the internet about Mr. Epstein?
A. I don't recall, but I remember looking up an seeing that he was very wealthy, that he was a billionaire.
Q. Okay. So as far as learning that Mr. Epstein was a billionaire, you learned via two ways, one was from Russ Adler, correct? Is that correct?
A. Yes, sir.
Q. And the other was through looking up Mr. Epstein on the internet, correct?
A. Yes.

Q. Okay. And you don't know what you reviewed on the internet in an effort to determine that Mr. Epstein was a billionaire; is that correct?
A. I do not recall.
Q. Do you know when you did that?
A. I do not.
Q. Was it prior to your needing to use the Epstein case to further your Ponzi scheme?
A. Yes.
Q. Okay. So prior to -- I think you indicated that you needed an influx of money at some point and that's when you decided to use the Epstein case in furtherance of the Ponzi scheme; is that correct?
A. Yes.
Q. So prior to that time though, prior to determining that you needed to use the Epstein case for the Ponzi scheme, you looked up Mr. Epstein and you spoke to Mr. Adler about his work; is that correct?
A. Yes.
Q. Why did you do that, Mr. Rothstein, if you weren't using the Epstein case at that point in your Ponzi scheme?
A. Because it was a legitimate case in the legitimate portion of RRA that I had reason to believe

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from speaking to Mr. Adler could bring in a significant amount of money to the firm.
Q. At that time Mr. Adler was one of your co-conspirators in the Ponzi scheme; is that correct?
A. By this time, yes, sir.
Q. Okay. When did Mr. Adler become a co-conspirator in your Ponzi scheme?
A. I don't recall the specific date.
Q. Was it before or after Mr. Adler recommended that Brad Edwards be hired at your firm?
A. Before.
Q. So before Brad Edwards was hired at RRA, Russell Adler was a co-conspirator of yours in the illegal part of the RRA firm; is that correct?
A. Yes.
Q. Then after that time you hired -- Mr. Edwards was hired after Adler was your co-conspirator? You are laughing, you are smiling, why is that, sir?
A. Because when you say "RRA" that way, the speaker sounds, it sounds like you are roaring.
Q. Okay. I'll just say Rothstein, how about that? You know what I'm talking about if I just say Rothstein.
A. RRA is fine.

Q. Okay. So Adler is your co-conspirator in the Ponzi scheme at the time that Brad Edwards is hired, correct?
A. Yes.
Q. Okay. Was it Adler who recommended to you that Brad Edwards be hired?
A. Yes. He was one of the people.
Q. Who else recommended that Edwards be hired?
A. I don't have a specific recollection of who it was, but others did.
Q. All right. But you have a recollection of Adler being one of the people, so let's talk about that, all right?
What did Adler tell you about Brad Edwards when you hired him? Did he tell you that he had these Epstein cases or an Epstein case in the fold?
A. Among other things, yes.
Q. What else did he tell you?
A. Told me he was a great lawyer and a great guy.
Q. Did he tell you what his history was, what Edwards' history was prior to coming to the Rothstein firm?
A. I'm certain that I asked him, but I don't have a specific recollection of that conversation.

Q. What did Adler tell you about the Epstein case that Edwards had at the time you were contemplating hiring him to become a member of the Rothstein firm?
A. He told me that it was a huge case involving a billionaire pedophile and that it was a winner.
Q. Did you, when you heard that, did you think that that was a case that could become part of your Ponzi scheme?
A. No, I actually thought of it as a way to earn legitimate money to help me out of the Ponzi scheme.
Q. So at the time you hired Mr. Edwards and you were talking to Adler about Edwards, you were trying to get out from under the Ponzi scheme?
A. In the bulk of 2009 I was praying for some sort of legitimate influx of money to get out of the Ponzi scheme.
Q. Okay. So now Adler tells you about this Brad Edwards guy, did you know Brad Edwards before Adler talked to you about him? Had you run into him?
A. I may have. I don't have a specific recollection one way or the other.
Q. Okay. So now he tells you that you should consider hiring Brad Edwards, this is your

co-conspirator talking to you, right? Is that correct?
A. Yes.
Q. And he says, by the way, he's got this great Epstein case involving this billionaire, correct?
A. Yes.
Q. Presumably then you had a meeting with Brad Edwards when you met him; is that correct?
MR. SCAROLA: Presumably he had a meeting when he met him?
MR. GOLDBERGER: I'm sorry, Mr. Scarola was cutting you off when you answered, so go ahead, answer again.
MR. SCAROLA: I didn't understand the question.
BY MR. GOLDBERGER:
Q. Do you understand the question, Mr. Rothstein?
A. I'm not sure I do because you asked me if I had a meeting when I met him and I think that meeting him is a meeting.
Q. Well, there was a meeting, correct?
A. I most likely met him before I hired him. I most likely talked to him before I hired him because that was my general way of doing business. It's all

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1 together possible that I gave Russ the okay to hire
2 him before, I just don't have a specific recollection
3 one way or the other.
4 Q. At some point, I take it, you learned,
5 whether you sat in on a meeting when Mr. Edwards was
6 hired or whether your co-conspirator hired him, at
7 some point you learned that Mr. Edwards, in fact, had
8 been hired by the firm; is that correct?
9 A. I'm certain that I gave the final okay to
10 hire him.
11 Q. Okay. When you were giving the final okay
12 to hire him, I assume there had to be discussion of
13 the money that he was going to be paid, correct?
14 A. With somebody, yes.
15 Q. Certainly with Mr. Edwards, right? I assume
16 he wanted to know how much he was getting paid.
17 A. Yes, but I don't have a specific
18 recollection of whether I discussed that with him or
19 whether I authorized Adler or maybe even Rosenfeldt to
20 discuss it with him. I don't recall.
21 Q. Do you have the slightest idea how much
22 money Mr. Edwards was paid when he first joined the
23 firm, what his salary was?
24 A. I don't have an independent recollection.
25 Q. Generally someone like Mr. Edwards at his

1 level of accomplishment and his age, you know what the
2 general salary would have been at your firm?
3 A. It didn't work that way.
4 Q. I see. Tell me how it worked.
5 A. It's a case-by-case basis.
6 Q. Tell me how it worked.
7 A. Case-by-case basis.
8 Q. And how did you make that determination on a
9 case-by-case basis?
10 A. Actual book of business, potential book of
11 business, potentiality for growth, character, what he
12 brought to the table, and obviously a function of how
13 much money we had available at the time.
14 Q. Okay. And you don't have any recollection
15 of the machinations that occurred in determining what
16 Mr. Edwards salary would be, correct?
17 A. I do not.
18 Q. But certainly one of the things you would
19 consider would be the book of business, i.e. the
20 Epstein case, right?
21 A. I'm certain that I did consider the Epstein
22 case.
23 Q. Do you know whether he brought any other
24 book of business --
25 A. But I'm also certain it wasn't the only

1 factor I considered.
2 Q. All right. Do you know whether he brought,
3 in his book of business, do you know whether he
4 brought any other cases to the firm other than the
5 Epstein case?
6 A. I don't recall one way or the other.
7 Q. Okay. Do you know whether your -- well, bad
8 question, I won't ask that.
9 Now, you've talked a lot about Ken Jenne
10 here this morning. Was Ken Jenne part of your Ponzi
11 scheme?
12 A. No, sir.
13 Q. Had nothing to do with it, right?
14 A. That's correct.
15 Q. Other than his having -- working for you as
16 an investigator, he was not one of your
17 co-conspirators, right?
18 A. He didn't work for me as an investigator, he
19 worked for me heading up our investigative division,
20 heading up our internal security, heading up my
21 personal security, and acting as a political advisor
22 to me.
23 Q. Okay. Did he serve any kind of
24 investigative function at all, after all, he was a law
25 enforcement officer at one point in his career?

1 A. I note that he assisted the other people at
2 the firm that were doing the investigative work. I
3 don't know if he personally did investigative work.
4 He may have.
5 Q. Do you know whether Mr. Jenne, in his role
6 as your advisor or your political consultant, do you
7 know if he was involved in any kind of illegality,
8 illegal wire tapping or anything like that while he
9 was at Rothstein?
10 MR. SCAROLA: Excuse me, I'm going to
11 object to the form of the question, vague and
12 ambiguous.
13 THE WITNESS: To my knowledge he was not.
14 BY MR. GOLDBERGER:
15 Q. To your knowledge, no?
16 A. Correct.
17 Q. Okay. You talked about having a bunch of
18 fundraisers, I know you had a bunch of fundraisers
19 that was kind of a deal at Rothstein. This was kind
20 of a rock star law firm, right? I mean, you had lots
21 of fundraisers, lots of parties, right? Was that the
22 image you were trying to present?
23 A. In reality that's the way we were.
24 Q. Okay.
25 A. A lot of young lawyers having a good time,

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trying to make money.
Q. And these young lawyers, would you consider Mr. Edwards to be a young lawyer or a middle-aged lawyer?
A. Young lawyer.
Q. Okay. Was he one of young lawyers that came to these fundraisers at your home?
A. I don't recall whether he was there or not. I recall him being at some, but I didn't know if he was at all of them.
Q. Okay. You do recall him coming to some of the fundraisers, though, correct?
A. I recall him being at my home. It may have been for firm parties or other parties, it may have been for fundraisers there.
Q. And that was during the time period that the Ponzi scheme was still going on, correct?
A. Yes.
Q. Did Adler ever the tell you about any discussions he had with Brad Edwards about the illegal part of the operations at Rothstein?
A. Can you reask the question, please?
Q. Sure. Sure.
Did Russell Adler ever tell you -- Russell Adler is your co-conspirator, we've established that.

Did Russell Adler in the furtherance of your conspiracy ever tell you he had discussed with Brad Edwards about the illegal activities at RRA?
A. No.
Q. Now, you testified when asked about whether the press -- if you were involved in asking the press to run with the Epstein story, you said something to the effect, "the way I was selling the Ponzi scheme it would be overkill."
I didn't understand your answer like you didn't understand some of my questions, so I'd like you to kind of tell me what you meant by that.
A. I was selling purportedly confidential settlements. Confidentiality was the hallmark of the Ponzi scheme, so too much publicity would have created a problem for me in the sale of what was supposed to be a completely confidential settlement.
Q. I think what you are telling me, and I don't want to misstate what I think you are telling me, but is it true that you felt some publicity would be okay but too much would be counter to the purposes of the conspiracy. Is that a fair statement?
A. The way I was thinking about it at the time this was going on was that some publicity would assist in establishing for the potential investors that there

was a real case going on, but that within that I would have to create some sort of fictions in order to sell the fake product.
Q. Okay. At the time that you decided to use the Epstein case as part of your illicit Ponzi scheme theme, I think you testified earlier today, when you were in some dire straights, you needed an influx of money, right?
A. Yes.
Q. That's when you decided to use the Epstein matters, correct?
A. Yes.
Q. Okay. And you knew, I assume, being the Ponzi scheme mastermind here, that you needed to make sure that you had at least a working knowledge of the Epstein case so that you could answer questions to the investors. I recognize that you left the room and told them to look at it, but you had to some knowledge of the case, right?
MR. SCAROLA: Counsel, that's a misrepresentation of what the earlier testimony was. I object, no proper predicate.
MR. GOLDBERGER: Okay, let's go through the whole thing again.
MR. SCAROLA: No, you are not going to go

through the whole thing again. Just because we have tolerated two lawyers asking questions, does not mean we are going to tolerate two lawyers asking the same questions.
MR. GOLDBERGER: Your objection is noted.
BY MR. GOLDBERGER:
Q. Okay. So let's talk about your need to use the Epstein case to further your conspiracy. You needed an influx of money, did you not?
A. Yes.
Q. Okay. You decided to use the Epstein case for that purpose, right?
A. Yes.
Q. And in order to use the Epstein case, you were going to meet with the investors and pitch the Epstein case with the investors, correct?
A. Yes.
Q. And in an effort to pitch the case to the investors, you had to have some knowledge of the case, did you not?
A. Some level of knowledge, yes, sir.
Q. Okay. And in order to gain that knowledge, you spoke to your co-conspirator, Russell Adler; is that correct?
A. That's one of the things I did.

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Q. Okay. And do you remember what Adler told you specifically about the Epstein case that helped you have a basis of information to sell it to the investors?

A. Other than him telling me that it was a billionaire pedophile, other than him telling me about the flight manifest, I don't have a specific recollection of what else he told me.

Q. Did you actually look at the flight manifest at sometime, Mr. Rothstein?

A. Yes, sir.

Q. And what was it about those flight manifests that you felt would help you pitch the Epstein case to the investor?

A. I don't remember who specifically was on it, but I remember it looking juicy.

Q. You don't know who was on it?

A. I don't recall.

Q. Did you add any names to that manifest at any time?

A. I had -- you mean physically write names on there?

Q. Any way you want to interpret -- did you -- not physically write any names on the manifest, but did you tell the investors that there were names on

the manifest that were actually not on the manifest?

A. I told the investors that there were other people that appeared on manifests, I don't recall whether it was that manifest or other manifests, and I got the names of those people from Russ Adler. Whether or not they actually appeared on the manifest or another manifest, I do not know.

Q. What names did you get from Russ Adler?

A. Russ Adler told me that Bill Clinton flew on Mr. Epstein's plane and that Prince Andrew flew on Mr. Epstein's plane.

Q. And is it your testimony today that you never looked at the manifest to see whether Bill Clinton or Prince Andrew's name were really on the manifest that you were going to use to pitch the investors?

A. It was my understanding they didn't have all the manifests.

Q. Okay. Did you ever ask for the manifests that purportedly had the name of Bill Clinton or Prince Andrew on it?

A. I probably did, but I don't have a specific recollection one way or the other.

Q. When you say you didn't have all the manifests, were all the manifests in your office --

were all the manifests within the law firm of RRA and you simply didn't have them in your office?

A. I have no idea one way or the other.

Q. Okay.

A. I did not have them.

Q. You were told by Russell Adler that you didn't have -- that you physically didn't have all the manifests, correct?

A. That's correct.

Q. But you don't know whether they were in the building somewhere, these other supposed manifests?

A. I have no idea one way or the other.

Q. You never asked for proof that Bill Clinton or Prince Andrew's name were on a manifest somewhere?

A. I didn't say that. I may very well have asked Adler or Ken Jenne to find the other manifests.

Q. Were you ever shown a manifest with the name Bill Clinton or the name Prince Andrew on them?

A. I do not recall one way or the other whether I saw that or not. I remember Adler telling me about it and then me repeating that information to the investors based upon Mr. Adler's representations to me.

Q. Now, you testified that you were told that the Epstein cases were "legitimate cases. Do you

remember that testimony you gave this morning?

A. Yes.

Q. And you remember your testimony that you were told they were legitimate cases by both Russ Adler and Brad Edwards, do you remember that?

A. I never said that Mr. Edwards or Mr. Adler said, "Scott, these are legitimate cases." I didn't question them as to their legitimacy.

Q. You did testify that you talked to Brad Edwards about the Epstein cases; is that correct?

MR. SCAROLA: No, counsel, that is a misrepresentation of the earlier testimony.

MR. GOLDBERGER: No, it's not.

BY MR. GOLDBERGER:

Q. Did you talk to Brad Edwards about the Epstein cases?

A. I do not recall one way or the other. That was my prior testimony, that's still my testimony. I don't -- I do not recall.

Q. We'll let the record speak --

A. I know I spoke to Adler about it.

Q. We'll let the record speak for itself. Your testimony, as I am questioning you now, is that you do not recall whether you spoke to Brad Edwards about the Epstein cases; is that correct?

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A. If you are including within that me walking past Brad in the hall and saying, "Hey, Brad how are you? How is the Epstein stuff going?" Then it's very likely that I talked to him about it in that manner. But I have no specific recollection one way or the other as to having any lengthy conversations with Mr. Edwards about the case.

I had a co-conspirator who was deeply involved in the Ponzi scheme that I could go to to get any information I wanted, Mr. Adler. I didn't need to go to Mr. Edwards.

Q. So if you had a question of your co-conspirator, Russell Adler, about the Epstein case, you would go ask Adler and would Adler always have the answer for you or would he say he would get you the answer?

A. Both.

Q. When he didn't have the answer, do you know who he was getting the answer from?

MR. SCAROLA: Objection, predicate.

THE WITNESS: I don't know who he was getting it from and I may have contacted other people in the office who were working on the file to ask. I may have asked Mr. Jenne, I may have asked Ms. Holmes, I many have asked a whole myriad of people.

BY MR. GOLDBERGER:

Q. So Ms. Holmes was working on the Epstein cases?

A. It's my refreshed recollection from seeing one of those e-mails that she must have been.

Q. Okay. And Ms. Holmes you said was a former federal law enforcement officer, was that your testimony?

A. Yes.

Q. You don't know whether she was FBI or IRS, correct?

A. I don't remember.

Q. Okay. And upon reflection, do you know whether she was hired without your say-so based on what Mr. Jenne told you or did you meet with her?

A. No, I actually -- I remember meeting with Ms. Holmes.

Q. Okay. What do you remember about that meeting?

A. I remember talking about her relative who was a judge. I remember her telling me about her time in law enforcement. I just don't remember which agency.

Q. Did she tell you why she left law enforcement?

A. She may have, I don't recall one way or the other.

Q. Did you ever ask Ms. Holmes to use any of her prior contacts in law enforcement to assist you in the Ponzi scheme to get information for you?

A. The question is kind of convoluted because the way you are asking it, it seems like you are intimating that Ms. Holmes knew. I may have asked Ms. Holmes to get me information that I was going to utilize with my co-conspirators in the Ponzi scheme, but Ms. Holmes did not know that there was a Ponzi scheme going on.

Q. All right. So you may have asked Ms. Holmes to try and get some information for you from her contacts in law enforcement, but it's your testimony, and I don't dispute it, it's your testimony that she knew nothing about the Ponzi scheme, correct?

A. I may have, I may not have. I do not remember and she absolutely knew nothing about the Ponzi scheme.

Q. Okay. Now, we talked about Brad Edwards getting paid and the multilevel ways in which you determined what a person's salary was. Do you know whether Brad Edwards got any bonuses along the way once the Epstein case was used as part of the Ponzi

scheme?

A. He did not.

Q. So he was --

A. If he got a bonus, it was something he earned.

Q. Did you make a determination as to what that bonus would be?

A. If he got a bonus, I would have been instrumental in determining it. You can determine if he got a bonus by looking at our financial records, I don't have an independent recollection one way or the other.

Q. So you don't know whether he got a bonus at all, correct?

A. That's correct.

Q. So I assume that if he got a bonus you wouldn't know whether it occurred before or after the Epstein case was used as part of the Ponzi scheme?

A. I don't know if he got a bonus, which means I wouldn't know the time frame.

Q. But we would learn -- you are instructing us, we would learn that by looking at when the Epstein case was brought into the Ponzi scheme and we learn that by looking at these -- what was the group that it was used to pitch to?

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A. Clockwork.
Q. So we would look at when the Clockwork group was brought into this and the Epstein case was used then and then we would look at the payroll records to see whether Mr. Edwards got a bonus after the Clockwork group was brought into the Ponzi scheme, correct?
A. From a timing perspective, yes. But Mr. Edwards had nothing to do with the Ponzi scheme, nor was he rewarded even surreptitiously without his knowledge for helping me with the Ponzi scheme. If he was rewarded it was because he deserved, I felt he deserved a reward, having nothing to do with the Ponzi scheme. The bulk of this law firm had nothing to do with the Ponzi scheme.
Q. I think you testified already, though, that money was fundable in the firm, right? I mean, you know, illegal money was used for legitimate purposes, correct?
A. Yes.
Q. Okay. So, for example, investigations that were done with the Epstein case, it's very possible that legitimate Ponzi money was used to finance those investigations?
A. I'd be guessing. It's certainly possible

because all the money went into a whole series of pots, and if you look at, most of the pots were trust accounts. If you look back, you look to see what my CFO, who was also a co-conspirator was doing, she was pulling the money from wherever she needed to to fund whatever she needed to fund.
MR. LAVECCHIO: Off the record a second.
[Discussion off the record.]
BY MR. GOLDBERGER:
Q. Let me circle back to what you needed to learn about the Epstein cases to help make your pitch to the investors.
You talked about the manifest already, correct, the flight manifest?
A. Yes.
Q. Okay. What else did you want to learn about the case or what else did you learn about the case so that you were conversant when you spoke to the investors about the Epstein case?
A. I recall asking someone what the causes of action were.
Q. Okay. Did you understand what they were?
A. I likely did at the time, I don't remember what they were now.
Q. Okay. Do you know which case we are talking

about? By the way, you had a number of Epstein cases in-house, do you know which case you were talking about?
A. As I sit here today, no, sir, I don't remember.
Q. Was it a state case or a federal case?
A. I don't remember one way or the other.
Q. All right.
A. I utilized all those boxes all together. I don't remember which one I sold them.
Q. And the exhibits --
A. It's something completely fictitious that I made up that I told them.
Q. The exhibit that you were shown earlier, Exhibit Number 1, that's the long multi-page federal lawsuit. Do you know whether that was part of the information that you reviewed or shown to the investors when you were pitching to them?
A. I do not remember one way or the other.
Q. Okay. Now, did you make any effort to learn from your co-conspirator who the plaintiffs were in this case, what kind of women they were?
A. Only that they were underage.
Q. Did anyone tell you that these women had -- some of these women had a history of prostitution?

A. They may have told me that, I wouldn't have cared one way or the other.
Q. Why would you not have cared about that, Mr. Rothstein?
A. It had nothing to do with the sale of the Ponzi scheme settlements.
Q. Okay. Were you told by anyone whether any of the women involved as plaintiffs in the case may have worked at adult clubs in the past? I mean strip clubs, let's call it what it is.
A. I may have been told that one way or the other. But again, it had nothing to do with the Ponzi scheme sale of fake settlements.
Q. As part of the information that you were told by you co-conspirator, Russell Adler, were you told that some of the plaintiffs that you had in-house had travelled on Mr. Epstein's airplane?
A. I believe Russ did tell me that.
Q. You know, in fact, that that was not true, correct?
A. I have no idea one way or the other, nor did I care.
Q. But your co-conspirator told you that, right?
A. Mr. Adler did, in fact, tell me that certain

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of the underage women had travelled on Mr. Epstein's plane.
Q. Did you ever meet any of the plaintiffs?
MR. SCAROLA: That's question that's been asked and answered.
THE WITNESS: I do not have a specific recollection of ever meeting them.
MR. SCAROLA: You are exhausting my indulgence.
MR. GOLDBERGER: Fair enough.
MR. SCAROLA: You've exhausted my indulgence.
BY MR. GOLDBERGER:
Q. Do you know whether any of your investigators at the firm had any kind of high tech surveillance equipment or, you know, wire tapping equipment?
A. I believe they did.
Q. Do you know whether this was legal stuff or illegal staff?
A. I did not know, nor did I care.
Q. Do you know if any of that stuff was used to either wire tap or surveil Mr. Epstein?
A. I do not know one way or the other.
Q. What sort of equipment did you know that

they had, meaning your investigators?
A. I had told Mr. Jenne and others involved in the investigation arm of RRA to get whatever equipment they thought they needed and to get the best stuff that they could get. What they actually did, I can't tell you.
Q. You know as part of the Epstein litigation, and I'm talking about now after your using it in the Ponzi scheme, do you know whether anyone at your firm attempted to depose ex-President Bill Clinton?
A. I don't recall that, sir.
Q. Okay. How about Donald Trump, same question?
A. I don't recall that. As a matter of fact, we had represented Trump in some things, we had some pretty close ties with him, so I can't imagine that they would have done that with my authority.
Q. Okay.
A. I don't recall that.
Q. Do you know whether Adler would have -- would Adler have the authorize to do that without getting your permission?
A. The authority, no. Might he have tried, yes.
Q. Okay. How about Alan Dershowitz, do you

have any knowledge of your firm's attempt during the Ponzi scheme to depose Alan Dershowitz?
A. No, sir. I don't have a recollection of one way or the other.
Q. Okay. The name Kendall Coffey was brought up before. Do you know who Kendall Coffey is?
A. Yes.
Q. Who do you know him to be?
A. Former U.S. attorney, current criminal defense lawyer.
Q. Was he a friendship of the firm's?
A. Represented RRA when I fled the country.
Q. So he was a friend of the firm, or a friend of yours at least, right?
A. He wasn't a friend of mine.
Q. A friend of the firm?
A. No idea.
Q. He represented them when I fled the country. I remember him coming in and doing like a show and tell in my office on TV.
MR. GOLDBERGER: Patience gets rewarded. I'm done.
Thank you, Mr. Rothstein. That's all the questions that I have.
THE WITNESS: You are welcome.

CROSS EXAMINATION
BY MR. SCAROLA:
Q. Mr. Rothstein, again, Jack Scarola on behalf of Brad Edwards. I want you to assume that Brad has testified under oath that you never had a substantive discussion with him regarding the Epstein case. Do you have any basis whatsoever to question the accuracy of that testimony?
A. I do not.
Q. I want you to assume that Brad has or will testify under oath that while you were copied on e-mails, you never attended a single legitimate meeting regarding the legitimate prosecution of the Epstein cases. Do you have any basis whatsoever to question the accuracy of that testimony?
A. No, sir.
Q. I want you to assume that Brad has or will testify under oath that you never directed the filing of any documents in the Epstein case, including the July federal complaint that's been marked as an exhibit to your deposition. Do you have any reason whatsoever to question the accuracy of that testimony?
A. No, sir.
Q. I want you to assume that Brad has or will testify under oath that you never directed the taking

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of a single deposition, or the propounding of any discovery in the Epstein cases. Do you have any reason to doubt the accuracy of that testimony?

A. No, sir.

Q. I want you to assume that Brad has or will testify that you did not provide any input whatsoever into the handling of the legitimate Epstein cases. Do you have any reason whatsoever to doubt the accuracy of that testimony?

A. No, sir.

Q. I want you to assume that Brad has or will testify that you never met any of the legitimate plaintiffs in the Epstein cases. Do you have any reason to doubt the accuracy of that testimony?

A. No, sir.

MS. HADDAD: I'm going to object to these same questions you keep asking, because Mr. Rothstein has testified at nauseam that he doesn't recall any of this and now you are asking him to bolster Mr. Edwards' either already given or purported testimony when he's testified he doesn't recall it.

BY MR. SCAROLA:

Q. I want you to assume that Brad has or will testify under oath that you never asked him once to report back to you on any factual matters regarding

the Epstein case. Do you have any reason to doubt the accuracy of that testimony?

A. No, sir.

Q. I want you to assume that Brad has testified repeatedly that he had absolutely no involvement in or knowledge of any illegal activity engaged in by you or any other RRA lawyer. Do you have any reason to doubt the accuracy of that testimony?

A. No, sir.

Q. I want to talk to you briefly about your personal perceptions of the significance of the testimony that you are giving today. If Brad Edwards had, in fact, been a participant in any of the illegal activities that you have been questioned about at any stage of this very lengthy deposition, and you knowingly concealed Brad Edwards' participation, what do you understand the personal consequences to be as a consequence of your having knowingly concealed Brad Edwards' participation?

A. I'll be violating my agreement with the United States government and I would run the risk of dying in prison.

Q. If Brad Edwards, contrary to what you have testified under oath and what Brad himself has repeatedly said, knew about anything having to do with

illegal activities at the RRA firm and you concealed your knowledge of Brad Edwards' knowledge of that illegal activity, what do you understand the consequences of that false testimony to be?

A. I'll be violating my agreement with the United States government and I would run the risk of dying in prison.

MR. SCAROLA: Thank you. I don't have any further questions.

THE WITNESS: Thank you, sir.

MR. NURIK: Mark, I don't know what your time frame is on your litigation, but the ability to receive the transcript, review it and prepare an errata sheet within what is normally the time allotted under the court rules cannot be accomplished in this case.

MR. GOLDBERGER: How much time are you generally --

MR. NURIK: I don't know.

Actually, the first set of errata sheets have just been prepared and finalized for the first deposition in December. I'm not suggesting it will take that long this time, but if you can give me an idea of what your time responsibilities are with the court, what the time limits are --

MR. GOLDBERGER: Do you think it will be less than a month, two months?

MR. NURIK: I don't think it will be less than a month. First of all, a lot depends on the ability to get the transcript to him to review.

MR. GOLDBERGER: Right.

MR. NURIK: And that's a whole procedure, it's not normal circumstances that we are dealing with.

MR. GOLDBERGER: If time becomes an issue, we'll approach you and ask you to expedite.

MR. SCAROLA: Mark, I will tell that from our perspective time is an issue.

MR. NURIK: Have at it then, Jack. Do what you need to do to get it done.

MR. SCAROLA: There is a long pending motion for summary judgment on Brad's behalf that has been delayed for purposes of taking this deposition. We are very anxious to be able to call that motion for summary judgment up for hearing, so whatever can be done reasonably to expedite the preparation of this portion of this transcript would be appreciated. We understand there are limitations beyond your control, but to the extent you can do it, that would be helpful. Thank you.

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MS. HADDAD: It's scheduled in a month, Mark.

MR. NURIK: We'll cooperate.

MR. SCAROLA: Thank you very much.

[Thereupon, the taking of the deposition was concluded at 12:37 p.m.]

SCOTT ROTHSTEIN
Sworn to and subscribed before me this day of , 2012.
Notary Public, State of Florida at Large.

CERTIFICATE
STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, Pearlyck Martin, a Notary Public in and for the State of Florida at Large, do hereby certify that, pursuant to a Notice of Taking Deposition in the above-entitled cause, SCOTT ROTHSTEIN was by me first duly cautioned and sworn to testify the whole truth, and upon being carefully examined testified as is hereinabove shown, and the testimony of said witness was reduced to typewriting under my personal supervision and that the said Video Conference deposition constitutes a true record of the testimony given by the witness.

I further certify that the said Video Conference deposition was taken at the time and place specified hereinabove and that I am neither of counsel nor solicitor to either of the parties in said suit nor interested in the event of the cause.

WITNESS my hand and official seal in the City of Miami, County of Dade, State of Florida, this day of June 19, 2012.

Pearlyck Martin

FRIEDMAN, LOMBARDI & OLSON
Suite 924, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Telephone (305) 371-6677

June 21, 2012

IN RE: EPSTEIN VS EDWARDS

SCOTT ROTHSTEIN C/O MARC NURIK
One East Broward Boulevard, Seventh Floor
Ft. Lauderdale, Florida 33301

Dear SCOTT ROTHSTEIN:

With reference to the deposition of yourself taken on June 14, 2012, in connection with the above-captioned case, please be advised that the transcript of the deposition has been completed and is awaiting signature.

Please arrange to stop by our office for the purpose of reading and signing the deposition. Our office hours are 9:00 a.m. to 4:00 p.m., Monday through Friday. Please telephone in advance.

You may, however, read a copy of the transcript, provided by any of the attorneys connected with the case, denoting any corrections by page and line number on a separate sheet of paper. This correction page must be signed by you and notarized and returned to us for filing with the original.

If this has not been taken care of, however, within the next 30 days, or by the time of trial, whichever comes first, I shall then conclude that the reading, subscribing and notice of filing have been waived and shall then proceed to deliver the original of the transcript to ordering attorney without further notice.

Pearlyck Martin

From: Barbro C Ehnbom[redacted]
Sent: 8/18/2012 4:11:07 PM
To: JEEVACATION@gmail.com
Subject: Fwd: Program & Attendee list
Attachments: SALSS Attendee 2012 FINAL v2.pdf; Untitled attachment 60978.htm; SALSS Program 2012 FINAL.pdf; Untitled attachment 60981.htm

Importance: High

Dear Jeffrey,

I am sorry I did not call back Yesterday-I was exhausted from a crazy week and fell asleep as soon as I came home! Anyway, here is the full program and attendee list attached, this is the Globalization Summit I invited Bill Clinton to when I met him in Stockholm last Summer- But he is a bit busy I gather!
Anyway, hope Greta Tufvesson got hold of you re search service? Also, I did see your mail about possibly coming here end of September-however, I am supposedly arranging a fund-raiser for Congress Woman Diana deGette of Colorado on Sept 27 in NYC; she is the only one with a scientific agenda and she is just super-if anything I am hoping on your involvement?
How about going to Stockholm mid or end november..albeit a bit dark and maybe cold..?
Let me know what you think!
Also, I just heard from my friend Jeff Kriendler in Miami and guess who was just walking in there -our friend Goldsamt! First prize for perseverance!
Also, Sofia and the prince is on every magazine here, I think it is wonderful!
Marcus has two big concerts in Stockholm this coming week. Me - SALSS!

KRAM
BE

Barbro C. Ehnbom
Sent from iPad

Vidarebefordrat brev:

Från: Cecilia Schött <[redacted]>
Datum: August 18, 2012 8:44:29 AM GMT+02:00
Till: Barbro Ehnbom <[redacted]>
Ämne: Program & Attendee list

Ernst & Young HQ

Hotell Kung Carl

The Royal Guards

The Museum of Science & Technology

MS Rederiet-finden

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Stockholm Science City

Organizing Committee

Chairman: Barbro C. Ehnbom
Program Advisor: Lena Tibell
Project Manager: Sena Alipowic
Program Manager: Cecilia Schütz
Stockholm Coordinator: Jonas Månsson
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Dr. Karin Hehenberger, Executive VP & CMO, Coronado Biosciences
Paul Schlitz, Managing Director & Operating Partner, TPG Biotech

8th

SWEDISH AMERICAN LIFE SCIENCE SUMMIT 2012

Program
SALSS 2012

Swedish-American Life Science Summit
Stockholm, Sweden
August 22 - August 24, 2012

'The times they are a-changin'

Which global events in the first years of this century will appear in future textbooks of history? My first bet is a gradual change that came about without headlines. When I was born in 1948 we were less than one billion children in the world. Today there are almost two billion aged 0-15 years. The game-changing event in the first decade of this century was that the number of children stopped growing. Two-child families are now the norm for 80% of mankind. The fast population growth will be over around 2050 and at that point only 10% of the 10 billion in the world will live in what was the West. Demographics are major changers of the market place.

My second bet is the G20 meeting in Washington 2008. As the richest needed to borrow money they asked the emerging economies to join and changed their name from G7 to G20. The official photo of the heads of state tells the story. In the middle stands the host, President George W. Bush. On his right is President da Silva and on his left President Jintao and King Abdulla, most probably placed according to their ability to lend money to US in the time of crisis. We know of the lending from Saudi and China. But Brazil has on its own been lending US about 30 billion USD per year since 2008. The economic strength of the world is shifting.

What do the ongoing tectonic shifts in demographics and economy mean for the future of frontline medical research? Will basic medical research be the last to globalize as it requires a unique functional combination of venture capital, institutions and creative individuals? Or will we see tectonic shifts in how the world does basic medical research already in the next decade?

Hans Rosling
Professor, Karolinska Institutet
Time's 100 Most Influential People in the World 2012
Årets Svensk i Världen 2012
SALSS Keynote 2011

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Program

Evening of August 22, 2012

Hotell Kung Carl Banquet

6:00 p.m. **Welcoming Reception**
Special Recognition to
Dr. Laurent Leksell, *Executive Director, Elekta*

Opening Remarks
Barbro C. Ehnbom, *Chairman, SALSS*

Bollywood Dance Performance

7:30 p.m. **Gold Sponsor Dinner** ***at Delphi HQ***
(by invitation only)
Hosted by Peter Utterström, *Partner, Delphi Ericsson*

Morning of August 23, 2012

Ernst & Young Headquarters

8:30 a.m. **Registration & Breakfast**

9:00 a.m. **Setting the Stage**
Dr. William A. Haseltine,
President, ACCESS Health International

9:20 a.m. **Welcoming Remarks**
Michael Treschow,
Chairman, Unilever & Former Chairman, Ericsson

9:30 a.m. **Special Guest Speaker**
Zhiping Cui,
SVP & Head of International Investment, Shanghai Fosun Pharmaceutical Group

9:45 a.m. ***The Role of Multi-stakeholder Collaborations in Improving Global Health and Care***
Dr. Gary Phillips,
Head Healthcare Industries, World Economic Forum

10:00 a.m. **Company Presentations & Coffee**
Bazigaard
DiaGenic
Serendipity Innovations

11:00 a.m. **Panel:** ***Successful Cross-Border Collaborations***

Moderator: Dr. William A. Haseltine,
President, ACCESS Health International

Professor Mathias Uhlén,
KTH Royal Institute of Technology
Dr. Laurent Leksell,
Executive Director, Elekta
Dr. Shiang Huang,
CEO, Kindstar
Christian Kinch,
CEO, Bazigaard
William J. Knidel, Jr.,
Managing Director, Ferghana Partners

12:00 noon **Luncheon**
Hosted by Jan Birgerson,
CEO, Ernst & Young Sweden

Luncheon Address:
Ylva Williams,
CEO, Stockholm Science City Foundation

1:30 p.m. ***The Third Place: Healthcare Everywhere***
Patrick Hochel,
Global Pharmaceutical Leader, Ernst & Young

1:45 p.m. ***The Asian Diabetes Epidemic***
Professor Kee Seng Chia,
Dean of Saw Swee Hock School of Public Health, National University of Singapore

2:00 p.m. ***Innovative Healthcare Delivery Models***
Dr. Nicolaus Henke,
Director & Head of Healthcare Practice, McKinsey & Company

2:15 p.m. **Company Presentations & Coffee**
Ericsson
Kindstar Global
Oral Care

3:15 p.m. **Panel:** ***Diabetes - The Healthcare Crisis***

Moderator: Dr. Karin Hehenberger,
EVP & CMO, Coronado Biosciences

Dr. Martin Fitchet,
COO, Janssen Research & Development
Professor Kerstin Brismar,
Karolinska Institutet
Dr. Alan Moses,
Global CMO, Novo Nordisk
Peter Thelin,
Partner, Brummer & Partners

4:15 p.m. **Honorary Guest Speaker**
Dr. Ewa Björling,
Minister for Trade, Swedish Government

Evening of August 23, 2012

M/S Riddarfjärden

7:00 p.m. **Dinner Cruise**
Hosted by Captain Lars Sjögren,
EVP, Danske Bank Sweden

Morning of August 24, 2012

The Museum of Science & Technology

8:00 a.m. **Registration & Breakfast**

8:30 a.m. **Setting the Stage**
G. Steven Burrill,
CEO, Burrill & Company

8:45 a.m. **Hot-Chair Interview:** ***Innovation & Capital***

Moderator: G. Steven Burrill,
CEO, Burrill & Company

Dr. Charlotte Brogren,
Director General, VINNOVA & Chairman, Industrifonden
Dr. Eugen Steiner,
Partner, HealthCap
Anjiong Lu,
Managing Director, International Investment at Fosun Pharmaceutical U.S. Group
Dr. Yaval Binae,
Managing Partner, Orchestra Medical Ventures
Niels-Jørgen Larsen,
Head of Corporate Finance, Danske Bank Sweden

9:45 a.m. **Company Presentations & Coffee**
Karolinska Development
Medicine in Need (MEND)
Moberg Derma

10:45 a.m. ***Creating a Digital Health System***
Dr. David Blumenthal,
National Coordinator for Health Information Technology under President Barack Obama from 2009 - 2011

11:00 a.m. **Panel:** ***How the Digital Revolution Will Create Better Health Care***

Moderator: Magnus Tyreman,
Director Nordics, McKinsey & Company

Karin Johansson,
State Secretary, Ministry of Health & Social Affairs
Professor K. Ganapathy,
President, Telemedicine Society of India
Magnil Bleckstrand,
Director Product Line Device Connections, Ericsson
Dr. Florence Haseltine,
Founder, Society for Women's Health Research
Judy Wade,
CEO, AliveCor

12:00 noon **Special Guest Speaker**
Dr. Tachi Yamada,
CMSO & EVP, Takeda Pharmaceuticals & Former President of the Global Health Program, The Bill & Melinda Gates Foundation

12:15 p.m. **Rising Stars Exhibit**
Access Health International
AliveCor
Avocell
BioLamina
Diabetes Tools
Insulation
MedUniverse
Pillpogger
Q-linea

13:15 p.m. **Concluding Luncheon**
Hosted by Magnus Tyreman,
Director Nordics, McKinsey & Company

Special Guest Appearances

Divine Entertainment by Opera Trio Divine

14:30 p.m. **Concluding Remarks**
H.E. Mark F. Brzezinski,
Ambassador, U.S. Embassy in Sweden

Addresses

Hotell Kung Carl
Birger Jarlsgatan 21
Phone: +46 (0)8 463 50 00

Ernst & Young HQ
Jakobsbergsgatan 24
Phone: +46 (0)8 520 590 00

M/S Riddarfjärden
Strandvägskajen 18
Phone: +46 (0)8 24 30 90

The Museum of Science & Technology
Museivägen 7
Phone: +46 (0)8 450 56 00

Transportation

Morning of August 23

Joint morning walk from Hotell Kung Carl to Ernst & Young HQ at 8:00 a.m.

Evening of August 23

A musical promenade is arranged from Hotell Kung Carl to M/S Riddarfjärden at 6:30 p.m.

Morning of August 24

A bus will depart from Hotell Kung Carl at 7:40 a.m. and arrive at The Museum of Science & Technology at 8:00 a.m.

Taxi Stockholm
Phone: +46 (0)8 612 00 00

For Program Inquiries:
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jonas@swedishamericanlifescience.com
Phone: +46 (0)70 999 3466

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INTELLECTUAL JAZZ

DAVID **AGUS**
DAN **ARIELY**
KEITH **BLACK**
DAVID **BLAINE**
MIKE **BLOCK**
ADAM **BLY**
SCOTT **BOLTON**
DAVID **BROOKS**
MARK **CUBAN**
ANTONIO **DAMASIO**
JACK **DANGERMOND**
DAVE **GALLO**
FRANK **GEHRY**
MATT **GROENING**
HERBIE **HANCOCK**
DANNY **HILLIS**
BJARKE **INGELS**
QUINCY **JONES**
MARY **JORDAN**
JON **KAMEN**
JEFFREY **KATZENBERG**
NORMAN **LEAR**
YO-YO **MA**
JOHN **MAEDA**
JOHN **MAZZIOTTA**
NICHOLAS **NEGROPONTE**
TODD **OLDHAM**
CRISTINA **PATO**
STEVEN **PINKER**
LISA **RANDALL**
PETER **RAVEN**
MOSHE **SAFDIE**
MEGAN **SMITH**
BENEDIKT **TASCHEN**
JULIE **TAYMOR**
CHARITY **TILLEMANN DICK**
CRAIG **VENTER**
GEOFFREY **WEST**
will.i.am
C. K. **WILLIAMS**
EO **WILSON**
DAMIAN **WOETZEL**
STEPHEN **WOLFRAM**
WILL **WRIGHT**
JOSHUA **WURMAN**

RICHARD SAUL **WURMAN**

WWW
•
WWW

SCHEDULE

TUES**18**SEPT

Mission Inn Hotel and Spa
3649 Mission Inn Avenue
Riverside, CA 92501
Tel: 951.784.0300
www.missioninn.com

5:00PM **OPENING** in the St. Francis of Assisi Chapel at The Mission Inn

RICHARD SAUL **WURMAN**
YO-YO **MA** and **will.i.am**
C. K. **WILLIAMS** AND STEVEN **PINKER**

7:20PM **WINE** and hors d'oeuvres in the Atrio adjacent to the Chapel

8:30PM **DINNER** in the Galleria at The Mission Inn

WED**19**SEPT

Esri
380 New York Street
Redlands, CA 92373
Tel. 909.793.2853
www.esri.com

7:00AM **Transport** from the Mission Inn to Esri Conference Center

7:15AM **Coffee, Juice** / Esri Conference Center

8:00AM **promptly**

JEFFREY **KATZENBERG** and NORMAN **LEAR**
DAVID **AGUS** and ANTONIO **DAMASIO**
HERBIE **HANCOCK** and **will.i.am**

10:15AM **BREAK**–Esri Café, adjacent to the Conference Center

11:15AM

E.O. **WILSON** and CRAIG **VENTER**
KEITH **BLACK** and DAVID **AGUS**
YO-YO **MA** and MIKE **BLOCK**

1:15PM **LUNCH**–Esri Café, adjacent to the Conference Center

2:45PM

DANNY **HILLIS** and STEPHEN **WOLFRAM**
DAVID **BLAINE** and JULIE **TAYMOR**
MATT **GROENING** and DAVID **BROOKS**

4:45PM **BREAK**–Esri Café, adjacent to the Conference Center
5:15PM **Chinese Telepresence** / Esri Executive Briefing Room

6:00PM

YO-YO **MA** and DAVID **BROOKS**
MARK **CUBAN** and DAN **ARIELY**
QUINCY **JONES** and DAMIAN **WOETZEL**

8:00PM **Transport** to The Mission Inn

8:45PM **DINNER** in the Galleria at The Mission Inn

THURS**20**SEPT

Esri
380 New York Street
Redlands, CA 92373
Tel. 909.793.2853
www.esri.com

7:00AM **Transport** from the Mission Inn to Esri Conference Center

7:15AM **Coffee, Juice** / Esri Conference Center

8:00AM **promptly**

CHARITY **TILLEMANN DICK**
PETER **RAVEN** and JACK **DANGERMOND**
MEGAN **SMITH** and NICHOLAS **NEGROPONTE**
FRANK **GEHRY** and JOHN **MAZZIOTTA**

10:15AM **BREAK**–Esri Café, adjacent to the Conference Center

11:00AM

BENEDIKT **TASCHEN** and JON **KAMEN**
MARY **JORDAN** and MOSHE **SAFDIE**
JOSHUA **WURMAN** and DAVE **GALLO**

1:00PM **LUNCH**–Esri Café, adjacent to the Conference Center

2:15PM

JOHN **MAEDA** and ADAM **BLY**
TODD **OLDHAM** and BJARKE **INGELS**

4:00PM **BREAK**–Esri Café, adjacent to the Conference Center
4:30PM **Chinese Telepresence** / Esri Executive Briefing Room

5:00PM

LISA **RANDALL** and SCOTT **BOLTON**
CRISTINA **PATO**
EO **WILSON** and WILL **WRIGHT**

6:15PM GEOFFREY **WEST** and RICHARD SAUL **WURMAN**

7:15PM **Transport** to The Mission Inn

8:30PM **FAREWELL DINNER** in the Spanish Art Gallery at The Mission Inn

DAVID **AGUS**

David Agus (born January 29, 1965) is an American physician and a co-founder of Navigenics, a personal genetic testing company, and Oncology.com, the largest online cancer resource and virtual community and Applied Proteomics. He is a Professor of Medicine and Engineering at the University of Southern California.

He graduated cum laude in molecular biology from Princeton University and received his medical degree from the University of Pennsylvania School of Medicine in 1991. Agus completed his residency training at Johns Hopkins Hospital and completed his oncology fellowship training at the Memorial Sloan-Kettering Cancer Center in New York. He spent two years at the National Institutes of Health as a Howard Hughes Medical Institute-NIH Research Scholar.

Agus has had a long and varied career. At the Memorial Sloan-Kettering Cancer Center in New York, he was an attending physician in the Department of Medical Oncology and head of the Laboratory of Tumor Biology. He was also Assistant Professor of Medicine at Cornell University Medical Center.

As director of the Spielberg Family Center for Applied Proteomics at Cedars-Sinai Medical Center in Los Angeles, he led a multidisciplinary team of researchers dedicated to the development and use of proteomic technologies to guide doctors in making health-care decisions tailored to individual needs. The center grew out of earlier clinical projects at Cedars-Sinai, where Agus served as an attending physician in oncology, which showed striking differences between the aggressiveness of prostate cancer in certain patients and their ability to respond to treatment.

Agus also served as Director of the Louis Warschaw Prostate Cancer Center, and as an attending physician in the Department of Medicine, Division of Medical Oncology at Cedars-Sinai. He was also an Associate Professor of Medicine at the University of California, Los Angeles (UCLA).

He currently is a Professor of Medicine and Engineering at the Keck School of Medicine of USC and the Viterbi School of Engineering and is the Director of the USC Center for Applied Molecular Medicine and the USC Westside Norris Cancer Center. Agus is co-Director of the newly funded USC-NCI Physical Sciences in Oncology Center together with Danny Hillis. Dr. Agus is an international leader in new technologies and approaches for personalized healthcare, chairs the Global Agenda Council (GAC) on Genetics for the World Economic Forum, and speaks regularly at TEDMED, the Aspen Ideas Festival and the World Economic Forum.

Agus has received many honors and awards, including the American Cancer Society Physician Research Award, a Clinical Scholar Award from the Sloan-Kettering Institute, a CaP CURE Young Investigator Award and the American Cancer Society Clinical Oncology Fellowship Award, the HealthNetwork Foundation's Excellence Award, and the 2009 Geoffrey Beene Foundation's Rock Stars of Science™, as seen in GQ. In 2009, he was selected to serve as a judge for the first Biotech Humanitarian Award.

Agus's research has focused on the application of proteomics and genomics for the study of cancer and the development of new medications for cancer. He has published many scientific articles.

He is a member of several scientific and medical societies, including the American Association for the Advancement of Science, American Association for Cancer Research, American College of Physicians, American Society of Clinical Oncology, American Society of Hematology and the American Medical Association.

Agus was recently named one of the "Future Health 100" by HealthSpottr.

The End of Illness is Agus's first book, was published January, 2012 by the Free Press Division of Simon and Schuster and is a New York Times #1 Bestseller.

Agus is married to Amy Joyce Povich, actress and daughter of syndicated television talk show host Maury Povich. Her stepmother, Connie Chung, is a former CBS News anchor. Agus' grandfather, the late Rabbi Jacob B. Agus, was a theologian and the author of several books on Jewish history and philosophy. Agus has two children, Sydney and Miles.

Agus has one film credit to his name, appearing as "David Agus" in the 2006 documentary "Who Needs Sleep?"

DAN **ARIELY**

Dan Ariely (born April 29, 1968) is an Israeli American professor of psychology and behavioral economics. He teaches at Duke University and is the founder of The Center for Advanced Hindsight. Ariely's talks on TED have been watched 2.8 million times. He is the author of *Predictably Irrational* and *The Upside of Irrationality*, both of which became New York Times best sellers.

Dan Ariely was born in New York City while his father was studying for an MBA degree at Columbia University. The family returned to Israel when he was three. He grew up in Ramat Hasharon. In his senior year of high school, he was active in Hanoar Haoved Vehalomed, an Israeli youth movement. While preparing a ktovet esh (fire inscription) for a traditional nighttime ceremony, the flammable materials he was mixing exploded, causing third-degree burns over 70 percent of his body.

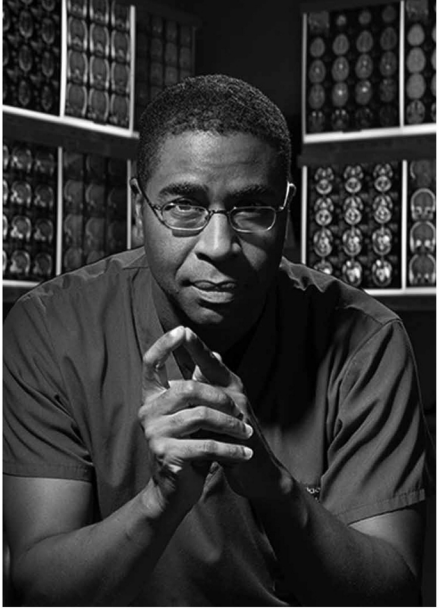
Ariely is married to Sumi, with whom he has two children, a son and a daughter.

Ariely was a physics and mathematics major at Tel Aviv University, but transferred to philosophy and psychology. However, in his last year he dropped philosophy and concentrated solely on psychology, in which he received his B.A. He also holds an M.A. and a Ph.D. in cognitive psychology from the University of North Carolina at Chapel Hill. He completed a second doctorate in business administration at Duke University at the urging of Nobel economic sciences laureate Daniel Kahneman.

After obtaining his Ph.D. degree, he taught at MIT between 1998 and 2008, before returning to Duke University as James B. Duke Professor of Psychology and Behavioral Economics. He was formerly the Alfred P. Sloan Professor of Behavioral Economics at MIT Sloan School of Management. Although he is a professor of marketing with no formal training in economics, he is considered one of the leading behavioral economists. Ariely is the author of the books *Predictably Irrational: The Hidden Forces That Shape Our Decisions* and *The Upside of Irrationality: The Unexpected Benefits of Defying Logic at Work and at Home*. When asked whether reading *Predictably Irrational* and understanding one's irrational behaviors could make a person's life worse (such as by defeating the benefits of a placebo), Ariely responded that there could be a short-term cost, but that there would also likely be long-term benefits, and that reading his book would not make a person worse off.

Ariely's laboratory, the Center of Advanced Hindsight at Duke University, pursues research in subjects like the psychology of money, decision making by physicians and patients, cheating, and social justice.

KEITH **BLACK**



Keith L. Black (born September 13, 1957) is an American neurosurgeon specialising in the treatment of brain tumors and a prolific campaigner for funding of cancer treatment. He is chairman of the neurosurgery department and director of the Maxine Dunitz Neurosurgical Institute at Cedars-Sinai Medical Center in Los Angeles, California.

Keith Black was born in Tuskegee, Alabama. His mother, Lillian, was a teacher and his father, Robert, was the principal at a racially segregated elementary school in Auburn, Alabama; prohibited by law to integrate the student body, Black's father instead integrated the faculty, raised standards, and brought more challenging subjects to the school. Later in his childhood, Black's parents found new jobs and relocated the family to Shaker Heights, Ohio. Black attended Shaker Heights High School. Already interested in medicine, Black was admitted to an apprenticeship program for minority students at Case Western Reserve University, and then became a teenaged lab assistant for Frederick Cross and Richard Jones (inventors of the Cross-Jones artificial heart valve) at St. Luke's Hospital in Cleveland. At 17, he won an award in a national science competition for research on the damage done to red blood cells in patients with heart-valve replacements. According to Black: "I was working in the lab of a heart surgeon who had developed his own artificial heart valve, and I had a concept that the heart valve might be damaging red blood cells, so I asked to do a research project using a scanning electron microscope at the time. When I was trying to basically learn the technique, I took some blood from the heart-lung bypass machine from patients undergoing heart-lung bypass, and when I incubated the red blood cells overnight, I noticed that a certain percentage of these cells change from their normal discoid shape to one that resembled a porcupine, called an econocyte. What I did was to describe the discocyte-econocyte transformation in patients undergoing heart-lung bypass, as an index of sub-lethal red blood cell damage. The importance being that the blood cells could not parachute through the small capillaries." He attended the University of Michigan in a program that allowed him to earn both his undergraduate degree and his medical degree in 6 years. He received his M.D. degree from the University of Michigan Medical School in 1981.

After serving his internship and residency at the University of Michigan, in 1987 he moved to the UCLA Medical Center in Los Angeles, where he later became head of UCLA's Comprehensive Brain Tumor Program. In 1997, after 10 years at UCLA, he moved to Cedars-Sinai Medical Center to head the Maxine Dunitz Neurosurgical Institute. He was also on the faculty of the University of California, Irvine School of Medicine from 1998 to 2003. In 2007 he opened the new Johnnie L. Cochran Jr. Brain Tumor Center at Cedars-Sinai, a research center named after the famous lawyer who had been Black's patient and supporter.

Black has been a frequent subject of media reports on medical advances in neurosurgery. He was featured in a 1996 episode of the PBS program The New Explorers entitled "Outsmarting the Brain". Esquire included him in its November 1999 "Genius Issue" as one of the "21 Most Important People of the 21st Century." He has been cited as an expert in reports about whether mobile phone use affects the incidence of brain tumors. He is also noted for his very busy surgery schedule: a 2004 Discover article noted that he performs about 250 brain surgeries per year, and that at age 46 he had "already performed more than 4,000 brain surgeries, the medical equivalent of closing in on baseball's all-time career hits record." (As of 2009, Black's surgery count had risen to "more than 5,000 operations for resection of brain tumors".)

In 1997, *Time* magazine featured Black on the cover of a special edition called "Heroes of Medicine". The accompanying article described Black's reputation as a surgeon who would operate on tumors that other doctors would not, as well as aspects of his medical research, including his discovery that the peptide bradykinin can be effective in opening the blood–brain barrier.

In 2009 Black published his autobiography, co-authored with Arnold Mann, entitled *Brain Surgeon*. New York Times reviewer Abigail Zuger described the book as a "fascinating, if somewhat stilted, memoir". The Publishers Weekly review commented that the book "examines racial hurdles he had to leap to become a neurosurgeon" and "alternat[es] incisive writing about incisions with his personal memoir, insightful and inspirational."

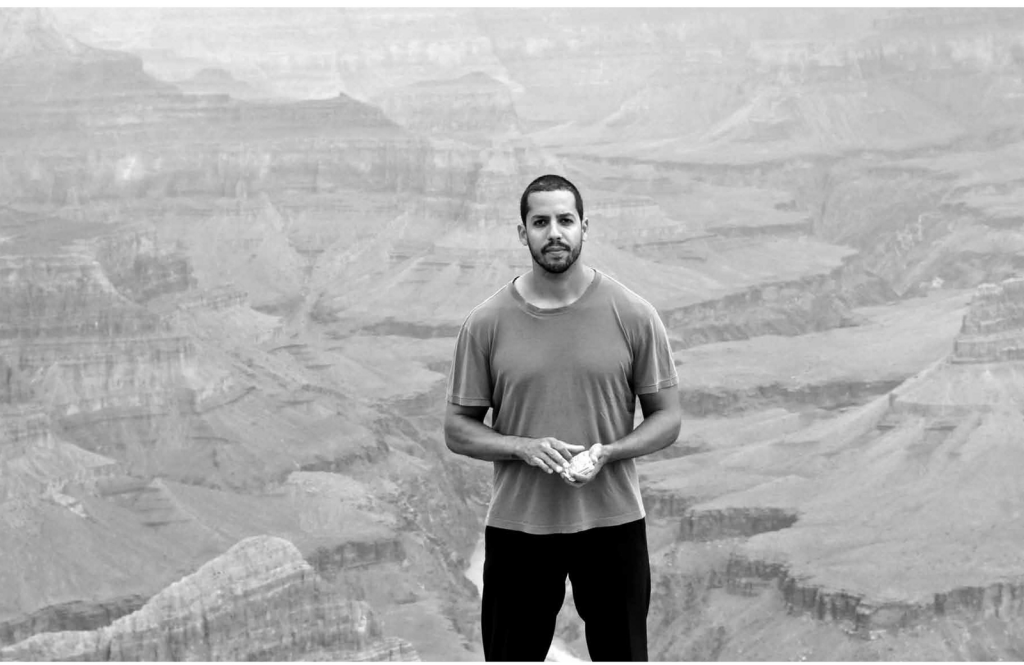
For more than a decade, David Blaine has been attracting the world's attention with his high-profile endurance stunts. Starting his career as a magician who appeared to do the impossible with a deck of cards, he was soon following in the footsteps of Houdini—seeking out that which seems physically impossible and actually doing it. To that end, he's been buried alive in New York City for a week, barely survived being encased inside a six-ton block of ice for three days and three nights, stood atop a 100-foot-tall pillar in Bryant Park for 36 hours without a safety net, survived inside a transparent box in London on nothing but water for 44 days, and spent one week submerged in a sphere-shaped aquarium at Lincoln Center, at the end of which he attempted to break the world record for breath holding. A year later, he succeeded live on the Oprah Winfrey show, holding his breath for 17 minutes and 4 seconds.

Born in Brooklyn, Blaine discovered his passion for magic at the age of four when he saw a magician perform in the subway. His mother encouraged his passion and he began performing professionally at private parties by the age of thirteen. By the age of twenty-three, Blaine had created, directed, and produced an original television program titled *Street Magic*, which garnered rave reviews by critics and revolutionized the way magic is portrayed on television. Penn Jillette of Penn & Teller called *Street Magic* "the best TV magic special ever done" and "the biggest breakthrough in our lifetime." The *New York Times* noted that David has "taken a craft that's been around for hundreds of years and done something unique and fresh with it." The *New Yorker* claimed that "he saved magic." Since then, Blaine has produced nine additional primetime specials.

Blaine has performed magic privately for U.S. Presidents Bill Clinton and George W. Bush, Governor Arnold Schwarzenegger, Bill Gates, Henry Kissinger, Mayor Bloomberg, Mark Zuckerberg, and Muhammad Ali, as well as President Dmitry Medvedev of Russia and other international leaders. He also performed alongside Michael Jackson, and during the Super Bowl halftime show.

In 2010, Blaine performed magic for 72 hours straight in Times Square, raising nearly $100,000 for relief efforts following the earthquake in Haiti.

Blaine resides in New York City with his fiancée, Alizee Guinochet. The couple welcomed a magical daughter into the world on January 27, 2011.



Michael Glen Block (born May 25, 1982) is an American cellist, composer, arranger, and solo artist hailed as "the ideal musician of the twenty-first century" by cultural icon Yo-Yo Ma. Mike Block has worked with Yo-Yo Ma, Bobby McFerrin, Lenny Kravitz, Shakira, The National, Joe Zawinul, Alison Krauss, Rachel Barton Pine, Mark O'Connor, and other notable musicians. Block currently plays with the Silk Road Ensemble. He has appeared on Late Night with Conan O'Brian, National Public Radio's St. Paul Sunday, Regis and Kelly, VH1, the Disney Channel, WNBC-TV with Chuck Scarborough, and the CBS Early Show.

Block is most famous for playing second cello alongside Yo-Yo Ma. He performed in Mark O'Connor's Appalachia Waltz trio for three years. His performances have been described as "vital, rich-hued solo playing" by the *New York Times*, and "a true artist ... a sight to behold" by the Salt Lake City Desert News.

Mike Block's Cello Concerto, Movement 1 was completed in 2009.

Mr. Block's classical compositions have been performed at the Bremen MusikFest, Tribeca New Music Festival, the Kimmel Center series "Fresh Ink," and the MATA Festival, at which he performed as soloist in his own Cello Concerto in 2009.

His non-classical writing has been featured at festivals such as Rockygrass, Delfest, Celtic Connections, and Wintergrass.

Mike Block has served as musical director to cellist Yo-Yo Ma, singer Bobby McFerrin, ballet star Damien Woetzel, jookin dancer Lil' Buck, actor/comedian Bill Irwin, jazz trumpeter Marcus Printup, world-music group The Silk Road Ensemble, and classical orchestra The Knights.

A frequent guest lecturer, Mr. Block has presented at Stanford University, Princeton University, Harvard University, New York University, Berklee College of Music, Cleveland Institute of Music, Belmont University, Southern Methodist University, Sam Houston State University, Illinois State University, Illinois Wesleyan University, and University of Arkansas. In 2006, he received Suzuki method certification in music education from the New York City-based School for Strings, under Pamela Devenport.

In 2009 Mike founded The Mike Block String Camp, which takes place in multiple locations each summer. The camp's goal is to empower musicians of all ages/levels to perform, improvise, compose, and arrange their own music - all by ear. The first location debuted in 2010 in Vero Beach, Florida, followed in 2011 with Fayetteville, Arkansas, and Saline, Michigan in 2012. The world-class faculty has included Darol Anger, Hanneke Cassel, Joe Craven, Rushad Eggleston, Brittany Haas, Natalie Haas, Jeremy Kittel, Clay Ross, Kimber Ludiker, Jefferson Hamer, Victor Lin, Emy Phelps, and Lauren Rioux.

Since 2009, Mike has been the Lead Teaching Artist for Silk Road Connect, a partnership between the Silk Road Project and schools in New York City and Boston areas.

The Mike Block Band presents an exciting and genre-bending combination of rock, classical, jazz, and folk music through original songs and instrumental compositions, featuring quirky yet honest lyrics, and a variety of musical influences.

Mike Block has also worked with notable musicians such as Edgar Meyer, Mike Marshall, Zakir Hussain, My Brightest Diamond, Bon Iver, Tim O'Brien, Marcel Khalife, Goran Bregovic, Kayhan Kalhor and Bruce Molsky.

Triborough Trio—Featuring Mike Block (cello), Hans Holzen (guitar), and Kyle Kegerreis (bass), the trio's mission is to put their personal spin on traditional and contemporary music from around the world in well-crafted and creative arrangements.

Mike is also the Artistic Director and host of GALA Brooklyn: "Global Art - Local Art:", a Music Festival in Brooklyn featuring a diverse array of musicians and artists in unique collaborations.

Notable guests include Anthony Mcgill (Metropolitan Opera), Aoife O'Donovan (singer for Crooked Still), Aaron Dugan (guitarist for Matisyahu), Multi-genre violinist/composer Todd Reynolds, Grammy-Nominated classical artists Anastasia Khitruk (violin), and the Enso Quartet, Marcus Printup from Jazz at Lincoln Center, and jazz saxophonist Seamus Blake, and singer-songwriter Amy Correia.

Performed on WNYC's Soundcheck with John Schaefer.

Mike has also worked with director Yaron Zilberman as a Music Consultant for "A Late Quartet", a 2011 movie starring Philip Seymour Hoffman and Christopher Walken.

On April 4, 2009, Mike Block was struck by a NYC Taxi while walking at the corner of W85th St. and West End Ave, in Manhattan. Injuries included broken rib, jaw, cheek, nose, and he lost nine teeth. His reconstruction required multiple surgeries, and his missing teeth were eventually restored on February 15, 2012.

ADAM **BLY**

Adam Bly (born 1981 in Montreal, Canada) is founder and CEO of Seed. He is the editor of "Science is Culture: Conversations at the New Intersection of Science + Society" (published by HarperCollins) and the creator of the data visualization platform Visualizing.org.

He began his career at the age of 16 as the youngest researcher at the National Research Council of Canada, where he spent three years studying the biochemistry of cancer, specifically the role of cell adhesion in metastasis. Out of the lab, he founded *Seed*—tag-lined "Science is Culture™"—and served as its Editor-in-Chief. "The best comparison for *Seed*," wrote a media critic at the time of the magazine's launch in 2001, "is the early years of *Rolling Stone*, when music was less a subject than a lens for viewing culture." Under his leadership, the magazine earned critical acclaim for modernizing scientific publishing and for bridging long-standing divides between science and society—from art and design to politics and religion. Together with Paola Antonelli he co-founded a monthly gathering of scientists, architects, and designers that laid the foundation for *Design and the Elastic Mind*, an exhibition about science and design at The Museum of Modern Art.

In 2007, Bly was named a Young Global Leader by the World Economic Forum. He is a recipient of the Golden Jubilee Medal from Her Majesty Queen Elizabeth II and his achievements have been highlighted by Canadian Prime Minister Jean Chrétien, "for showing people the scope and power of science not just as an object of study but as a key to understanding the world around us."

Bly has lectured around the world on the future of science and its role in society, including at the World Economic Forum, the National Academies of Science, the Royal Society, the National Institutes of Health, the State Department, NASA, the Chinese Ministry of Science and Technology, The Museum of Modern Art, and The Academy of Sciences for the Developing World, before the National Science Board and the U.S. House of Representatives, and at universities including Harvard, MIT, and Beijing. He has served on the nominating committees and juries of the Buckminster Fuller Challenge, the Earth Award, and the TED Prize, and sits on the Science Advisory Committee of the World Economic Forum, the External Advisory Board of the University of Michigan's Risk Science Center, the American Committee of the Weizmann Institute of Science, the Communications Advisory Board of the National Academy of Sciences, and as an advisor to OECD's Global Project on Measuring the Progress of Societies.

Bly was recently named Vice Chair of the World Economic Forum's Global Agenda Council on Design Innovation and Partner to the Executive Coordination Office for the Rio+20 United Nations Conference on Sustainable Development.

SCOTT **BOLTON**

Dr. Scott Bolton is the Director of the Space Sciences Department at Southwest Research Institute (SwRI) in San Antonio, Texas. Dr. Bolton is also the Principal Investigator for the Juno project, a project within NASA's New Frontiers Program. Prior to being Director at SwRI, Dr. Bolton was a senior scientist and manager at the Jet Propulsion Laboratory (JPL) for over 25 years. During his tenure as Director of Space Science at SwRI, Dr. Bolton oversaw the launches of New Horizons and IBEX, the selection of Juno, the confirmation of MMS, and the delivery of hardware for a number of non-NASA programs related to national security. As director of SwRI's Space Science Department, Dr. Bolton is responsible for the approximately 150 engineers and scientists working on over a dozen programs including new proposals, instrument development, mission operations and scientific data analysis.

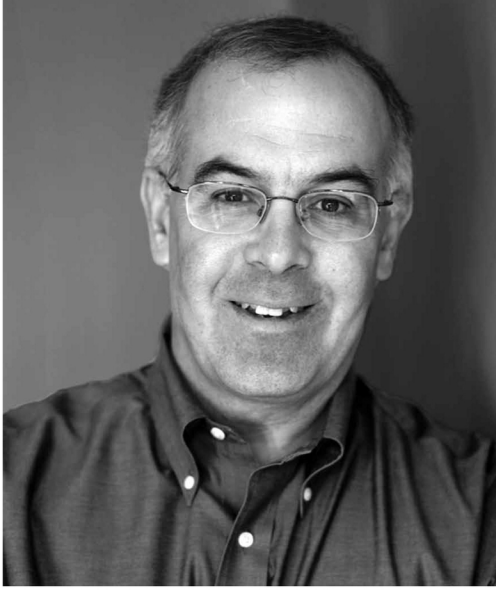
As Principal Investigator of Juno, Dr. Bolton is responsible for all aspects of the Juno program including project management by JPL, spacecraft development at Lockheed Martin, all science instruments, launch vehicle development and operation, and the resulting scientific analysis throughout the life of the project. Dr. Bolton has more than 30 years experience in the field of aerospace and space science. Dr. Bolton received his B.S. in Aerospace Engineering from U. Michigan in 1980, and a Ph.D. in Astrophysics from U.C. Berkeley in 1990.

Dr. Bolton is a Co-Investigator on a number of NASA missions including experiments on the Cassini mission. Dr. Bolton chaired the Titan science group for the Cassini-Huygens mission and was responsible for the formulation of the scientific investigation of Saturn's moon Titan. Dr. Bolton has been a Principal Investigator with NASA on various research programs since 1988. His research includes the modeling of the Jovian and Saturnian radiation belts, atmospheric dynamics and composition, and the formation and evolution of the solar system. He has authored over 150 scientific papers, five book chapters, and consulted/appeared in five space science documentaries. He received the NASA Outstanding Leadership Medal in 2012, Exceptional Achievement Medal in 2002; the NASA Exceptional Scientific Achievement Medal in 1994. He also received JPL Individual Awards for Exceptional Excellence in Leadership in 2002, 2001, and 1996, and Excellence in Management in 2000; and has received sixteen NASA Group Achievement Awards. Dr. Bolton maintains a relationship with JPL and the California Institute of Technology through a special appointment as a Senior Staff Scientist.

Dr. Bolton also leads a number of educational programs aimed at developing science, math and art skills for children from elementary to high school and college level. As part of the NASA Juno educational Outreach Program, Dr. Bolton has dedicated developed educational programs involving both formal and informal education including the

creation of science and math curriculum driving new national standards for elementary level education (an age bracket known to be underserved in this area). Dr. Bolton has worked with a number of corporate sponsors dedicated to space science educational programs, including Lego, Universal, Sony, and Time-Warner. Dr. Bolton helped develope an innovative educational program, in partnership with the Lewis Center for Educational Excellence, that provides an opportunity for elementary to high school level children to experience the scientific and engineering process directly. This program trains teachers on science and math education and provides access to NASA research facilities and scientists for hundreds of schools around the country. Through his private company, Artistic Sciences, Inc, Dr. Bolton's has produced a number of musical concerts, art exhibits, scientific documentaries and videos aimed at inspiring and motivating children in academic studies. He has worked with a number of musical artists developing both educational and musical programs. He is one of the founding members of the Vangelis Foundation in Athens, Greece dedicated to the combined study of Science, Math, Art, Music and Philosophy.

DAVID **BROOKS**



David Brooks (born August 11, 1961) is a political and cultural commentator who writes for The *New York Times*. He worked as an editorial writer and film reviewer for the *Washington Times*; a reporter and later op-ed editor for The *Wall Street Journal*; a senior editor at The *Weekly Standard* from its inception; a contributing editor at *Newsweek* and The *Atlantic Monthly*; and as a commentator on National Public Radio. He is now a columnist for The *New York Times* and commentator on PBS NewsHour.

Brooks, who is Jewish, was born in Toronto, Canada—his father was a U.S. citizen living in Canada at the time—and grew up in New York City in Stuyvesant Town. He graduated from Grace Church School in New York City, Radnor High School (located in a Main Line suburb of Philadelphia) in 1979 and from the University of Chicago, with a degree in history, in 1983.

Brooks edited a 1996 anthology of writings by new conservative writers, *Backward and Upward: The New Conservative Writing*. He wrote a book of cultural commentary titled *Bobos in Paradise: The New Upper Class and How They Got There*, published in 2000, and followed it four years later with *On Paradise Drive: How We Live Now (And Always Have) in the Future Tense*.

He also authored *The Social Animal: The Hidden Sources of Love, Character and Achievement*. The book was excerpted in The *New Yorker* magazine in January 2011 and received mixed reviews upon its full publication, by Random House, in March of that year. The book has been a commercial success, reaching the #3 spot on the Publishers Weekly best-sellers list for non-fiction in April 2011.

Brooks was a visiting professor of public policy at Duke University's Terry Sanford Institute of Public Policy, and he taught an undergraduate seminar there in the fall of 2006.

He and his wife live in the Cleveland Park neighborhood of Northwest Washington, DC.

Brooks describes himself as being originally a liberal before "coming to my senses." In 1983, he wrote a parody of conservative pundit William F. Buckley Jr., which said "In the afternoons he is in the habit of going into crowded rooms and making everybody else feel inferior. The evenings are reserved for extended bouts of name-dropping."

Buckley admired the parody and offered Brooks a job with *National Review*. A turning point in Brooks's thinking came later that year in a televised debate with Milton Friedman, which, as Brooks describes it, "was essentially me making a point, and he making a two-sentence rebuttal which totally devastated my point."

Before the 2003 invasion of Iraq, Brooks argued forcefully for American military intervention, echoing the belief of commentators and political figures that American and British forces would be welcomed as liberators. In the spring of 2004, some of his opinion pieces suggested that he had tempered his earlier optimism about the war.

Brooks' public writing about the U.S. wars in Afghanistan and Iraq is similar to those by neoconservatives, according to a Salon article by Glenn Greenwald, that labels Brooks as a neoconservative. His angry dismissal of the conviction of Scooter Libby as being "a farce" and having "no significance" was derided by political blogger Andrew Sullivan.

On August 10, 2006, Brooks wrote a column for The *New York Times* titled "Party No. 3". The column proposed the idea of the McCain-Lieberman Party, or the fictional representation of the fictional moderate majority in America.

Ottawa Citizen commentator David Warren has identified Brooks as the sort of conservative pundit that liberals like, someone who is "sophisticated" and "engages with" the liberal agenda, in contrast to a real conservative like Charles Krauthammer. Brooks has long been a supporter of John McCain; however, he did not show a liking for McCain's 2008 running mate, Sarah Palin, calling her a "cancer" on the Republican Party. He has referred to her as a "joke," unlikely to ever win the Republican nomination. But he later admitted during a CSPAN interview that he had gone too far in his previous "cancer" comments about Palin, which he regretted, and simply stated he was not a fan of her values.

In a March 2007 article published in The *New York Times* titled "No U-Turns", Brooks explained that the Republican Party must distance itself from the minimal-government conservative principles that had arisen during the Abraham Lincoln, Barry Goldwater, Ronald Reagan and Calvin Coolidge eras. He claims that these core concepts had served their purposes and should no longer be embraced by Republicans in order to win elections, which he considers the most important purpose of a political party designed to serve the political class.

Brooks has been a frequent admirer of President Barack Obama. In an August 2009 profile of Brooks, The *New Republic* describes his first encounter with Obama, in the spring of 2005: "Usually when I talk to senators, while they may know a policy area better than me, they generally don't know political philosophy better than me. I got the sense he knew both better than me. [...] I remember distinctly an image of—we were sitting on his couches, and I was looking at his pant leg and his perfectly creased pant, and I'm thinking, a) he's going to be president and b) he'll be a very good president." Two days after Obama's second autobiography, *The Audacity of Hope*, hit bookstores, Brooks published a column in The *New York Times*, titled "Run, Barack, Run", urging the Chicago politician to run for president. However as of December 2011 in a CSPAN interview, Brook's opinion of Obama's presidency was more tempered, giving Obama only a "B-" rating, and said that Obama's chances of reelection would be less than 50-50 if elections were held at that time.

In writing for The *New York Times* in January 2010, Brooks described Israel as "an astonishing success story". He wrote that "Jews are a famously accomplished group," who, because they were "forced to give up farming in the Middle Ages... have been living off their wits ever since". In Brooks' view, "Israel's technological success is the fruition of the Zionist dream. The country was not founded so stray settlers could sit among thousands of angry Palestinians in Hebron. It was founded so Jews would have a safe place to come together and create things for the world."

Brooks opposes what he sees as self-destructive behavior, such as teenage sex and divorce. His view is that "sex is more explicit everywhere barring real life. As the entertainment media have become more sex-saturated, American teenagers have become more sexually abstemious" by "waiting longer to have sex...[and] having fewer partners." He sees the culture war as nearly over, because "today's young people...seem happy with the frankness of the left and the wholesomeness of the right." As a result, he is optimistic about the United States' social stability, which he considers to be "in the middle of an amazing moment of improvement and repair."

Brooks also broke with many in the conservative movement when, in late 2003, he came out in favor of same-sex marriage in his *New York Times* column. He equated the idea with traditional conservative values: "We should insist on gay marriage. We should regard it as scandalous that two people could claim to love each other and not want to sanctify their love with marriage and fidelity.... It's going to be up to conservatives to make the important, moral case for marriage, including gay marriage."

Regarding abortion, Brooks has advocated for pro-choice government regulations: abortion should be legal, with parental consent for minors, during the first four or five months, and illegal afterward, except in extremely rare circumstances. (*New York Times*, April 22, 2002.)

MARK **CUBAN**

When Mark Cuban purchased the Dallas Mavericks on January 14, 2000, the face of the organization began to change immediately. Once again Mavericks games had a party atmosphere as Reunion Arena rocked with the return of the "Reunion Rowdies." Mavericks games became more than just ordinary NBA games—they were a total entertainment experience.

Cuban was not only successful at instilling a sense of pride and passion into Mavericks fans by presenting himself as the ultimate role model by cheering from the same seats he had in years past, but he also became the first owner in team sports to encourage fan interaction through e-mail on his personal computer. It was through this personal touch that fans throughout the Metroplex, and around the world, began to notice Cuban's energetic personality and take notice of the Mavericks. He has personally responded to thousands of emails, and several suggestions from fans have led to innovative changes such as a new three-sided shot clock, which allows line of site to the 24-second clock from anywhere in the arena.

Cuban's whatever-it-takes attitude and commitment to winning has everyone's attention. From his first introduction to the team to the end of his first season as owner, the players responded with a 31-19 record, including a 9-1 mark in April 2000. In addition to hiring special coaches for offense, defense and shooting, Cuban has promised to do everything in his power to improve the team. This goal was achieved as the club finished the 2000-01 season with a 53-29 record en route to their first playoff appearance in 11 years where they became just the sixth team in NBA history to be down 0-2 and come back to win a five-game series vs. Utah in Round 1.

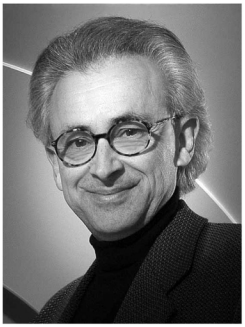
Before the start of the 2001-02 season, American Airlines Center, the Mavs new home, opened and Cuban co-founded HDNet, an all high-definition television network on DIRECTV channel 199 which launched in September 2001. As with his other ventures, Cuban is revolutionizing the television industry with HDNet. He is planning to expand HDNet to include three more networks showing high-def sports, movies and entertainment by the end of 2002.

During the Mavs 2001-02 campaign, the team continued their winning ways by finishing the season with a franchise-best record of 57-25 and an NBA-best road record of 27-14, advancing to the postseason for the second-consecutive year.

Prior to his purchase of the Mavericks, Cuban co-founded Broadcast.com, the leading provider of multimedia and streaming on the Internet, in 1995, selling it to Yahoo! in July of 1999. Before Broadcast.com, Cuban co-founded MicroSolutions, a leading National Systems Integrator, in 1983, and later sold it to CompuServe.

Today, in addition to his ownership of the Mavericks, Cuban is an active investor in leading and cutting-edge technologies and continues to be a sought-after speaker.

ANTONIO **DAMASIO**



Antonio Damasio (born February 25, 1944 in Lisbon, Portugal) is a University Professor (an award based on multi-disciplinary interests and significant accomplishments in several disciplines) and David Dornsife Professor of Neuroscience at the University of Southern California, where he heads USC's Brain and Creativity Institute. Prior to taking up his posts at USC, in 2005, Damasio was M.W. Van Allen Professor and Head of Neurology at the University of Iowa Hospitals and Clinics from 1976 to 2005. He is also Adjunct Professor at the Salk Institute.

Damasio is the author of several best-selling books which describe his scientific thinking. "As a leading neuroscientist, Damasio has dared to speculate on neurobiological data, and has offered a theory about the relationship between human emotions, human rationality, and the underlying biology."

Damasio was born in Lisbon and studied medicine at the University of Lisbon Medical School in Portugal, where he also did his neurological residency and completed his doctorate. He worked as a research fellow at the Aphasia Research Center in Boston in 1967, prior to receiving his MD in Lisbon. His work there on behavioural neurology was done under the supervision of the late Norman Geschwind, the Harvard neurologist who created the field.

As a researcher, Damasio's main field is the neurobiology of the mind, especially neural systems which subserve emotion, decision-making, memory, language and consciousness. Damasio's seeks to demonstrate that emotions play a critical role in high level cognition, an idea that ran counter to dominant 20th century views in psychology, neuroscience and philosophy. He showed that emotions and their biological underpinnings are involved in decision-making (both positively and negatively, and often non-consciously); provide the scaffolding for the construction of social cognition; and are required for the self processes which undergird consciousness. "Damasio provides a contemporary scientific validation of the linkage between feelings and the body by highlighting the connection between mind and nerve cells... this personalized embodiment of mind."

He formulated the somatic markers hypothesis, which captures the essence of these ideas. This idea has inspired many systems-neuroscience experiments carried out in laboratories in the U.S. and Europe, and has had a major impact in contemporary science and philosophy. His articles on this topic include: Bechara A, Damasio AR, Damasio H, Anderson S. Insensitivity to future consequences following damage to human prefrontal cortex. Cognition. 50:7-15. 1994; Bechara A, Damasio H, Tranel D, Damasio AR. Deciding advantageously before knowing the advantageous strategy. Science. 275:1293-1294. 1997; Anderson SW, Bechara A, Damasio H, Tranel D, Damasio AR. Impairment of social and moral behaviour related to early damage in human prefrontal cortex. Nature Neuroscience. 2:1032-1037. Damasio has been named by the Institute of Scientific Information as one of the most highly cited researchers in the past decade). Current work on the biology of moral decisions, neuro-economics, social communication, and drug-addiction, has been strongly influenced by Damasio's hypothesis.

Damasio also proposed that emotions are part of homeostatic regulation and are rooted in reward/punishment mechanisms. He recovered James' perspective on feelings as a read-out of body states, but expanded it with an "as-if-body-loop" device which allows for the substrate of feelings to be simulated rather than actual (foreshadowing the simulation process later uncovered by mirror neurons). He demonstrated experimentally that the insular cortex is a critical platform for feelings, a finding that has been widely replicated, and he uncovered cortical and subcortical induction sites for human emotions, e.g. in ventromedial prefrontal cortex and amygdala. He also demonstrated that while the insular cortex plays a major role in feelings, it is not necessary for feelings to occur, suggesting that brain stem structures play a basic role in the feeling process.

He has continued to investigate the neural basis of feelings and demonstrated that although the insular cortex is a major substrate for this process it is not exclusive, suggesting that brain stem nuclei are critical platforms as well. He regards feelings as the necessary foundation of sentience.

In another development, Damasio proposed that the cortical architecture on which learning and recall depend involves multiple, hierarchically organized loops of axonal projections that converge on certain nodes out of which projections diverge to the points of origin of convergence (the convergence-divergence framework). This architecture is applicable to the understanding of memory processes and of aspects of consciousness related to the access of mental contents.

In "The Feeling of What Happens", Damasio lays the foundations of the "enchainment of precedences": "the nonconscious neural signaling of an individual organism begets the protoself which permits core self and core consciousness, which allow for an autobiographical self, which permits extended consciousness. At the end of the chain, extended consciousness permits conscience.

Damasio's research depended significantly on establishing the modern human lesion method, an enterprise made possible by Hanna Damasio's structural neuroimaging/neuroanatomy work complemented by experimental neuroanatomy (with Gary Van Hoesen and Josef Parvizi), experimental neuropsychology (with Antoine Bechara, Ralph Adolphs, and Dan Tranel) and functional neuroimaging (with Kaspar Meyer, Jonas Kaplan, and Mary Helen Immordino-Yang). The experimental neuroanatomy work with Van Hoesen and Bradley Hyman led to the discovery of the disconnection of the hippocampus caused by neurofibrillary tangles in the entophinal cortex of patients with Alzheimer's disease.

As a clinician, he and his collaborators have studied and treated disorders of behaviour and cognition, and movement disorders.

Damasio's books deal with the relationship between emotions and feelings, and what their brain substrates. His 1994 book, *Descartes' Error: Emotion, Reason and the Human Brain*, won the Science et Vie prize, was a finalist for the *Los Angeles Times* Book Award, and is translated in over 30 languages. It is regarded as one of the most influential books of the past two decades. His second book, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness*, was named as one of the ten best books of 2001 by the *New York Times Book Review*, a *Publishers Weekly* Best Book of the Year, a *Library Journal* Best Book of the Year, and has over 30 foreign editions. Damasio's *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain*, was published in 2003. In it, Damasio suggested that Spinoza's thinking foreshadowed discoveries in biology and neuroscience views on the mind-body problem. Spinoza was a protobiologist. His latest book is *Self Comes to Mind: Constructing the Conscious Brain*. In it Damasio suggests that the self is the key to conscious minds and that feelings, from the kind he designates as primordial to the well-known feelings of emotion, are the basic elements in the construction of the protoself and core self. The book received the Corinne International Book Prize.

Damasio is a member of the American Academy of Arts and Sciences, the National Academy of Sciences' Institute of Medicine, and the European Academy of Sciences and Arts. Damasio has received many awards including the Prince of Asturias Award in Science and Technology, the Honda Prize, the Kappers Neuroscience Medal, the Beaumont Medal from the American Medical Association, the Nonino Prize and the Reenpaa Prize in Neuroscience. He has received honorary doctoral degrees (Doctor honoris causa) from the University of Aachen (2002), University of Aveiro (2003), University of Copenhagen (Copenhagen Business School; 2009), University of Leiden (2010), University Ramon Llull, Barcelona (2010), University of Coimbra (2011) and from the EPFL, Lausanne (2011).

His current work involves the social emotions, consciousness and the creative interface between neuroscience and the arts, especially music and film. The role of feelings states on sentience.

Damasio is married to Dr. Hanna Damasio, his colleague and frequent co-author.

Damasio himself notes, in fallibilist fashion, "I have a difficult time seeing scientific results, especially in neurobiology, as anything but provisional approximations"'. Whether despite or because of that fallibilism, Damasio writes in the belief that 'scientific knowledge can be a pillar to help humans endure and prevail'.

OUR HOST

JACK **DANGERMOND**

Jack Dangermond is the founder and president of Esri, the world's fourth largest privately held software company. Founded in 1969 and headquartered in Redlands, California, Esri is widely recognized as the technical and market leader in geographic information systems, or GIS, pioneering innovative solutions for working with spatial data.

Esri has more than one million users in over 350,000 organizations representing government; nongovernmental organizations (NGOs); academia; and industries such as utilities, health care, transportation, telecommunications, homeland security, retail, and agriculture.

Dangermond is recognized not only as a pioneer in spatial analysis methods but also as one of the most influential people in GIS. He actively manages Esri and is closely connected to projects, clients, and company vision. He takes a leadership role in national and global initiatives to facilitate standards for data access and sharing across agencies and organizations. He is personally committed to applying GIS methods for environmental stewardship and sustainable communities.

Dangermond is the recipient of numerous fellowships, honorary degrees, and awards. He has authored hundreds of papers on GIS in such diverse fields as photogrammetry, computer science, planning, environmental science, and cartography. He delivers keynote addresses at meetings and conferences around the globe.

Dangermond's current work is focused on helping organizations deploy spatial data in enterprise environments, Web-based services, and mobile computing systems as well as enhancing applications, models, and tools that can be used for optimized routing, intelligent site selection, crime and disease analysis, location-based services, infrastructure management, public safety, and homeland security.

DAVE **GALLO**

David Gallo is an American oceanographer and Director of Special Projects at the Woods Hole Oceanographic Institution—a preeminent, globally recognized scientific laboratory. For more than 25 years, Dr. Gallo has been at the forefront of ocean exploration, participating in and being witness to the development of new technologies and scientific discoveries that shape our view of planet earth. He has been described by TED Conferences as "an enthusiastic ambassador between the sea and those of us on dry land." With more than 8 million views his TED presentation "Underwater Astonishments" is among the top 5 TED Talks viewed to date.

David has participated in expeditions to all of the world's oceans and was one of the first scientists to use a combination of robots and submarines to explore the deep seafloor. Most recently he co-led an expedition to create the first detailed and comprehensive map of the *RMS Titanic* and he co-led the successful international effort to locate the remains of Air France flight 447.

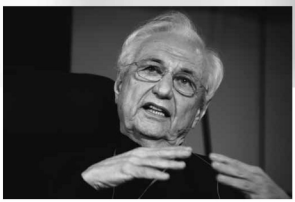
Dr. Gallo is currently active in planning a series of challenging expeditions and is encouraging the development of new technologies for ocean exploration. He is a member of James Cameron's Deep Ocean Task Force and the XPrize Ocean Advisory Board. Almost every expedition into the deep provides results that are often surprising, sometimes startling and in many cases revolutionary.

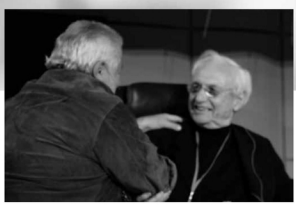
David is becoming increasingly outspoken about the relationship between humanity and the sea. He feels strongly that instead of taking the oceans for granted we need to recognize the oceans critical role in providing the air we breath, the water we drink, and the food we eat. At the same time, Dr. Gallo feels that human activity has impacted the ocean on a global scale and with significant consequences. The oceans hold the clues to our past and the key to our future yet they remain mostly unexplored and poorly understood.

Dr. Gallo is personally committed to conveying the excitement and importance of ocean exploration to the public-at-large. He has lectured internationally to audiences ranging from children to CEO's with the goal of awakening the little bit of Jacques Cousteau and Jules Vernes that resides in each of us. He has given more than 10 TED and TEDx presentations and has appeared in numerous documentaries (Discovery Channel, History Channel, National Geographic) and has been featured on numerous televised news programs (Weather Channel , PBS Need to Know, MSNBC Ed Show, and NBC Today show).

In recognition of his efforts in exploration and science communications, David was recently elected a fellow of the American Association for the Advancement of Science. He is a National Fellow of the Explorer's Club, a member of the American Geophysical Union, and active on several boards including the Marine Environmental Research Institute, the One World One Ocean Campaign, and the Terramar Project.

FRANK **GEHRY**





Raised in Toronto, Canada, Frank Gehry moved with his family to Los Angeles in 1947. Mr. Gehry received his Bachelor of Architecture degree from the University of Southern California in 1954, and he studied City Planning at the Harvard University Graduate School of Design. In subsequent years, Mr. Gehry has built an architectural career that has spanned five decades and produced public and private buildings in America, Europe and Asia. Hallmarks of Mr. Gehry's work include a particular concern that people exist comfortably within the spaces that he creates, and an insistence that his buildings address the context and culture of their sites and the budgets of his clients.

His work has earned Mr. Gehry several of the most significant awards in the architectural field. He was inducted into the College of Fellows of the American Institute of Architects in 1974, and his buildings have received over 100 national and regional A.I.A. awards. In 1977, Mr. Gehry was named recipient of the Arnold W. Brunner Memorial Prize in Architecture from the American Academy of Arts and Letters. In 1989, he was awarded the Pritzker Architecture Prize, perhaps the premiere accolade of the field, honoring "significant contributions to humanity and the built environment through the art of architecture." In 1992, he received the Wolf Prize in Art (Architecture) from the Wolf Foundation. In the same year, he was named the recipient of the Praemium Imperiale Award by the Japan Art Association to "honor outstanding contributions to the development, popularization, and progress of the arts." In 1994, he became the first recipient of the Dorothy and Lillian Gish Award for lifetime contribution to the arts. In 1998, Mr. Gehry received the National Medal of Arts, and he became the first recipient of the Friedrich Kiesler Prize. In 1999, Mr. Gehry received the Lotos Medal of Merit from the Lotos Club, and he received the Gold Medal from the American Institute of Architects. In 2000, Mr. Gehry received the Gold Medal from the Royal Institute of British Architects, and he received the Lifetime Achievement Award from Americans for the Arts. In 2002, Mr. Gehry received the Gold Medal for Architecture from the American Academy of Arts and Letters. Mr. Gehry was named a Fellow of the American Academy of Arts and Letters in 1987, a trustee of the American Academy in Rome in 1989, and a Fellow of the American Academy of Arts and Sciences in 1991. In 1994, he was bestowed with the title of Academician by the National Academy of Design. In 1998, he was named an Honorary Academician by the Royal Academy of Arts. In 2003, Mr. Gehry was inducted into the European Academy of Sciences and Arts and he was designated as a Companion to the Order of Canada. In 2005 Mr. Gehry received the Ordre National de Legion d'honneur Chevalier from the French Government. In 2006 he was a first year inductee into the California Hall of Fame. In 2008, Mr. Gehry received the Golden Lion Lifetime Achievement Award at the Venice Biennale. In 2010, Mr. Gehry received the John Singleton Copley Award from the American Associates of the Royal Academy Trust, and he received the Cooper Union for the Advancement of Science and Art Award in New York. Mr. Gehry has received honorary doctoral degrees from Occidental College, Whittier College, the California College of Arts and Crafts, the Technical University of Nova Scotia, the Rhode Island School of Design, the California Institute of Arts, the Southern California Institute of Architecture, the Otis Art Institute at the Parsons School of Design, the University of Toronto, the University of Southern California, Yale University, Harvard University, and the University of Edinburgh. Mr. Gehry has held teaching positions at some of the world's most prestigious institutions including Harvard University, University of Southern California, University of California Los Angeles, Sci-Arc, University of Toronto, Columbia University, the Federal Institute of Technology in Zurich, and at Yale University where he still teaches today.

Notable projects include: the Guggenheim Museum in Bilbao, Spain; the DZ Bank Building in Berlin; Nationale-Nederlanden Building in Prague; the Jay Pritzker Pavilion and BP Bridge in Millennium Park in Chicago, Illinois; Maggie's Centre, a cancer patient center in Dundee, Scotland; Hotel Marques de Riscal in El Ciego, Spain; Lou Ruvo Brain Institute in Las Vegas, Nevada; Princeton University Peter B. Lewis Science Library in Princeton, New Jersey; Art Gallery of Ontario Renovation in Toronto, Ontario, Canada; the New World Symphony in Miami, Florida; the Eight Spruce Street Residential Tower located in New York City; and the Walt Disney Concert Hall in Los Angeles, California. Projects under construction include the Signature Theatre in New York City; the Ohr O'Keefe Museums in Biloxi, Mississippi; the Make it Right Foundation in New Orleans, Louisiana, the Puente de Vida Museum of Biodiversity in Panama; the Frederick R. Weisman Art Museum Expansion at the University of Minnesota; and the Foundation Louis Vuitton Museum in Paris, France. Mr. Gehry is also completing work on the Guggenheim Abu Dhabi; LUMA Foundation in Arles, France and the University of Technology, Sydney in Sydney, Australia.

2006 / 200 lbs ago

MATT **GROENING**

Matt Groening was born in Portland, Oregon, on February 15, the third of five children. His father, Homer, was a cartoonist and filmmaker. From an early age, Matt created his own cartoons, amusing his friends and annoying his teachers. Groening attended Evergreen State College in Washington State, where he studied philosophy and continued his interest in cartoons, comics and music.

After his graduation in 1977, Groening headed to Los Angeles where he struggled in immobilizing but irksome poverty. Increasingly frustrated by the traffic, smog, and his landlords, Matt began to vent his angst to his friends by sending them cartoons starring a bug-eyed rabbit named Binky. Groening soon began to publish and sell these cartoons at the record shop where he worked. Their popularity encouraged Matt to syndicate, and in April 1980, Life In Hell® formally debuted in the *Los Angeles Reader*. It was there that he met his future wife, Deborah Caplan, and together they formed Acme Features Syndicate, which today circulates Life in Hell® to more than 250 newspapers around the world in a half-dozen languages.

Life in Hell® has also been collected in a best-selling series of books with over two million copies in print, including *Love is Hell*, *Work is Hell*, *School is Hell*, *Childhood is Hell*, *Akbar & Jeff's Guide to Life*, *Greetings From Hell*, *The Big Book of Hell*, *With Love From Hell*, *How to Go to Hell*, *The Road to Hell*, *Binky's Guide to Love*, and *Love is Still Hell*.

In 1987 James L. Brooks approached Matt about creating animated shorts to fit between sketches of "The Tracey Ullman Show." Matt agreed, but instead of using the Life in Hell® characters, he created an entirely new cast: The Simpsons, which bear the names of his family members, Homer, Marge, Lisa and Maggie (Bart is an anagram for brat).

The Simpsons were soon spun off into a half-hour animated series which first aired on December 17, 1989 with a Christmas special, followed by the series premiere on January 14, 1990. It has since gone on to become the longest running prime-time animated show in television history. An international hit, the series has also spawned a licensing and merchandising empire.

Books based on The Simpsons include *The Simpsons Xmas Book*, *Greetings From The Simpsons*, *The Simpsons Rainy Day Fun Book*, *The Simpsons Uncensored Family Album*, *Maggie Simpson's Alphabet Book*, *Maggie Simpson's Counting Book*, *Maggie Simpson's Book of Colors & Shapes*, *Maggie Simpson's Book of Animals*, *The Simpsons Fun in the Sun Book*, *Making Faces With The Simpsons*, *The Ultra-Jumbo Rain-Or-Shine Fun Book*, *Cartooning With The Simpsons*, *Bart's Guide To Life* and *The Simpsons: A Complete Guide To Our Favorite Family*, a campanion book to the television series.

Groening is also creator and publisher of Bongo Comics and Zongo Comics.

HERBIE **HANCOCK**

Herbie Hancock is a true icon of modern music. Throughout his explorations, he has transcended limitations and genres while maintaining his unmistakable voice. With an illustrious career spanning five decades and 14 Grammy® Awards, including Album of the Year for River: The Joni Letters, he continues to amaze audiences across the globe.

There are few artists in the music industry who have had more influence on acoustic and electronic jazz and R&B than Herbie Hancock. As the immortal Miles Davis said in his autobiography, "Herbie was the step after Bud Powell and Thelonious Monk, and I haven't heard anybody yet who has come after him."

Born in Chicago in 1940, Herbie was a child piano prodigy who performed a Mozart piano concerto with the Chicago Symphony Orchestra at age 11. He began playing jazz in high school, initially influenced by Oscar Peterson and Bill Evans. He also developed a passion for electronics and science, and double-majored in music and electrical engineering at Grinnell College.

In 1960, Herbie was discovered by trumpeter Donald Byrd. After two years of session work with Byrd as well as Phil Woods and Oliver Nelson, he signed with Blue Note as a solo artist. His 1963 debut album, 'Takin' Off', was an immediate success, producing the hit "Watermelon Man."

In 1963, Miles Davis invited Herbie to join the Miles Davis Quintet. During his five years with Davis, Herbie and his colleagues Wayne Shorter (tenor sax), Ron Carter (bass), and Tony Williams (drums) recorded many classics, including 'ESP', 'Nefertiti' and 'Sorcerer'. Later on, Herbie made appearances on Davis' groundbreaking 'In a Silent Way' and 'Bitches Brew', which heralded the birth of jazz-fusion.

Herbie's own solo career blossomed on Blue Note, with classic albums including 'Maiden Voyage', 'Empyrean Isles', and 'Speak Like a Child'. He composed the score to Michelangelo Antonioni's 1966 film 'Blow Up', which led to a successful career in feature film and television music.

After leaving Davis, Herbie put together a new band called The Headhunters and, in 1973, recorded 'Head Hunters.' With its crossover hit single "Chameleon," it became the first jazz album to go platinum.

By mid-decade, Herbie was playing for stadium-sized crowds all over the world and had no fewer than four albums in the pop charts at once. In total, Herbie had 11 albums in the pop charts during the 1970s. His '70s output inspired and provided samples for generations of hip-hop and dance music artists.

Herbie also stayed close to his love of acoustic jazz in the '70s, recording and performing with VSOP (reuniting him with his Miles Davis colleagues), and in duet settings with Chick Corea and Oscar Peterson.

In 1980, Herbie introduced the trumpeter Wynton Marsalis to the world as a solo artist, producing his debut album and touring with him as well. In 1983, a new pull to the alternative side led Herbie to a series of collaborations with Bill Laswell. The first, 'Future Shock', again struck platinum, and the single "Rockit" rocked the dance and R&B charts, winning a Grammy for Best R&B Instrumental. The video of the track won five MTV awards. 'Sound System', the follow-up, also received a Grammy in the R&B instrumental category.

Herbie won an Oscar in 1986 for scoring the film "'Round Midnight", in which he also appeared as an actor. Numerous television appearances over the years led to two hosting assignments in the 1980s: "Rock School" on PBS and Showtime's "Coast To Coast".

After an adventurous 1994 project for Mercury Records, 'Dis Is Da Drum', he moved to the Verve label, forming an all-star band to record 1996's Grammy-winning 'The New Standard'. In 1997, an album of duets with Wayne Shorter, '1+1', was released.

The legendary Headhunters reunited in 1998, recording an album for Herbie's own Verve-distributed imprint, and touring with the Dave Matthews Band. That year also marked the recording and release of 'Gershwin's World', which included collaborators Joni Mitchell, Stevie Wonder, Kathleen Battle, the Orpheus Chamber Orchestra, Wayne Shorter and Chick Corea. 'Gershwin's World' won three Grammys in 1999, including Best Traditional Jazz Album and Best R&B Vocal Performance for Stevie Wonder's "St. Louis Blues."

Herbie reunited with Bill Laswell to collaborate with some young hip-hop and techno artists on 2001's FUTURE2FUTURE. He also joined with Roy Hargrove and Michael Brecker in 2002 to record a live concert album, 'Directions In Music: Live at Massey Hall', a tribute to John Coltrane and Miles Davis.

'Possibilities', released in August 2005, teamed Herbie with many popular artists, such as Sting, Annie Lennox, John Mayer, Christina Aguilera, Paul Simon, Carlos Santana, Joss Stone and Damien Rice. That year, he played a number of concert dates with a re-staffed Headhunters, and became the first-ever Artist-In-Residence at the Tennessee-based festival Bonnaroo.

In 2007, Hancock recorded and released 'River: The Joni Letters', a tribute to longtime friend and collaborator Joni Mitchell featuring Wayne Shorter, guitarist Lionel Loueke, bassist Dave Holland and drummer Vinnie Colaiuta and co-produced by Larry Klein. He enlisted vocalists Norah Jones, Tina Turner, Corinne Bailey Rae, Luciana Souza, Leonard Cohen and Mitchell herself to perform songs she wrote or was inspired by. The album received glowing reviews and was a year-end Top 10 choice for many critics. It also garnered three Grammy Awards, including Album of the Year; Herbie is one of only a handful of jazz musicians ever to receive that honor.

In 2010 Hancock released the critically-acclaimed CD, 'Herbie Hancock's The Imagine Project,' winner of two 2011 Grammy Awards for Best Pop Collaboration and Best Improvised Jazz Solo. Utilizing the universal language of

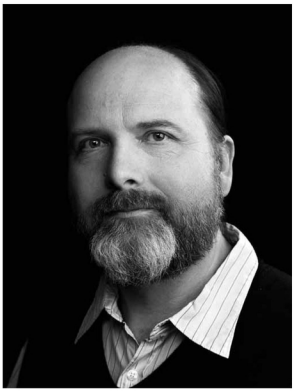
music to express its central themes of peace and global responsibility, the 'Imagine' project was recorded around the world and features a stellar group of musicians including Jeff Beck, Seal,Pink, Dave Matthews, The Chieftains, Lionel Loueke, Oumou Sangare, Konono #1, Anoushka Shankar, Chaka Khan, Marcus Miller, Derek Trucks, Susan Tedeschi, Tinariwen, and Ceu.

Herbie Hancock also maintains a thriving career outside the performing stage and recording studio. Recently named by the Los Angeles Philharmonic as Creative Chair For Jazz, he currently also serves as Institute Chairman of the Thelonious Monk Institute of Jazz, the foremost international organization devoted to the development of jazz performance and education worldwide. Hancock is also a founder of The International Committee of Artists for Peace, and was recently awarded the much esteemed "Commandeur des Arts et des Lettres" by French Prime Minister Francois Fillon.

In July of 2011 Hancock was designated a UNESCO Goodwill Ambassador by UNESCO Director-General Irina Bokova. Recognizing Herbie Hancock's "dedication to the promotion of peace through dialogue, culture and the arts," the Director-General has asked the celebrated jazz musician "to contribute to UNESCO's efforts to promote mutual understanding among cultures, with a particular emphasis on fostering the emergence of new and creative ideas amongst youth, to find solutions to global problems, as well as ensuring equal access to the diversity of artistic expressions." UNESCO's Goodwill Ambassadors are an outstanding group of celebrity advocates who have generously accepted to use their talent and status to help focus the world's attention on the objectives and aims of UNESCO's work in its fields of competence: education, culture, science and communication/information

Now in the fifth decade of his professional life, Herbie Hancock remains where he has always been: in the forefront of world culture, technology, business and music. Though one can't track exactly where he will go next, he is sure to leave his inimitable imprint wherever he lands.

DANNY **HILLIS**



William Daniel "Danny" Hillis (born September 25, 1956, in Baltimore, Maryland) is an American inventor, scientist, engineer, entrepreneur, and author. He co-founded Thinking Machines Corporation, a company that developed the Connection Machine, a parallel supercomputer designed by Hillis at MIT. He is also co-founder of the Long Now Foundation, Applied Minds, Metaweb Technologies, Applied Proteomics, and author of *The Pattern on the Stone: The Simple Ideas That Make Computers Work*.

Danny Hillis was born in Baltimore, Maryland in 1956. His father, William Hillis, was a US Air Force epidemiologist studying hepatitis in Africa and relocated with his family through Rwanda, Burundi, Republic of the Congo, and Kenya. He spent a brief part of his childhood in Calcutta, India when his father was a visiting faculty at ISI, Calcutta. During these years the young Hillis was home schooled by his mother Aryge Briggs Hillis, a biostatistician, and developed an early appreciation for mathematics and biology. His younger brother is David Hillis, a professor of evolutionary biology at the University of Texas at Austin, and his sister is Argye E. Hillis, a professor of neurology at Johns Hopkins University.

In 1978 Hillis graduated from MIT with a BS degree in mathematics, followed in 1981 with an MS degree in Electrical Engineering and Computer Science (EECS), specializing in robotics.

During this time Hillis worked at the MIT Logo Laboratory developing computer hardware and software for children. He designed computer-oriented toys and games for the Milton Bradley Company, and co-founded Terrapin Software—a producer of computer software for elementary schools. He also built a digital computer composed of Tinkertoys that is on display at the Museum of Science, Boston.

Hillis' major research, however, was into parallel computing. Hillis designed the Connection Machine, a parallel supercomputer; in 1983 Hillis co-founded Thinking Machines Corporation to produce and market supercomputers based on this design. In 1988, continuing this research, Hillis received a PhD in EECS from MIT under doctoral advisers Gerald Jay Sussman, Marvin Minsky and Claude Shannon.

Hillis co-founded Thinking Machines Corporation in 1983 while doing his doctoral work at MIT. The company was to develop Hillis' Connection Machine design into commercial parallel supercomputers, and to explore computational pathways to building artificial intelligence. Hillis' ambitions are represented by the company's motto: "We're building a machine that will be proud of us," and Hillis' parallel architecture was to be the main component for this task:

Clearly, the organizing principle of the brain is parallelism. It's using massive parallelism. The information is in the connection between a lot of very simple parallel units working together. So if we built a computer that was more along that system of organization, it would likely be able to do the same kinds of things the brain does.

At Thinking Machines Corporation, Hillis built a technical team with many people that would later become leaders in science and industry including Brewster Kahle, Guy Steele, Sydney Brenner, David Waltz, Jack Schwartz, and Eric Lander. He even recruited Richard Feynman to spend his summers there. For many years, Thinking Machines Corporation connection machines were the fastest computers in the world.

During 1994, however, Thinking Machines filed for bankruptcy. In 1996, after a short stint as a professor at the MIT Media Lab, Hillis joined The Walt Disney Company full time in the newly created role of Disney Fellow and Vice President, Research and Development, Walt Disney Imagineering, which Hillis claimed was an early ambition of his:

I've wanted to work at Disney ever since I was a child...I remember listening to Walt Disney on television describing the 'Imagineers' who designed Disneyland. I decided then that someday I would be an Imagineer. Later, I became interested in a different kind of magic—the magic of computers. Now I finally have the perfect job—bringing computer magic into Disney.

At Disney, Hillis developed new technologies as well as business strategies for Disney's theme parks, television, motion pictures, Internet and consumer products businesses. He also designed new theme park rides, a full sized walking robot dinosaur and various micro mechanical devices.

Hillis left Disney in 2000, taking with him Bran Ferren, President of the Walt Disney Imagineering, R&D Creative Technologies division. Together, Ferren and Hillis founded Applied Minds, a company aimed at providing technology and consulting services to firms in an array of industries, including aerospace, electronics, and toys. In July 2005, Hillis and others from Applied Minds initiated Metaweb Technologies, Inc. to develop a semantic data storage infrastructure for the Internet, and Freebase, an "open, shared database of the world's knowledge". When Metaweb was acquired by Google, the technology became the basis of Google's Knowledge Graph. Hillis, together with Dr. David B. Agus, cofounded a spinoff of Applied Minds called Applied Proteomics Inc which designed and prototyped a machine that measures the level of proteins in the blood for medical diagnosis.

Hillis' work with Agus on cancer led to the founding of the University of Southern California Physical Sciences-Oncology Center (USC PS-OC), funded by the National Cancer Institute (NCI). Hillis is the principle investigator of this program.

In 1993, with Thinking Machines facing its demise, Hillis wrote about long-term thinking and suggested a project to build a clock designed to function for millennia:

When I was a child, people used to talk about what would happen by the year 2000. Now, thirty years later, they still talk about what will happen by the year 2000. The future has been shrinking by one year per year for my entire life. I think it is time for us to start a long-term project that gets people thinking past the mental barrier of the Millennium. I would like to propose a large (think Stonehenge) mechanical clock, powered by seasonal temperature changes. It ticks once a year, bongs once a century, and the cuckoo comes out every millennium.

This clock became the Clock of the Long Now, a name invented by the songwriter and composer, Brian Eno. Hillis wrote an article for Wired magazine suggesting a clock that would last over 10,000 years. The project led directly to the founding of the Long Now Foundation in 1996 by Hillis and others, including Stewart Brand, Brian Eno, Esther Dyson, and Mitch Kapor.

Hillis asserts that parallelism itself is approximately the main ingredient of intelligence; that there is not anything else required to make a mind result from a distributed network of processors. Hillis believes that

...intelligence is just a whole lot of little things, thousands of them. And what will happen is we'll learn about each one at a time, and as we do it, machines will be more and more like people. It will be a gradual process, and that's been happening.

This is not so different from Marvin Minsky's Society of Mind theory, which holds that mind is a collection of agents, each one taking care of a particular aspect of intelligence, and communicating with one another, exchanging information as required.

Some artificial intelligence theorists have other opinions—that it's not the underlying computational mode that's crucial, but rather particular algorithms (of reasoning, memory, perception, etc.). Others argue that the right combination of "little things" is needed to give rise to the overall emergent patterns of coordinated activity that constitute real intelligence.

Hillis is one of a small number of people who have made a serious attempt to create such a "thinking machine" and his ambitions are clear:

"I'd like to find a way for consciousness to transcend human flesh. Building a thinking machine is really a search for a kind of Earthly immortality. Something much more intelligent than we can exist. Making a thinking machine is my way to reach out to that."

Hillis' 1998 popular science book *The Pattern on the Stone* attempts to explain concepts from computer science for laymen using simple language, metaphor and analogy. It moves from Boolean algebra through topics such as information theory, parallel computing, cryptography, algorithms, heuristics, Turing machines, and promising technologies such as quantum computing and emergent systems.

BJARKE **INGELS**

Bjarke Ingels started BIG Bjarke Ingels Group in 2005 after co-founding PLOT Architects in 2001 and working at OMA in Rotterdam. Through a series of award-winning design projects and buildings, Bjarke has developed a reputation for designing buildings that are as programmatically and technically innovative as they are cost and resource conscious. Bjarke has received numerous awards and honors, including the Danish Crown Prince's Culture Prize in 2011, the Golden Lion at the Venice Biennale in 2004, and the ULI Award for Excellence in 2009. In 2011, the Wall Street Journal awarded Bjarke the Architectural Innovator of the Year Award. In 2012, the American Institute of Architects granted the 8 House its Honor Award, calling it "a complex and exemplary project of a new typology."

Alongside his architectural practice, Bjarke taught at Harvard University, Yale University, Columbia University, and Rice University and is an honorary professor at the Royal Academy of Arts, School of Architecture in Copenhagen. He is a frequent public speaker and has spoken in venues such as TED, WIRED, AMCHAM, 10 Downing Street, and the World Economic Forum.

QUINCY **JONES**

An impresario in the broadest and most creative sense of the word, Quincy Jones' career has encompassed the roles of composer, record producer, artist, film producer, arranger, conductor, instrumentalist, TV producer, record company executive, magazine founder, multi-media entrepreneur and humanitarian. As a master inventor of musical hybrids, he has shuffled pop, soul, hip-hop, jazz, classical, African and Brazilian music into many dazzling fusions, traversing virtually every medium, including records, live performance, movies and television.

Celebrating more than 60 years performing and being involved in music, Quincy's creative magic has spanned over six decades, beginning with the music of the post-swing era and continuing through today's high-technology, international multi-media hybrids. In the mid-50's, he was the first popular conductor-arranger to record with a Fender bass. His theme from the hit TV series Ironside was the first synthesizer-based pop theme song. As the first black composer to be embraced by the Hollywood establishment in the 60's, he helped refresh movie music with badly needed infusions of jazz and soul. His landmark 1989 album, Back On The Block—named "Album Of The Year" at the 1990 Grammy Awards—brought such legends as Dizzy Gillespie, Ella Fitzgerald, Sarah Vaughan and Miles Davis together with Ice T, Big Daddy Kane and Melle Mel to create the first fusion of the be bop and hip hop musical traditions; while his 1993 recording of the critically acclaimed Miles and Quincy Live At Montreux, featured Quincy conducting Miles Davis' live performance of the historic Gil Evans arrangements from the Miles Ahead, Porgy and Bess and Sketches of Spain sessions, garnered a Grammy Award for Best Large Jazz Ensemble Performance. As producer and conductor of the historic "We Are The World" recording (the best-selling single of all time) and Michael Jackson's multi-platinum solo albums, Off The Wall, Bad and Thriller (the best selling album of all time, with over 50 million copies sold), Quincy Jones stands as one of the most successful and admired creative artist/executives in the entertainment world.

His 1995 recording, Q's Jook Joint, again showcased Quincy's ability to mold the unique talents of an eclectic group of singers and musicians, in what resulted in a retrospective of his broad and diverse career from that of a seasoned Jazz musician, to skilled composer, arranger, and bandleader, to acclaimed record producer.

A reference to the backwoods club houses of rural America in the 1930's, 40's, and 50's, the platinum selling Q's Jook Joint featured performances by artists such as Bono, Brandy, Ray Charles, Phil Collins, Coolio, Kenny "Babyface" Edmonds, Gloria Estefan, Rachelle Ferrell, Aaron Hall, Herbie Hancock, Heavy D., Ron Isley, Chaka Khan, R. Kelly, Queen Latifah, Tone Loc, the Luniz, Brian McKnight, Melle Mel, Shaquille O'Neal, Joshua Redman, the Broadway musical troupe Stomp, SWV, Take 6, newcomer Tamia, Toots Thielemans, Mervyn Warren, Barry White, Warren Wiebe, Charlie Wilson, Nancy Wilson, Stevie Wonder, Mr. X, and Yo-Yo, among others, and garnered seven Grammy nominations. His recording, From Q, With Love, featured a collection of 26 love songs that he recorded over the last 32 years of his more than 50 year career in the music business.

Named by Time Magazine as one of the most influential jazz musicians of the 20th century, Quincy Jones was born on March 14, 1933, in Chicago and brought up in Seattle. While in junior high school, he began studying trumpet and sang in a gospel quartet at age 12. His musical studies continued at the prestigious Berklee College of Music in Boston, where he remained until the opportunity arose to tour with Lionel Hampton's band as a trumpeter, arranger and sometime-pianist. He moved on to New York and the musical "big leagues" in 1951, where his reputation as an arranger grew. By the mid-50's, he was arranging and recording for such diverse artists as Sarah Vaughan, Ray Charles, Count Basie, Duke Ellington, Big Maybelle, Dinah Washington, Cannonball Adderly and LeVern Baker.

In 1957, Quincy decided to continue his musical education by studying with Nadia Boulanger, the legendary Parisian tutor to American expatriate composers such as Leonard Bernstein and Aaron Copeland. To subsidize his studies he took a job with Barclay Disques, Mercury's French distributor. Among the artists he recorded in Europe were Charles Aznavour, Jacques Brel and Henri Salvador, as well as such visitors from America as Sarah Vaughan, Billy Eckstine and Andy Williams. Quincy's love affair with European audiences continues through the present: in 1991, he began a continuing association with the Montreux Jazz and World Music Festival, which he serves as co-producer.

Quincy won the first of his many Grammy's in 1963 for his Count Basie arrangement of "I Can't Stop Loving You." Quincy's three-year musical association as conductor and arranger with Frank Sinatra in the mid-60's also teamed him with Basie for the classic Sinatra At The Sands, containing the famous arrangement of "Fly Me To The Moon," the first recording played by astronaut Buzz Aldrin when he landed upon the moon's surface in 1969.

When he became vice-president at Mercury Records in 1961, Quincy became the first high-level black executive of an established major record company. Toward the end of his association with the label, Quincy turned his attention to another musical area that had been closed to blacks--the world of film scores. In 1963, he started work on the music for Sidney Lumet's The Pawnbroker and it was the first of his 33 major motion picture scores. In 1985, he co-produced Steven Spielberg's adaptation of Alice Walker's The Color Purple, which garnered eleven Oscar nominations, introduced Whoopi Goldberg and Oprah Winfrey to film audiences, and marked Quincy's debut as a film producer. In 1991 Quincy helped launch NBC-TV's hit series, The Fresh Prince Of Bel Air, for which he served as an executive producer.

In 1990, Quincy Jones formed Quincy Jones Entertainment (QJE), a co-venture with Time Warner, Inc. The new company, which Quincy served as CEO and chairman, had a broad ranging, multi-media agenda which encompassed programming for current and future technologies, including theatrical motion pictures and network, cable and syndicated television. QJE produced NBC Television's Fresh Prince Of Bel Air (now in syndication), and UPN's In The House and Fox Television's Mad TV, among other syndicated shows and television specials. In 1991 Jones founded VIBE Magazine, and with his publishing group VIBE Ventures, would go on to acquire *SPIN* Magazine before divesting his magazine interests.

In January 1992, Quincy Jones executive produced the *An American Reunion* concert at Lincoln Memorial, an all-star concert and celebration that was the first official event of the presidential inaugural celebration and drew widespread acclaim as an HBO telecast.

On March 25, 1996, Quincy Jones, executive produced the most watched awards show in the world, the 68th Annual Academy Awards. The show received widespread acclaim as one of the most memorable Academy Award shows in recent years.

In 1997, Quincy Jones formed the Quincy Jones Media Group. QJMG's feature film projects in development include such highly anticipated films as the adaptations of the Ralph Ellison novel *Juneteeth*, David Halberstam's *The Children* for Home Box Office in association with producers Kathleen Kennedy and Frank Marshall, a bio-pic on the 19th century Russian poet Alexander Pushkin, *Pimp and Seeds of Peace* for Showtime, among others. For television, QJMG is developing the sit-com The White Guy. QJMG is also active in live entertainment, direct response marketing, and cross-media projects for home entertainment and educational applications.

As a record company executive, Quincy remained highly active in the recording field throughout the 1990s as the guiding force behind his own Qwest Records, which boasted such important artists as New Order, Tevin Campbell, Andre Crouch, Patti Austin, James Ingram, Siedah Garrett, Gregory Jefferson and Justin Warfield. New Order's album, Substance earned Qwest a gold album in 1987. Tevin Campbell's T.E.V.I.N was both a critical sensation and major commercial success, and the label's release of the Boyz N The Hood soundtrack album was among the most successful soundtrack recordings of 1991. Qwest Records has also released soundtrack albums from the major motion pictures Sarafina! and Malcolm X.

In 1994, Quincy Jones led a group of businessmen, including Hall of Fame football player Willie Davis, television producer Don Cornelius, television journalist Geraldo Rivera and businesswoman Sonia Gonsalves Salzman in the formation of Qwest Broadcasting, a minority controlled broadcasting company which purchased television stations in Atlanta and New Orleans for approximately $167 million, establishing it as one of the largest minority owned broadcasting companies in the United States. Quincy served as chairman and CEO of Qwest Broadcasting. In 1999, taking advantage of the rapid escalation of broadcast station values, Jones and his partners sold Qwest Broadcasting for a reported $270 million.

The laurels, awards and accolades have been innumerable: Quincy has won an Emmy Award for his score of the of the opening episode of the landmark TV miniseries, Roots, seven Oscar nominations, the Academy of Motion Picture Arts and Sciences' Jean Hersholt Humanitarian Award, 27 Grammy Awards, and N.A.R.A.S.' prestigious Trustees' Award and The Grammy Living Legend Award. He is the all-time most nominated Grammy artist with a total of 79 Grammy nominations. In 1990, France recognized Quincy with its most distinguished title, the Commandeur de la Legion d' Honneur. He is also the recipient of the French Ministry of Culture's Distinguished Arts and Letters Award. Quincy is the recipient of the Royal Swedish Academy of Music's coveted Polar Music Prize, and the Republic of Italy's Rudolph Valentino Award. He is also the recipient of honorary doctorates from Howard University, the Berklee College of Music, Seattle University, Wesleyan University, Brandeis University, Loyola University (New Orleans), Clark Atlanta University, Claremont University's Graduate School, the University of Connecticut, Harvard University, Tuskegee University, New York University, University of Miami and The American Film Institute, among others. In 2001, Jones was named a Kennedy Center Honoree, for his contributions to the cultural fabric of the United States of America. He was recognized by the National Endowment for the Arts as a Jazz Master—the nation's highest jazz honor, and was most recently bestowed the National Medal of Arts, our nation's highest artistic honor.

In 1990, his life and career were chronicled in the critically acclaimed Warner Bros. film, Listen Up: The Lives of Quincy Jones, produced by Courtney Sale Ross, a film which helped illuminate not only Quincy's life and spirit, but also revealed much about the development of the African American musical tradition. Reflecting on the changes in pop music over the years, Quincy says, "If there are any common denominators, they are spirit and

musicality. I go for the music that gives me goose bumps, music that touches my heart and my soul." Over the years, Quincy Jones has reached the essence of music and art: the ability to touch people's feelings and emotions.

In 2001, Quincy Jones added the title "Best Selling Author" to his list of accomplishments when his autobiography *Q: The Autobiography of Quincy Jones* entered the *New York Times*, *Los Angeles Times* and *Wall Street Journal* Best-Sellers lists. Released by Doubleday Publishing, the critically acclaimed biography retells Jones' life story from his days as an impoverished youth on the Southside of Chicago through a massively impressive career in music, film and television where he worked beside legends such as Billie Holiday, Ray Charles, Dizzy Gillespie, Count Basie, Ella Fitzgerald and Michael Jackson, among many others. In conjunction with the autobiography, Rhino Records released a 4-cd boxed set of Jones' music, spanning his more than 5 decade career in the music business, entitled "Q: The Musical Biography of Quincy Jones."

The audio recording of "Q: The Autobiography of Quincy Jones," (Simon & Schuster) earned Jones his 27th Grammy Award, in the Best Spoken Word Category, while "Q: The Musical Biography of Quincy Jones" garnered him a 15th NAACP Image Award, in the category of Outstanding Jazz Artist.

In 2008 *The Complete Quincy Jones: My Journey & Passions*, (Palace Press) examined the virtuosity of the man Frank Sinatra named "Q," celebrating his prolific contribution to American art and culture. The book included a foreword by Clint Eastwood, preface from Bono, an introduction by Maya Angelou and an afterword by Sidney Poitier. Comprised of personal interviews and recollections from Jones, this collection peers behind the veil of celebrity, with extraordinary access to his creative inspirations and achievements.

Jones next projects include the forthcoming release of Soul Bossa Nostra, an album featuring some of today's biggest recording artists and producers such as Usher, Ludacris, Akon, Jamie Foxx, Jennifer Hudson, Mary J. Blige, T-Pain, Robin Thicke, LL Cool J, John Legend, Snoop Dogg, Wyclef Jean, Q-Tip, Talib Kweli, Three 6 Mafia, David Banner, Bebe Winans, Mervyn Warren, Jermaine Dupri, DJ Paul, and Scott Storch, among others, who have joined together to celebrate the music of the multi-Grammy winning producer, composer and arranger by recording contemporary versions of popular recordings from his massive catalog; the book *Q on Producing* which recounts his six-decade long career working in the recording studio with music icons such as Count Basie, Duke Ellington, Ella Fitzgerald, Frank Sinatra and Michael Jackson, among many others; a duets album with Stevie Wonder and Tony Bennett; as well as multiple projects for film and television.

With a long history of humanitarian work which began in the 1960's and 70's, Jones was one of the key supporters of Jesse Jackson's Operation P.U.S.H. In 1985, he pioneered the model of using celebrity to raise money and awareness for a cause with "We Are the World." The song remains the best-selling single of all-time, and raised more than $63 Million for Ethiopian famine relief. More importantly, however, it shined a spotlight on the Ethiopian drought and U.S. Government responded with over $800 million in aid.

In 1999 Quincy Jones joined Bono and Bob Geldof during a meeting with Pope John Paul II as a part of the Jubilee 2000 delegation to end third world debt. The delegation's visit resulted in $27 billion in third world debt relief for Bolivia, Mozambique, and the Ivory Coast.

In 2004, in front of a live audience of more than a half-million spectators, Jones launched the *We Are the Future* initiative with a concert featuring Carlos Santana, Alicia Keyes, Josh Groban, Oprah Winfrey, Norah Jones and a host of other entertainers from around the world. The initiative has established Municipal Child Centers in the cities of Addis Ababa (Ethiopia), Asmara (Eritrea), Freetown (Sierra Leone), Kigali (Rwanda) and Nablus (Palestine) where youth are being trained to run child-based programs in health, nutrition, Information and Communication Technology (ICT), Sports and Arts.

In 2007, Jones and the Harvard School of Public Health joined forces to advance the health and well-being of children worldwide through Project Q, a strategic initiative of School's Center for Health Communication. Through the strategic use of media, Project Q challenges leaders and citizens of the world to provide essential resources to enable young people to achieve their full potential.

A centerpiece of Project Q is the Q Prize, which recognizes extraordinary leadership by public figures and social entrepreneurs who are championing the needs of children. The inaugural Q Prize was awarded in January 2007 to Scott Neeson, founder of the Cambodian Children's Fund, and over $600,000 was raised in support of Neeson's work. The 2008 Q Prize will be awarded on October 23 in New York City.

Through his personal foundation, The Quincy Jones Foundation, Jones raises awareness and financial resources for initiatives that support global children's issues in areas of conflict, malaria eradication, clean water and efforts to restore the Gulf Coast (post-Katrina). Philanthropic partners include Malaria No More, Millennium Promise, and R&B singer Usher's New Look Foundation.

MARY **JORDAN**

Mary Catherine Jordan (born November 10, 1960) is a Pulitzer Prize-winning American journalist for the *Washington Post*. She is currently the editor of Washington Post Live, which organizes political debates, conferences and news events for the media company. She has written on U.S. politics, the American education system and many other subjects. With her husband, *Post* journalist Kevin Sullivan, Jordan ran the newspaper's bureaus in Tokyo, Mexico City and London. Jordan has written from nearly 40 countries and also been a frequent commentator on BBC Television.

Jordan, a daughter of Irish immigrants, was born and raised in Cleveland, Ohio. She graduated from Georgetown University in 1983 and earned a master's degree from Columbia University's Graduate School of Journalism in 1984. In 1989–90, Jordan was awarded a Nieman Fellowship by Harvard University.

Jordan began her Post career as an intern for the Style section, crisscrossed the country writing about colleges and schools as the national education reporter, and covered Virginia and national politics.

For a year at Trinity College in Dublin, Ireland, she studied William Butler Yeats and other Irish poets. She was given her first job in the newspaper business by legendary Irish author and editor Tim Pat Coogan, who hired her to write a column in the *Irish Press*. She enrolled in Japanese language classes at Georgetown University before moving to Tokyo for four years and studied Spanish on a post-graduate fellowship at Stanford University before moving to Mexico for five years.

Currently, Jordan moderates many high-profile forums for the *Washington Post* including the "The 40th Anniversary of Watergate" in June 2012 that featured key Watergate figures including including former White House counsel John Dean, *Washington Post* editor Ben Bradlee, and reporters Bob Woodward and Carl Bernstein.

She hosted the 2010 Maryland gubernatorial debate between Governor Martin O'Malley and former Governor Robert Ehrlich, and moderated a rare sitdown with Redskin owner Dan Snyder, Capital's owner Ted Leonsis, and other owners of Washington's sports teams.

Among the many newsmakers she has interviewed: Legendary singer and songwriter Paul McCartney, Colombian novelist Gabriel Garcia Marquez, Nobel Prize winner Henry Kissinger, former British Prime Minister Tony Blair and Benjamin Arellano Felix, one of Mexico's most notorious drug kingpins. Jordan has written extensively about injustices and discrimination against women around the world including articles about the exceedingly low conviction rate of rape in Britain and the unfortunate girls in India denied schooling solely because they were not born male.

Jordan and Sullivan won the 2003 Pulitzer Prize for International Reporting for their *Post* series on the "horrific conditions in Mexico's criminal justice system and how they affect the daily lives of people," as the Pulitzer Board described. Along with four Post photographers, Jordan and Sullivan were also finalists for the 2009 Pulitzer Prize for International Reporting for their series of stories on the difficulties women face around the world. The Pulitzer jury called the series a "sensitive examination of how females in the developing world are often oppressed from birth to death, a reporting project marked by indelible portraits of women and girls and enhanced by multimedia presentations."

Jordan and Sullivan authored *The Prison Angel: Mother Antonia's Journey from Beverly Hills to a Life of Service in a Mexican Jail* (The Penguin Press, 2005). In 2006, the book won the Christopher Award, which "salutes media that affirm the highest values of the human spirit."
Jordan and Sullivan have also won numerous other awards including the George Polk Award for their coverage of the 1997 Asian Financial Crisis and awards from the Overseas Press Club of America and the Society of Professional Journalists.

JON **KAMEN**

@radical.media creates some of the world's most innovative content across all platforms of media. Originally renowned for its commercial and advertising success, it has transformed and grown to develop, produce, and distribute television, feature films, music programming, live events, digital content and design. As the founding Chairman and CEO of @radical.media, Jon continues to expand @radical's capabilities within this ever-evolving media landscape.

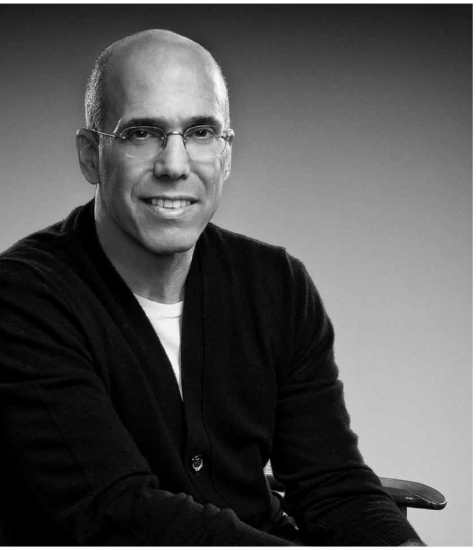
Beyond an Executive, Jon is a Producer and Executive Producer of groundbreaking projects. Amongst @radical's major achievements, @radical.media has been recognized for producing multiple award-winning projects including the Academy Award and Independent Spirit Award for the documentary The Fog of War; and a Grammy for the Concert for George. This past year, @radical produced the Academy Award and Emmy-nominated HBO documentary Paradise Lost 3 and the Emmy-nominated A&E documentary following Paul Simon's Graceland journey, Under African Skies.

@radical is currently in production on a Ron Howard-directed documentary on the Made In America festival in Philadelphia. And it recently launched THNKR, a Premium YouTube Channel, offering viewers extraordinary access to the people, stories, and ideas that are transforming the world.

Beyond his professional duties and prolific production credits, Jon is on the Board of Trustees of the Rhode Island School of Design, and has recently has been appointed to the Board of the Mr. Holland's Opus Foundation. Jon has continuously fostered @ radical's work with numerous organizations and public service initiatives, including RED, ONE, and Conservation International. In 2012, he accepted Mayor Bloomberg's Made in New York Award at Gracie Mansion.

Jon strives to increase the reach, impact, and legacies of the advertising and entertainment industries. During his two terms as National Chairman of the AICP, he founded the "Art and Technique of the American Television Commercial," which has been presented for the past 20 years at the Museum of Modern Art. In 1994, Jon received the Crystal Apple Award for his outstanding contributions to the city's production industry.

JEFFREY **KATZENBERG**



Jeffrey Katzenberg (born December 21, 1950) is an American film producer and CEO of DreamWorks Animation. He is perhaps most known for his period as chairman of The Walt Disney Studios when Disney produced some of its biggest hits, including The Little Mermaid, Beauty and the Beast, Aladdin and The Lion King. As a founder and CEO of DreamWorks Animation, he has overseen the production of such animated franchises as Shrek, Madagascar, Kung Fu Panda, Monsters vs. Aliens and How to Train Your Dragon.

Katzenberg was born in New York City, the son of Anne, an artist, and Walter, a stockbroker. He attended the Ethical Culture Fieldston School, graduating in 1969.

Katzenberg began his career as an assistant to producer David Picker, then in 1974 he became an assistant to Barry Diller, the Chairman of Paramount Pictures. Diller moved Katzenberg to the marketing department, followed by other assignments within the studio, until he was assigned to revive the Star Trek franchise, which resulted in the hit film, Star Trek: The Motion Picture (1979). He continued to work his way up and became President of Production under Paramount President Michael Eisner.

In 1984, Michael Eisner became Chief Executive Officer (CEO) at The Walt Disney Company. Eisner brought Katzenberg with him to take charge of Disney's motion picture division. Katzenberg was responsible for reviving the studio which, at the time, ranked last at the box office among the major studios. He focused the studio on the production of adult-oriented comedies under its Touchstone Pictures banner, including films such as Down and Out in Beverly Hills (1986), Three Men and a Baby (1987) and Good Morning, Vietnam (1987). By 1987, Disney had become the number-one studio at the box office. Katzenberg also oversaw Touchstone Television, which produced such hit TV series, The Golden Girls and Home Improvement.

Katzenberg was also charged with turning around Disney's ailing Feature Animation unit, creating some intrastudio controversy when he personally edited three minutes out of a completed Disney animated feature, The Black Cauldron (1985), shortly after joining the company. Under his management, the animation department eventually began creating some of Disney's most critically acclaimed and highest grossing animated features. These films include Who Framed Roger Rabbit (1988), The Little Mermaid (1989),The Rescuers Down Under (1990), Beauty and the Beast (1991, the first animated feature to be nominated for an Academy Award for Best Picture), Aladdin (1992), and The Lion King (1994). In addition, Katzenberg also sealed the deal that created the highly successful partnership between Pixar and Disney and the deal that brought Miramax Films into Disney.

When Eisner's second in command, Frank Wells, died in a helicopter crash in 1994, Eisner refused to promote Katzenberg to the vacated position of president. This led to a falling out between the two executives, and Katzenberg left the company in September 1994. He launched a lawsuit against Disney to recover money he felt he was owed and settled out of court for an estimated $250 million.

Later in 1994, Katzenberg co-founded DreamWorks SKG with Steven Spielberg and David Geffen, with Katzenberg taking primary responsibility for animation operations. He was also credited as executive producer on the DreamWorks animated films The Prince of Egypt (1998), The Road to El Dorado and Joseph: King of Dreams (both in 2000) and Shrek in 2001.

After DreamWorks Animation suffered a $125 million loss on the traditionally-animated Sinbad: Legend of the Seven Seas, the studio switched to all computer-generated animation. Since then, DreamWorks' animated films have been consistently successful.

In 2004, DreamWorks Animation (DWA) was spun off from DreamWorks as a separate company headed by Katzenberg in an IPO and has recorded mostly profitable quarters since then.

The live-action DreamWorks movie studio was sold to Viacom in December 2005. In 2008, the live-action DreamWorks studio again became an independent production company, releasing its films through Disney.

In 2006, Katzenberg made an appearance on the fifth season of The Apprentice. He awarded the task winners an opportunity to be character voices in Over the Hedge.

Katzenberg has been an industry leader in promoting digital 3D production of film, calling it "the greatest advance in the film industry since the arrival of color in the 1930s." When Katzenberg appeared on The Colbert Report on April 20, 2010, he confirmed that from now on "every single movie" that DreamWorks Animation produced would be in 3D and gave Stephen Colbert a pair of new 3D glasses.

Katzenberg married Marilyn Siegel, a kindergarten teacher, in 1975, and they have two children.

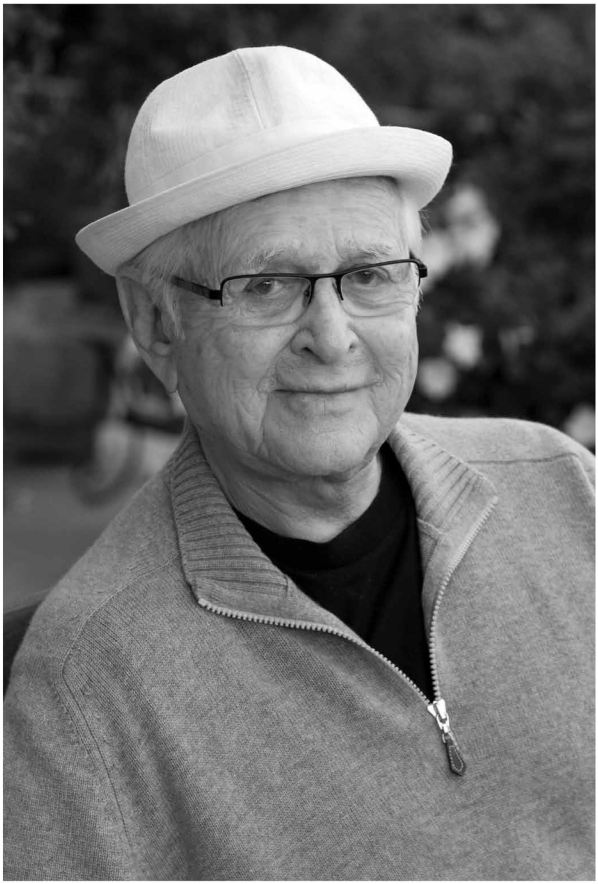
Together, Marilyn and Jeffrey have been highly active in charitable causes. They donated the multi-million-dollar Katzenberg Center to Boston University's College of General Studies, citing that the school gave their two children the "love of education." They also donated the Marilyn and Jeffrey Katzenberg Center for Animation at the University of Southern California.

In addition to serving as Chairman of the Board for the Motion Picture and Television Fund Foundation, Katzenberg sits on the boards or serves as a trustee of AIDS Project Los Angeles, American Museum of the Moving Image, California Institute of the Arts, Cedars-Sinai Medical Center, Geffen Playhouse, Michael J. Fox Foundation for Parkinson's Research, University of Southern California School of Cinematic Arts and The Simon Wiesenthal Center. Together with DreamWorks Animation, Katzenberg founded the DreamWorks Animation Academy of Inner-City Arts in 2008.

Katzenberg has an estimated worth of $800 million according to Forbes. Katzenberg is reported to have donated over $3.5 million in political contributions since 1979: 33% ($1.171+ million) to Democrats, 66% ($2.33+ million) to special interest groups without party affiliations, and less than 1% ($7,000) to Republicans.

He was awarded an honorary doctorate from Ringling College of Art and Design on May 2, 2008.

NORMAN **LEAR**



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Norman Lear has enjoyed a long career in television and film, and as a political and social activist and philanthropist.

Mr. Lear began his television writing career in 1950 when he and his partner, Ed Simmons, were signed to write for the The Ford Star Revue, starring Jack Haley. After only four shows, they were hired away by Jerry Lewis to write for the Martin and Lewis Colgate Comedy Hour, which they continued to write until 1953. Mr. Lear then began writing on his own for comedy shows including The Martha Raye Show, The George Gobel Show, and The Tennessee Ernie Ford Show.

In 1958, Mr. Lear teamed with director Bud Yorkin to form Tandem Productions. Together they produced several feature films, with Mr. Lear taking on roles as executive producer, writer, and director. He was nominated in 1967 for an Academy Award for his script for Divorce American Style. In 1970, CBS signed with Tandem to produce All in the Family, which first aired on January 12, 1971 and ran for nine seasons. It earned four Emmy Awards for Best Comedy series as well as the Peabody Award in 1977. All in the Family was followed by a succession of other television hit shows including Maude, Sanford and Son, The Jeffersons, One Day at a Time, Good Times, and Mary Hartman, Mary Hartman.

Concerned about the growing influence of radical religious evangelists, Mr. Lear decided to leave television in 1980 and formed People For the American Way, a non-profit organization designed to speak out for Bill of Rights guarantees and to monitor violations of constitutional freedoms. People For remains an influential and effective voice for freedom. In 1982, he produced a two-hour television special I Love Liberty, with a cast of stars and an audience filling the Los Angeles Sports Arena.

Mr. Lear's business career continued in 1984 when he and his business partners created T.A.T. Communications, later known as Embassy Communications, which was sold in 1985. Mr. Lear then created and is currently chairman of Act III Communications, a multimedia holding company with interests in the recording, motion picture, broadcasting, publishing, and licensing industries, including Concord Music Group and Village Roadshow Pictures Group.

In addition to People for the American Way, Mr. Lear has founded other nonprofit organizations, including the Norman Lear Center at the USC Annenberg School for Communication (2000–present), a multidisciplinary research and public policy center dedicated to exploring the convergence of entertainment, commerce and society; the Business Enterprise Trust (1989–2000) to spotlight exemplary social innovations in American business; and with his wife, Lyn, co-founded the Environmental Media Association (1989–present), to mobilize the entertainment industry to become more environmentally responsible.

In 1999, President Clinton bestowed the National Medal of Arts on Mr. Lear, noting that "Norman Lear has held up a mirror to American society and changed the way we look at it." He has the distinction of being among the first seven television pioneers inducted into the Television Academy Hall of Fame (1984). In addition to his awards for All in the Family, he has been honored by the International Platform Association (1977), the Writers Guild of America (1977) and many other professional and civic organizations.

In 2001, Lyn and Norman Lear created the Declaration of Independence Road Trip, a four-year educational initiative and national multimedia tour of one of the surviving original copies of the Declaration, which they purchased to share with the American people. As part of the project, Mr. Lear launched Declare Yourself, a nonpartisan youth voter initiative that registered well over four million new young voters in the 2004, 2006, and 2008 elections.

At the Presidential Inauguration in 2009, Declare Yourself premiered BornAgainAmerican.org, featuring an inspiring music video that has been viewed by millions across the country. It is part of an on-going drive to promote active and thoughtful citizenship, as embodied in the Declaration of Independence, which continues to tour.

Mr. Lear is married to Lyn Davis Lear and resides in Los Angeles, California. He has six children: Ellen, Kate, Maggie, Benjamin, Brianna, Madeline and four grandchildren: Daniel, Noah, Griffin, Zoe.

YO-YO **MA**

Yo-Yo Ma's multi-faceted career is testament to his continual search for new ways to communicate with audiences, and to his personal desire for artistic growth and renewal. Whether performing new or familiar works from the cello repertoire, coming together with colleagues for chamber music or exploring cultures and musical forms outside the Western classical tradition, Mr. Ma strives to find connections that stimulate the imagination.

One of Mr. Ma's goals is the exploration of music as a means of communication and as a vehicle for the migrations of ideas across a range of cultures throughout the world. Expanding upon this interest, in 1998, Mr. Ma established the Silk Road Project, a nonprofit arts and educational organization. Under his artistic direction, the Silk Road Project presents performances by the acclaimed Silk Road Ensemble, engages in cross-cultural exchanges and residencies, leads workshops for students, and partners with leading cultural institutions to create educational materials and programs.

The Project's ongoing affiliation with Harvard University has made it possible to broaden and enhance educational programming. In the 2011–2012 school year, with ongoing partnerships with arts and educational organizations in New York City, it continues to expand Silk Road Connect, a multidisciplinary educational initiative for middle-school students in the city's public schools. Developing new music is also a central undertaking of the Silk Road Project, which has been involved in commissioning and performing more than 60 new musical and multimedia works from composers and arrangers around the world.

As the Chicago Symphony Orchestra's Judson and Joyce Green Creative Consultant, Mr. Ma is partnering with Maestro Riccardo Muti to provide collaborative musical leadership and guidance on innovative program development for The Institute for Learning, Access and Training at the Chicago Symphony Orchestra, and for Chicago Symphony artistic initiatives. Mr. Ma's work focuses on the transformative power music can have in individuals' lives, and on increasing the number and variety of opportunities audiences have to experience music in their communities. Mr. Ma and the Institute have created the Citizen Musician Initiative, a movement that calls on all musicians, music lovers, music teachers and institutions to use the art form to bridge gulfs between people and to create and inspire a sense of community. www.citizenmusician.org features stories of Citizen Musician activity across the globe.

Mr. Ma is also widely recognized for his strong commitment to educational programs that bring the world into the classroom and the classroom into the world. While touring, he takes time whenever possible to conduct master classes as well as more informal programs for students—musicians and non-musicians alike. He has also reached young audiences through appearances on "Arthur," "Mister Rogers' Neighborhood" and "Sesame Street."

Mr. Ma's discography of over 75 albums (including more than 15 Grammy Award winners) reflects his wide-ranging interests. He has made several successful recordings that defy categorization, among them "Hush" with Bobby McFerrin, "Appalachia Waltz" and "Appalachian Journey" with Mark O'Connor and Edgar Meyer and two Grammy-winning tributes to the music of Brazil, "Obrigado Brazil" and "Obrigado Brazil—Live in Concert." Mr. Ma's recent recordings include Mendelssohn Trios with Emanuel Ax and Itzhak Perlman. His new album, "The Goat Rodeo Sessions," with Edgar Meyer, Chris Thile and Stuart Duncan was released in October 2011. Across this full range of releases, Mr. Ma remains one of the best-selling recording artists in the classical field. All of his recent albums have quickly entered the Billboard chart of classical best sellers, remaining in the Top 15 for extended periods, often with as many as four titles simultaneously on the list. In fall 2009, Sony Classical released a box set of over 90 albums to commemorate Mr. Ma's 30 years as a Sony recording artist.

Yo-Yo Ma was born in 1955 to Chinese parents living in Paris. He began to study the cello with his father at age four and soon came with his family to New York, where he spent most of his formative years. Later, his principal teacher was Leonard Rose at The Juilliard School. He has received numerous awards, including the Avery Fisher Prize (1978), the Glenn Gould Prize (1999), the National Medal of the Arts (2001), the Dan David Prize (2006), the Sonning Prize (2006), the World Economic Forum's Crystal Award (2008) and the Presidential Medal of Freedom (2010). In 2011 Mr. Ma was recognized as a Kennedy Center Honoree. He was the recipient of the 2012 Polar Music Prize. Appointed a CultureConnect Ambassador by the United States Department of State in 2002, Mr. Ma has met with, trained and mentored thousands of students worldwide in countries including Lithuania, Korea, Lebanon, Azerbaijan and China. Mr. Ma serves as a UN Messenger of Peace and as a member of the President's Committee on the Arts & the Humanities. He has performed for eight American presidents, most recently at the invitation of President Obama on the occasion of the 56th Inaugural Ceremony. Mr. Ma and his wife have two children. He plays two instruments, a 1733 Montagnana cello from Venice and the 1712 Davidoff Stradivarius.

For additional information, see: www.yo-yoma.com, www.silkroadproject.org, and www.opus3artists.com.

JOHN **MAEDA**

John Maeda (born 1966 in Seattle, Washington) is a Japanese-American graphic designer, computer scientist, academic, and author. His work in design, technology and leadership explores the area where the fields merge. He is the current President of the Rhode Island School of Design.

Maeda was originally a software engineering student at the Massachusetts Institute of Technology, when he became fascinated with the work of Paul Rand and Muriel Cooper. Cooper was a director of MIT's Visual Language Workshop. After completing his bachelors and masters degrees at MIT, Maeda studied in Japan at Tsukuba University's Institute of Art and Design to complete his Ph.D. in design.

As an artist, Maeda's early work redefined the use of electronic media as a tool for expression by combining computer programming with traditional artistic technique, laying the groundwork for the interactive motion graphics that are taken for granted on the web today. He has exhibited in one-man shows in London, New York and Paris. His work is in the permanent collections of the Museum of Modern Art, the San Francisco Museum of Modern Art and the Cartier Foundation in Paris.

At RISD, Maeda is leading the movement to transform STEM (Science, Technology, Engineering, and Math) to STEAM by adding Art. He believes art and design are poised to transform our economy in the 21st century like science and technology did in the last century.

In 1999, he was named one of the 21 most important people in the 21st century by *Esquire*. In 2001, he received the National Design Award for Communication Design in the United States and Japan's Mainichi Design Prize.

In 2006, Maeda published *Laws of Simplicity*, his best-selling book to date, based on a research project to find ways for people to simplify their life in the face of growing complexity.

In 2009 he was inducted into the New York Art Director's Club Hall of Fame, and he received the AIGA Medal in 2011. He is a trustee of the Cooper-Hewitt National Design Museum.

JOHN **MAZZIOTTA**

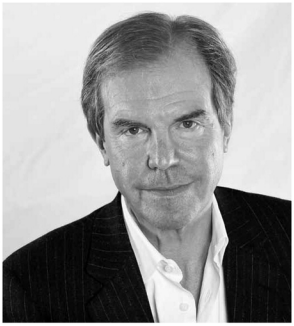
Dr. John Mazziotta is Chair of the Department of Neurology, David Geffen School of Medicine at UCLA, and Director of the UCLA Ahmanson-Lovelace Brain Mapping Center. After receiving his B.A. and M.A. degrees from Columbia University in 1972, he obtained an M.D. and Ph.D. in Neuroanatomy and Computer Science from Georgetown University in 1977. Following an internship at Georgetown, he completed Neurology and Nuclear Medicine training at UCLA and joined the faculty here in 1983.

Dr. Mazziotta chairs one of the nation's largest Neurology departments, which for nine of the last ten years achieved the distinguished position of being first in National Institutes of Health (NIH) research funding. An expert in brain imaging, he established the Brain Mapping Center at UCLA that includes all of the methods available to study human brain structure and function. He was the principal investigator of the International Consortium for Brain Mapping, whose goal is to develop the first atlas of the human brain that will include behavioral, demographic, imaging, and genetic data from 7,000 subjects.

Since beginning this work, Dr. Mazziotta has published more than 255 research papers and eight texts. He has received numerous awards and honors, including the Oldendorf Award from the American Society of Neuroimaging, the S. Weir Mitchell Award and the Wartenberg Prize of the American Academy of Neurology, the Von Hevesy Prize from the International Society of Nuclear Medicine, the 1996 Medical Science Award from the UCLA Medical Alumni Association, election to the Institute of Medicine of the National Academy of Sciences, Honorary Doctorate from l'Université de Caen and membership in the Royal College of Physicians.

In January 2012, Dr. Mazziotta was appointed Associate Vice Chancellor for Medical Sciences and Executive Vice Dean of the David Geffen School of Medicine at UCLA.

NICHOLAS **NEGROPONTE**



Nicholas Negroponte (born December 1, 1943) is an American architect best known as the founder and Chairman Emeritus of Massachusetts Institute of Technology's Media Lab, and also known as the founder of the One Laptop per Child Association (OLPC).

Negroponte was born to Dimitri John Negroponte, a Greek shipping magnate, and grew up in New York City's Upper East Side. He is the younger brother of John Negroponte, former United States Deputy Secretary of State.

He attended Buckley School in New York City, Le Rosey in Switzerland, and The Choate School (now Choate Rosemary Hall) in Wallingford, Connecticut, from which he graduated in 1961. Subsequently, he studied at MIT as both an undergraduate and graduate student in Architecture where his research focused on issues of computer-aided design. He earned a Master's degree in architecture from MIT in 1966.

Negroponte joined the faculty of MIT in 1966. For several years thereafter he divided his teaching time between MIT and several visiting professorships at Yale, Michigan and the University of California, Berkeley.

In 1967, Negroponte founded MIT's Architecture Machine Group, a combination lab and think tank which studied new approaches to human-computer interaction. In 1985, Negroponte created the MIT Media Lab with Jerome B. Wiesner. As director, he developed the lab into the pre-eminent computer science laboratory for new media and a high-tech playground for investigating the human-computer interface. Negroponte also became a proponent of intelligent agents and personalized electronic newspapers, for which he popularized the term the Daily Me.

In 1992, Negroponte became involved in the creation of *Wired* Magazine as the first investor. From 1993 to 1998, he contributed a monthly column to the magazine in which he reiterated a basic theme: "Move bits, not atoms."

Negroponte expanded many of the ideas from his Wired columns into a bestselling book *Being Digital* (1995), which made famous his forecasts on how the interactive world, the entertainment world and the information world would eventually merge. *Being Digital* was a bestseller and was translated into some twenty languages. Negroponte is a digital optimist who believed that computers would make life better for everyone. However, critics such as Cass Sunstein have faulted his techno-utopian ideas for failing to consider the historical, political and cultural realities with which new technologies should be viewed.

Negroponte's belief that wired technologies such as telephones will ultimately become unwired by using airwaves instead of wires or fiber optics, and that unwired technologies such as televisions will become wired, is commonly referred to as the Negroponte switch.

In 2000, Negroponte stepped down as director of the Media Lab as Walter Bender took over as Executive Director. However, Negroponte retained the role of laboratory Chairman. When Frank Moss was appointed director of the lab in 2006, Negroponte stepped down as lab chairman to focus more fully on his work with One Laptop Per Child (OLPC) although he retains his appointment as professor at MIT.

In November 2005, at the World Summit on the Information Society held in Tunis, Negroponte unveiled the concept of a $100 laptop computer, The Children's Machine, designed for students in the developing world. The price has increased to US$180, however. The project is part of a broader program by One Laptop Per Child, a non-profit organisation started by Negroponte and other Media Lab faculty, to extend Internet access in developing countries.

Negroponte is an active angel investor and has invested in over 30 startup companies over the last 30 years, including Zagats, *Wired*, Ambient Devices, Skype and Velti. He sits on several boards, including Motorola (listed on the New York Stock Exchange) and Velti (listed on the London Stock Exchange and the NASDAQ). He is also on the advisory board of TTI/Vanguard. In August 2007, he was appointed to a five-member special committee with the objective of assuring the continued journalistic and editorial integrity and independence of the *Wall Street Journal* and other Dow Jones & Company publications and services. The committee was formed as part of the merger of Dow Jones with News Corporation. Negroponte's fellow founding committee members are Louis Boccardi, Thomas Bray, Jack Fuller, and the late former Congresswoman Jennifer Dunn.

Negroponte has influenced modern day futurists, such as David Houle.

TODD **OLDHAM**

Todd is a well-known designer whose career spans more than 20 years. Distinguished as an innovator of accessible design, Todd Oldham is the founder of Todd Oldham Studio, a multifaceted, full-service design studio based in NYC.

Originally a New York fashion designer, the host of "Todd Time" on MTV's House of Style, Todd's career has evolved to include all areas of design, from interior design, film and photography, to furniture and graphic design.

Todd is currently working on his 19th book *Charley Harper's Animal Kingdom*. His previous books include a 672-page monograph on the life's work of artist Alexander Girard; a unique ongoing series called *Place Space* that explores singular places and the uncommonly devoted people that create them; an artist's monograph on the brilliant, warped work of Wayne White (all published by AMMO BOOKS). Most recently, Kid Made Modern, a collection of art supplies and kits, books and events, debuted this summer in all Target locations.

CRISTINA **PATO**

Cristina Pato has already opened historical new paths for the Gaita (Galician bagpipe). In 1998 Cristina Pato became the first female Gaita player releasing a solo album and since then she has collaborated with world music, jazz, classical and experimental artists (including Chicago Symphony, Yo-Yo Ma, The Chieftains, Arturo O'Farril, World Symphony Orchestra, Paquito D'Rivera). Her unique and powerful style full of passion and energy has been acclaimed by The *New York Times* as "a virtuosic burst of energy" or the BBC as "the Galician bagpipe diva". Cristina Pato fuses the influences of Latin music, jazz, pop and contemporary music, and uses her artistry and unprecedented virtuosic skill to bring her musical vision to life. Pato is a member of Yo-Yo Ma's Silk Road Ensemble.

Internationally acclaimed as a Gaita master and classical pianist, Cristina Pato enjoys an active professional career devoted to both Galician popular and classical music. Her dual careers have led to performances throughout major stages throughout the world, including USA (Carnegie Hall, Lincoln Center), India (Kamani Auditorium), Jerusalem (Jerusalem Festival), Angola, China, Corea, Portugal (Festa do Avante), Brazil (Liszt Festival), UK (Celtic Connections), France, Italy (Etnofestival), Germany, Mexico (Palacio de Bellas Artes) and her native Spain.

An active recording artist and performer since age 12, Ms. Pato has released four solo Gaita recordings, two as a pianist and has collaborated in more than thirty recordings as a guest artist, including the Grammy award winner "Yo-Yo Ma and Friends; Songs of Joy and Peace" (SONY BMG 2008), the "Miles Español: New Skectches of Spain" album and the Grammy nominated Silk Road Ensemble album "Off the Map" (World Village 2010). Ms. Pato has given more than 500 concerts with her own band many of them recorded and broadcasted by television stations such as BBC, TVG, CNN and RTVE, and she has been praised by newspapers as The *New York Times*, *El Pais*, *La Voz de Galicia* or The *Scotsman*.

Ms. Pato is Doctor of Musical Arts in Collaborative Piano from the Mason Gross School of the Arts, Rutgers University (NJ, USA), where she studied with a fellowship from Fundacion Barrie de la Maza. She was awarded with the Edna Mason Scholarship and the Irene Alm Memorial Prize for excellence in scholarly research and performance (Rutgers University, May 2008). Cristina Pato holds both a Master of Music Degree in Piano Performance and a Master of Music Degree in Music Theory and Chamber Music (with honors) from the Conservatorio de Musica del Liceu (Barcelona). She also holds also a Master of Fine Arts Degree in Digital Arts (Computer Music) from the Universitat Pompeu Fabra (Barcelona).

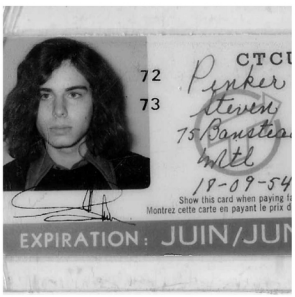
Cristina Pato is part of the Leadership Council of The Silk Road Ensemble collaborating closely with Harvard University, the ensemble's residency. Cristina is also a faculty member (adjunct) at the vocal department of New Jersey City University.

During the 2011-2012 season Cristina Pato has toured Africa and Spain with her own band; USA, China, and Korea with Yo Yo Ma and The Silk Road Ensemble and India with HUM Ensemble. She collaborated in the album Miles Español along with Chick Corea and Jack DeJonnette and participated at the Kennedy Center Honors Awards honoring Yo Yo Ma with The Silk Road Ensemble, Johns Williams and James Taylor.

She is the founder and artistic director of Galician Connection, a forum in world music celebrated annually at Cidade da Cultura de Galicia.

Ms. Pato resides in New York City since 2004.
More info: www.cristinapato.com

STEVEN **PINKER**



Steven Pinker was born in 1954 in the English-speaking Jewish community of Montreal,Canada. He earned a bachelor's degree in experimental psychology at McGill University and then moved to Cambridge, Massachusetts in 1976, where he has spent most of his career bouncing back and forth between Harvard and MIT. He earned his doctorate at Harvard in 1979, followed by a postdoctoral fellowship at MIT, a one-year stint as an assistant professor at Harvard, and in 1982, a move back to MIT that lasted until 2003, when he returned to Harvard. Currently he is Harvard College Professor and the Johnstone Family Professor in the Department of Psychology. He also has spent two years in California: in 1981–82, when he was an assistant professor at Stanford, and in 1995–96,when he spent a sabbatical year at the University of California, Santa Barbara.

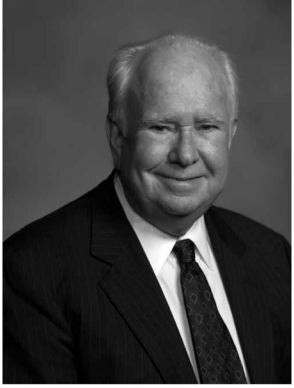
Pinker is an experimental psychologist who is interested in all aspects of language and mind. Much of his initial research was in visual cognition, the ability to imagine shapes, recognize faces and objects, and direct attention within the visual field. But beginning in graduate school he cultivated an interest in language, particularly language development in children, and this topic eventually took over his research activities. Aside from his experimental papers in language and visual cognition, he wrote two fairly technical books early in his career. One outlined a theory of how children acquire the words and grammatical structures of their mother tongue. The second focused on one aspect of this process, the ability to use different kinds of verbs in appropriate sentences, such as intransitive verbs, transitive verbs, and verbs taking different combinations of complements and indirect objects. For the next two decades his research focused on the distinction between irregular verbs like bring-brought and regular verbs like walk-walked. The reason is that the two kinds of verbs neatly embody the two processes that make language possible: looking up words in memory, and combining words (or parts of words) according to rules. He has also studied language development in twins and the neuroimaging of language processes in the brain, and has recently begun lines of research on the nature of reminding and on the function of innuendo and other forms of indirect speech.

In 1994 he published the first of five books written for a general audience. *The Language Instinct* was an introduction to all aspects of language, held together by the idea that language is a biological adaptation. This was followed in 1997 by *How the Mind Works*, which offered a similar synthesis of the rest of the mind, from vision and reasoning to the emotions, humor, and art. In 1999 he published *Words and Rules: The Ingredients of Language* which presented his research on regular and irregular verbs as a way of explaining how language works in general. In 2002 he published *The Blank Slate: The Modern Denial of Human Nature*, which explored the political, moral, and emotional colorings of the concept of human nature. *The Stuff of Thought: Language as a Window into Human Nature*, published in 2007, discussed the ways in which language reveals our thoughts, emotions, and social relationships. His most recent book is *The Better Angels of Our Nature: Why Violence Has Declined*, published in 2011. Pinker frequently writes for The *New York Times*, *Time*, The *New Republic*, and other magazines on subjects such as language and politics, the neural basis of consciousness, and the genetic enhancement of human beings.

Pinker is the Chair of the Usage Panel of The *American Heritage Dictionary* and has served as editor or advisor for numerous scientific, scholarly, media, and humanist organizations, including the American Association the Advancement of Science, the National Science Foundation, the American Academy of Arts and Sciences, the American Psychological Association, and the Linguistics Society of America. He has won many prizes for his books (including the William James Book Prize three times, the *Los Angeles Times* Science Book Prize, and the Eleanor Maccoby Book Prize), his research (including the Troland Research Prize from the National Academy of Sciences, the Early Career Award from the American Psychological Association, and the Henry Dale Prize from the Royal Institution of Great Britain), and his graduate and undergraduate teaching. He is also a Humanist Laureate, the 2006 Humanist of the Year, recipient of the 2008 Innovations for Humanity Award from La Ciudad de las Ideas in Mexico, the 2008 Honorary President of the Canadian Psychological Association, and the recipient of six honorary doctorates.

Pinker lives in Boston and in Truro with Rebecca Newberger Goldstein. The other authors in the family are his sister Susan Pinker and Rebecca's daughter Yael Goldstein Love.

LISA **RANDALL**



Professor Lisa Randall studies theoretical particle physics and cosmology at Harvard University. Her research connects theoretical insights to puzzles in our current understanding of the properties and interactions of matter. She has developed and studied a wide variety of models to address these questions, the most prominent involving extra dimensions of space. Her work has involved improving our under-standing of the Standard Model of particle physics, supersymmetry, baryogenesis, cosmological inflation, and dark matter. Randall's research also explores ways to experimentally test and verify ideas and her current research focuses in large part on the Large Hadron Collider and dark matter searches and models.

Randall has also had a public presence through her writing, lectures, and radio and TV appearances. Randall's books, *Warped Passages: Unraveling the Mysteries of the Universe's Hidden Dimensions* and *Knocking on Heaven's Door: How Physics and Scientific Thinking Illuminate the Universe and the Modern World* were both on The *New York Times*' list of 100 Notable Books of the Year. *Higgs Discovery: The Power of Empty Space* was released as a Kindle Single in the summer of 2012 as an update with recent particle physics developments.

Randall's studies have made her among the most cited and influential theoretical physicists and she has received numerous awards and honors for her scientific endeavors. She is a member of the National Academy of Sciences, the American Philosophical Society, the American Academy of Arts and Sciences, was a fellow of the American Physical Society, and is a past winner of an Alfred P. Sloan Foundation Research Fellowship, a National Science Foundation Young Investigator Award, a DOE Outstanding Junior Investigator Award, and the Westinghouse Science Talent Search. Randall is an Honorary Member of the Royal Irish Academy and an Honorary Fellow of the British Institute of Physics. In 2003, she received the Premio Caterina Tomassoni e Felice Pietro Chisesi Award, from the University of Rome, La Sapienza. In 2006, she received the Klopsteg Award from the American Society of Physics Teachers (AAPT) for her lectures and in 2007 she received the Julius Lilienfeld Prize from the American Physical Society for her work on elementary particle physics and cosmology and for communicating this work to the public.

Randall has also pursued art-science connections, writing a libretto for *Hypermusic: A Projective Opera in Seven Planes* that premiered in the Pompidou Center in Paris and co-curating an art exhibit for the Los Angeles Arts Association, Measure for Measure, which was presented in Gallery 825 in Los Angeles, at the Guggenheim Gallery at Chapman University, and at Harvard's Carpenter Center. In 2012, she was the recipient of the Andrew Gemant Award from the American Institute of Physics, which is given annually for significant contributions to the cultural, artistic, or humanistic dimension of physics.

Professor Randall was on the list of *Time* Magazine's "100 Most Influential People" of 2007 and was one of 40 people featured in The *Rolling Stone* 40th Anniversary issue that year. Prof. Randall was featured in *Newsweek's* "Who's Next in 2006" as "one of the most promising theoretical physicists of her generation" and in *Seed* Magazine's "2005 Year in Science Icons". In 2008, Prof. Randall was among *Esquire* Magazine's "75 Most Influential People."

Professor Randall earned her Ph.D. from Harvard University and held professorships at MIT and Princeton University before returning to Harvard in 2001. She is also the recipient of honorary degrees from Brown University, Duke University, Bard College, and the University of Antwerp.

PETER **RAVEN**

Peter H. Raven, a leading botanist and advocate of conservation and biodiversity with a notably international outlook, is president emeritus of the Missouri Botanical Garden and George Engelmann Professor of Botany Emeritus at Washington University in St. Louis. In addition, Dr. Raven is a Trustee of the National Geographic Society and Chairman of the Society's Committee for Research and Exploration. For more than 39 years, Dr. Raven headed the Missouri Botanical Garden, an institution he nurtured to become a world-class center for botanical research, education, and horticulture display. During this period, the Garden became a leader in botanical research and conservation in Latin America, Africa, Asia, and North America.

Dr. Raven first realized in the mid 1960s that the rapid growth of the human population, consumption, and the spread of polluting technologies were threatening biological diversity to a degree that had not been realized earlier. He soon became an outspoken advocate of the need for conservation throughout the world based on efforts to attain sustainability and social justice everywhere. He was described by *Time* magazine as a "Hero for the Planet," and has received numerous prizes and awards, including the International Prize for Biology from the government of Japan; Volvo Environment Prize; the Tyler Prize for Environmental Achievement; the Sasakawa Environment Prize; and the BBVA Prize for Ecology and Conservation, Madrid. In October 2009 he was awarded the first RBG Kew International Medal, given on the occasion of the 250th anniversary of the Gardens; in January 2010, the Award for International Scientific Cooperation of the Chinese Academy of Science and the Friendship Award (for promoting international cooperation) from the government of China. Earlier in 2012, he received an award from the President of Mexico for his work with Mexican scientists and institutions over the years. Earlier in his career, Dr. Raven held Guggenheim and John D. and Catherine T. MacArthur Foundation Fellowships.

In 2001, Dr. Raven received the National Medal of Science, the highest award for scientific accomplishment in the United States. He has been president of the American Association for the Advancement of Science, Sigma Xi, the American Institute of Biological Sciences, and a number of other organizations. He served for 12 years as Home Secretary of the National Academy of Sciences, to which he was elected in 1977. He is also a member of the American Academy of Arts and Sciences and of the American Philosophical Society, of the academies of science in Argentina, Australia, Austria, Brazil, Chile, China, Denmark, Georgia, Hungary, India, Italy, Mexico, New Zealand, Russia, Sweden, Ukraine, the U.K. (the Royal Society), and of the Pontifical Academy of Sciences and the Academy of Sciences for the Developing World (TWAS).

Dr. Raven is Co-editor of the *Flora of China*, a joint Chinese-American international project that is leading to a contemporary, 50-volume account on all the plants of China scheduled for completion at the end of 2012. He was the first chair of the U.S. Civilian Research and Development Foundation, a private, congressionally-chartered organization that funds joint research with the independent countries of the former Soviet Union.

Dr. Raven has written numerous books and publications, both popular and scientific, including *Biology of Plants* (co-authored with Ray Evert and Susan Eichhorn, W. H. Freeman and Company/Worth Publishers, New York), the internationally best-selling textbook in botany, of which the eighth edition appeared in 2011; and *Environment* (co-authored with Linda Berg, Wiley & Sons, New York), a leading textbook on the environment, now in its eighth edition (2011).

Dr. Raven received his Ph.D. from the University of California, Los Angeles, in 1960 after completing his undergraduate studies at the University of California, Berkeley. He has been awarded honorary degrees by a number of universities in the United States and around the world.

MOSHE **SAFDIE**

Moshe Safdie is an architect, urban planner, educator, theorist, and author. Embracing a comprehensive and humane design philosophy, Safdie is committed to architecture that supports and enhances a project's program; that is informed by the geographic, social, and cultural elements that define a place; and that responds to human needs and aspirations. Safdie has completed a wide range of projects, such as cultural, educational, and civic institutions; neighborhoods and public parks; mixed-use urban centers and airports; and master plans for existing communities and entirely new cities around the world.

Major projects by Safdie Architects currently under construction or recently completed include Mamilla Alrov Center, a dynamic urban center near the Old City in Jerusalem; Marina Bay Sands, a mixed-use integrated resort in Singapore; Khalsa Heritage Memorial Complex, the national museum of the Sikh people in the Punjab, India; the United States Institute of Peace Headquarters on the Mall in Washington, D.C.; the National Campus for the Archeology of Israel in Jerusalem; Golden Dream Bay, a high-density residential project in Qinhuangdao, China; the Kauffman Center for the Performing Arts in Kansas City, Missouri; and the Crystal Bridges Museum of American Art in Bentonville, Arkansas.

Born in Haifa, Israel, in 1938, Safdie moved to Canada with his family at a young age. He graduated from McGill University in 1961 with a degree in architecture. After apprenticing with Louis I. Kahn in Philadelphia, Safdie returned to Montreal to oversee the master plan for the 1967 World Exhibition. In 1964 he established his own firm to realize Habitat '67, an adaptation of his thesis at McGill, which was the central feature of the World's Fair and a groundbreaking design in the history of architecture.

In 1970, Safdie established a Jerusalem branch office, commencing an intense involvement with the rebuilding of Jerusalem. He was responsible for major segments of the restoration of the Old City and the reconstruction of the new center, linking the Old and New Cities. Over the years, his involvement expanded and included the new city of Modi'in, the new Yad Vashem Holocaust Museum, and the Rabin Memorial Center. During this period, Safdie also became involved in the developing world, working in Senegal, Iran, Singapore, and in the northern Canadian arctic. In 1978, after teaching at Yale, McGill, and Ben Gurion Universities, Safdie relocated his residence and principal office to Boston. He served as Director of the Urban Design Program at Harvard University Graduate School of Design from 1978 to 1984, and Ian Woodner Professor of Architecture and Urban Design from 1984 to 1989. In the following decade, he was responsible for the design of six of Canada's principal public institutions, including the Quebec Museum of Civilization, the National Gallery of Canada, and Vancouver Library Square.

Safdie has worked with a wide range of clients, including municipal entities and government agencies, colleges and universities, private developers, and non-profit organizations and civic institutions. Many of his firm's buildings have become beloved regional and national landmarks, including Exploration Place Science Center, Wichita, Kansas; Salt Lake City Public Library, Salt Lake City, Utah; Peabody Essex Museum, Salem, Massachusetts; Springfield Federal Courthouse, Springfield, Massachusetts; Skirball Cultural Center, Los Angeles, California; Lester B. Pearson International Airport, Toronto, Canada; the National Gallery of Canada; and Yad Vashem Holocaust Museum, Jerusalem, Israel.

In addition to numerous articles on the theory and practice of architecture, Safdie has written several books, most notably, *Beyond Habitat* (1970), *For Everyone a Garden* (1974), *Form and Purpose* (1982), and *Jerusalem: The Future of the Past* (1989). *The City After the Automobile* (1997) details Safdie's ideas about urbanism and city planning. A comprehensive monograph of his work, *Moshe Safdie I*, was published in 1996. *Moshe Safdie II*, a second monograph featuring work from 1996–2008, was published in 2009.

Safdie has been featured in several films, including Moshe Safdie, The Power of Architecture, which is a portrait film (directed by Donald Winkler, 2004), My Architect: A Son's Journey about Nathaniel Kahn and his father Louis I. Khan (directed by Nathaniel Kahn, 2003), and The Sound of the Carceri, about Bach and Piranesi, with Yo-Yo Ma (directed by Francois Girard, 1997). In the fall of 2010, The National Gallery of Canada presented *Global Citizen: The Architecture of Moshe Safdie*, an exhibition that explores the architect's buildings and design philosophy. The exhibition is co-sponsored by Crystal Bridges Museum of American Art and the Skirball Cultural Center.

Past exhibitions of Safdie's designs include *Building a New Museum* (Peabody Essex Museum, 2003-2004); *Moshe Safdie, Museum Architecture 1971–1998* (Tel Aviv University, 1998); *Moshe Safdie, Projects: 1979–1989* (Harvard University Graduate School of Design, 1989); and *For Everyone a Garden* (Baltimore Museum of Art, National Gallery of Canada, and San Francisco Museum of Modern Art, 1973-1974).

Safdie has been the recipient of numerous awards, honorary degrees, and civil honors, including the Companion of the Order of Canada and the Gold Medal of the Royal Architectural Institute of Canada.

MEGAN **SMITH**

Megan recently joined Google's advanced products team, Google [x], where she is working on range of projects including co-creating/hosting SolveForX, a forum to encourage and amplify technology-based moonshot thinking and teamwork (http://www.wesolveforx.com/). For nine years before that she oversaw Google's New Business Development team managing early-stage partnerships, pilot explorations, and technology licensing working closely with Google's engineering and product teams globally across all product areas. She led many of the company's early acquisitions, including Keyhole (Google Earth), Where2Tech (Google Maps) and Picasa. Megan also led the Google.org team transition to expand and innovate engineering based projects including Google Crisis Response, Google for Nonprofits, and Earth Outreach/Earth Engine, Googler 1%-time (now called "GoogleServe20") in addition to operationalizing Google's more traditional corporate giving.

Prior to joining Google in 2003, Megan was the CEO and, earlier, COO of PlanetOut, the leading gay, lesbian, bisexual and transgender online community, where the team broke through many barriers and partnered closely with all of the early major web players. She also held roles at General Magic and Apple Japan. Over the years, Megan has contributed to a wide range of engineering projects, including an award-winning bicycle lock, space station construction program, solar cookstoves and was a member of the MIT student team who designed, built and raced a solar car 2000 miles across the Australian outback. She holds a bachelor's degree and a master's degree in mechanical engineering from MIT, where she now serves on the board. She completed her master's thesis work at the MIT Media Lab.

BENEDIKT **TASCHEN**

Benedikt Taschen, 1961, Cologne, Germany, is a German publisher. His professional life started at age 18 in a 250-square-foot (23 m²) store in Cologne, Germany, named TASCHEN COMICS. In 1984, he bought 40,000 remainder copies of a Magritte monograph published in English with money borrowed from his family. The books sold through at double the price in two months and he was soon publishing his own books. By the end of the 1980s TASCHEN titles were available in over a dozen languages at prices that made art books affordable to students and collectors alike.

By the late 1990s, he had become a household name in publishing. When *Vanity Fair's* Matt Tyrnauer deemed him, "one of the few people in business who has the courage to do exactly what he wants whenever he wants to", Benedikt Taschen tested the theory with Helmut Newton's *SUMO*, the largest bound book of the 20th century. "I have done a lot of books, and I can tell you—without mentioning names—that publishers are not all like him. There are very few like him. Or there are none like him. He is also, I might add, a madman", says Helmut Newton to *Vanity Fair*.

SUMO is also the company's most successful title of the last ten years and the precursor to Benedikt Taschen's most ambitious personal project: *GOAT—Greatest of All Time*, a tribute to Muhammad Ali, shipping in Spring 2004. Four years in the making, *GOAT* weighs 75 lbs and is 20" x 20" in size, with nearly 800 pages of archival and original photographs, graphic artwork and articles and essays—including those of Ali himself.

Another of his books is the *Icons* series of art books, some of the most accessible in the world.

Today, TASCHEN has offices in Cologne, Hong Kong, London, Los Angeles, Madrid, Paris and Tokyo and stores in Amsterdam, Berlin, Beverly Hills, Brussels, Cologne, Copenhagen, Hamburg, Hollywood, London, Miami, New York, and Paris. TASCHEN employs 200 staff members worldwide and many longtime freelance editors. As Billy Wilder put it in *Vanity Fair* 2000: "Benedikt reminds me of an old-time Hollywood figure—a studio head, someone who is in firm command and has his hand in everything".

He is married and lives in the *Chemosphere*, designed by John Lautner in 1960. He bought the home for $1 million in 1997, restored the building, and published a book on Lautner. He lives and works in Cologne and Los Angeles.

JULIE **TAYMOR**

In 1998, Julie Taymor became the first woman to win the Tony® Award for Best Direction of a Musical, and also won a Tony® for Best Costumes, for her landmark production of *The Lion King*. The musical has won three Molière Awards including Best Musical and Best Costumes, garnered Drama Desk, Outer Critics Circle and Drama League awards for Taymor's direction, and myriad awards for her original costume, mask and puppet designs. For her latest Broadway production, *Spider-Man: Turn Off the Dark*, Taymor served as director and co-book writer. Taymor made her Broadway debut in 1996 with *Juan Darién: A Carnival Mass*, nominated for five Tony® Awards.

Other theater work includes *The Green Bird*, *Titus Andronicus*, *The Tempest*, *The Taming of the Shrew*, *The Transposed Heads* and *Liberty's Taken*.

Taymor's feature film directorial debut, Titus, starred Anthony Hopkins, Jessica Lange and Alan Cumming. In 2002, her biographical film Frida, starring Salma Hayek and Alfred Molina, earned six Academy Award® nominations, winning two. She took on the music of the Beatles, and earned a Golden Globe® nomination for Best Motion Picture—Musical or Comedy, in Across the Universe. Julie's most recent film, The Tempest, had its North American premiere at the 48th New York Film Festival in October 2010, following a world premiere at the 67th Venice International Film Festival. Taymor's adaptation of the William Shakespeare play features an all-star cast including Helen Mirren, Russell Brand, Djimon Hounsou and Alfred Molina.

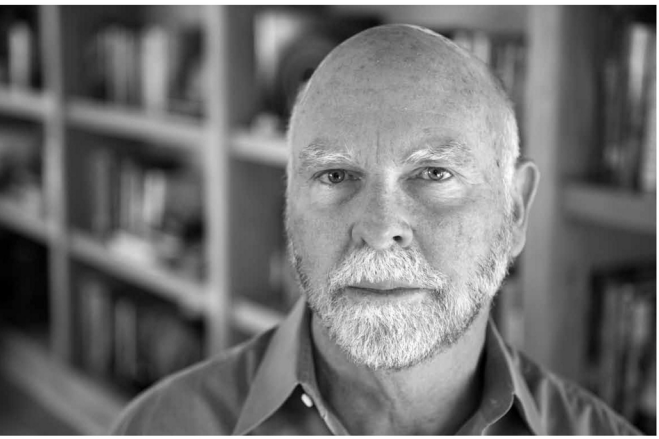
Beyond the theatre and screen, Taymor has directed five operas internationally including *Oedipus Rex* with Jessye Norman, for which she earned the International Classical Music Award for Best Opera Production. A subsequent film version premiered at the Sundance Film Festival and won her an Emmy® award.

Taymor also directed *Salomé*, *The Flying Dutchman*, *Die Zauberflöte* (which has been in repertory at The Met for six years), *The Magic Flute* (the abridged English version of *Die Zauberflöte*, which inaugurated a new PBS series entitled "Great Performances at The Met") and Elliot Goldenthal's *Grendel*.

An illustrated book on her career, Julie Taymor: *Playing With Fire*, was recently expanded and revised by Harry N. Abrams. Her book, *The Lion King: Pride Rock on Broadway*, is published by Hyperion. Taymor's adapted screenplay for Titus is published in an illustrated book by Newmarket Press. An illustrated book, *Frida: Bringing Frida Kahlo's Life and Art to Film*, is available from Newmarket Press. Harry N. Abrams also published an illustrated screenplay of Taymor's film adaptation of The Tempest which coincided with its premiere.

Taymor is a 1991 recipient of the MacArthur "genius" Fellowship.

J. CRAIG **VENTER**



J. Craig Venter, Ph.D., is regarded as one of the leading scientists of the 21st century for his numerous invaluable contributions to genomic research. He is Founder, Chairman, and President of the J. Craig Venter Institute (JCVI), a not-for-profit, research organization with approximately 300 scientists and staff dedicated to human, microbial, plant, synthetic and environmental genomic research, and the exploration of social and ethical issues in genomics.

Dr. Venter is also Founder and CEO of Synthetic Genomics Inc (SGI), a privately held company dedicated to commercializing genomic-driven solutions to address global needs such as new sources of energy, new food and nutritional products, and next generation vaccines.

Dr. Venter began his formal education after a tour of duty as a Navy Corpsman in Vietnam from 1967 to 1968. After earning both a Bachelor's degree in Biochemistry and a Ph.D. in Physiology and Pharmacology from the University of California at San Diego, he was appointed professor at the State University of New York at Buffalo and the Roswell Park Cancer Institute. In 1984, he moved to the National Institutes of Health campus where he developed Expressed Sequence Tags or ESTs, a revolutionary new strategy for rapid gene discovery. In 1992 Dr. Venter founded The Institute for Genomic Research (TIGR, now part of JCVI), a not-for-profit research institute, where in 1995 he and his team decoded the genome of the first free-living organism, the bacterium Haemophilus influenzae, using his new whole genome shotgun technique.

In 1998, Dr. Venter founded Celera Genomics to sequence the human genome using new tools and techniques he and his team developed. This research culminated with the February 2001 publication of the human genome in the journal, *Science*. He and his team at Celera also sequenced the fruit fly, mouse and rat genomes.

Dr. Venter and his team at JCVI continue to blaze new trails in genomics. They have sequenced and analyzed hundreds of genomes, and have published numerous important papers covering such areas as environmental genomics, the first complete diploid human genome, and the groundbreaking advance in creating the first self-replicating bacterial cell constructed entirely with synthetic DNA.

Dr. Venter is one of the most frequently cited scientists, and the author of more than 250 research articles. He is also the recipient of numerous honorary degrees, public honors, and scientific awards, including the 2008 United States National Medal of Science, the 2002 Gairdner Foundation International Award, the 2001 Paul Ehrlich and Ludwig Darmstaedter Prize and the King Faisal International Award for Science. Dr. Venter is a member of numerous prestigious scientific organizations including the National Academy of Sciences, the American Academy of Arts and Sciences, and the American Society for Microbiology.

CHARITY **TILLEMANN DICK**

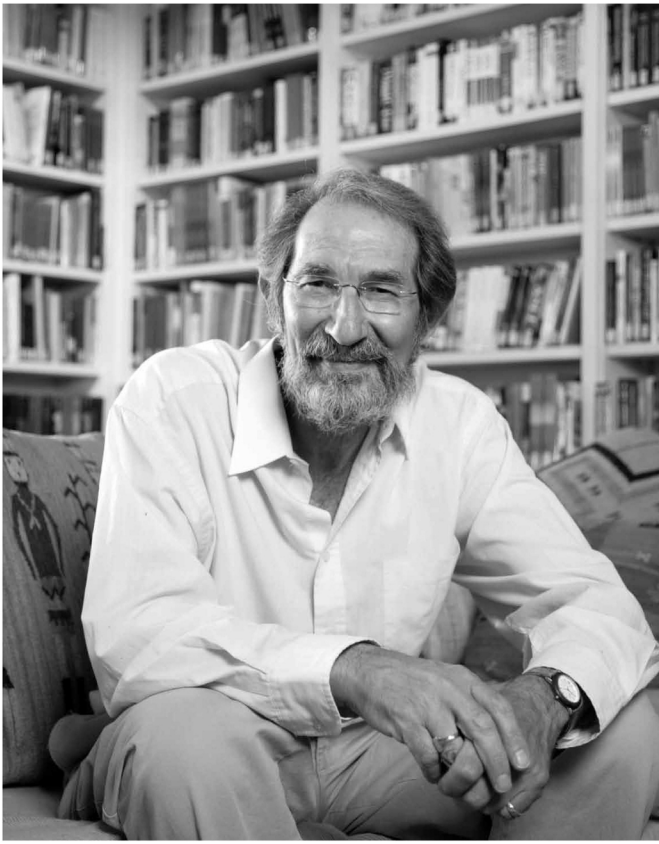
Charity Tillemann Dick is an American-born soprano and a recipient of two double lung transplants. Charity has performed across the United States, Europe, and Asia in venues as diverse as the Rose Theater at Lincoln Center in New York City; The Kennedy Center in Washington, DC; Severance Hall in Cleveland, Ohio; Il Giardino Di Boboli in Florence, Italy; the National Palace of the Arts in Budapest, Hungary; the Tel Aviv Opera House in Israel; the American Embassy in Beijing, China; the United Nations in New York; and National Statuary Hall in the United States Capitol. She has collaborated and performed with noted conductors and musicians including Eva Marton, Bruno Rigacci, Joela Jones, Marvin Hamlisch, Bono, Zoltan Kocis, Joan Dornemann, and former Secretary of State Dr. Condoleezza Rice. Some of her operatic roles have included Titania in A Mid Summer's Night Dream, Gilda in Rigoletto, Violetta in La Traviata, and Ophelia in Ophelia Forever. Charity has also performed for numerous presidents, prime ministers, members of Congress, and world dignitaries.

After receiving a diagnosis of Idiopathic Pulmonary Hypertension in 2004, Charity served as the national spokesperson for the Pulmonary Hypertension Association, working to raise awareness, increase federal research funding, expand stem cell research, and promote preventative and alternative medicine. In September of 2009, Charity received a bilateral lung transplant at the Cleveland Clinic in Ohio. After complications from rejection, Charity received a second bilateral lung transplant in January 2012.

Since receiving her first transplant, Charity has shared her amazing story and vocal talents at numerous conferences, musical performance, and events, including: TEDMED 2010 in San Diego, CA; the 6th National Learning Congress on Organ Donation in Dallas, TX; the 2010 Empathy and Innovation Summit in Cleveland, OH; and the EG Conference in Monterey, CA. Charity has been featured on CNN with Dr. Sanjay Gupta, CBS This Morning, Glamour magazine, ABCNews.com, TED.com, The Huffington Post, The *Wall Street Journal* Health Blog, the *Cleveland Plain Dealer*, the *San Francisco Chronicle*, and The *Sunday Times* (London). Her performances have been broadcast around the world on CNN, CBS, BBC, FOX, MSNBC, PBS, C-SPAN and NPR.

Charity received a Bachelor's degree with high honors from Regis University in Denver, CO, where she was raised with her 10 brothers and sisters. She later studied music at the Peabody Conservatory at Johns Hopkins University and the Liszt Academy of Music in Budapest. She currently resides in Washington, DC and New York City.

GEOFFREY **WEST**



Geoffrey West is Distinguished Professor and former President of the Santa Fe Institute (SFI) and an Associate Fellow of the Said Business School, Oxford University. Prior to joining SFI in 2003, he was leader of high energy physics at Los Alamos National Laboratory, where he remains a Senior Fellow. He received his B.A. from Cambridge University in 1961 and his Ph.D. in physics from Stanford University in 1966. After spells at Cornell and Harvard Universities, he returned to Stanford in 1970 to join the faculty. He was President of SFI from 2005–2009.

West is a theoretical physicist whose primary interests have been in fundamental questions in physics and biology, ranging from the elementary particles, their interactions and cosmological implications to the origins of universal scaling laws and a unifying quantitative framework of biology. His research in biology has included metabolic rate, growth, aging and mortality, sleep, cancer, and ecosystem dynamics.

His recent work has focused on developing an underlying quantitative theory for the structure and dynamics of cities, companies and long-term sustainability, including rates of growth and innovation, the accelerating pace of life, and why companies die, yet cities survive.

He has given many colloquia, keynote addresses and public lectures world-wide. Awards include the Mercer Prize from the Ecological Society of America, the Weldon Prize for Mathematical Biology, and the Glenn Award for Aging research. He has been featured in many publications world-wide including The *New York Times*, *Nature*, *Science*, The *Financial Times*, *Time*, *Newsweek* and *Scientific American* and has participated in television productions including Nova, National Geographic and the BBC. His work was selected as a breakthrough idea of 2007 by *Harvard Business Review* and, in 2006, he was named to *Time* magazine's list of "100 Most Influential People in the World".

will.i.am

will.i.am, a multi-faceted entertainer and creative innovator, is a seven-time Grammy Award winner. Known for his work with The Black Eyed Peas, who have sold 31 million albums and 58 million singles worldwide, he also works with some of the industry's biggest names including Michael Jackson, Rihanna, Usher, Nicki Minaj, Britney Spears, David Guetta, and film composer Hans Zimmer.

Frontman and founder of The Black Eyed Peas will.i.am has released two songs from his upcoming solo cd, #willpower on Interscope Records. The first two singles from the cd released in 2012 are: "T.H.E (The Hardest Ever)," featuring Mick Jagger and Jennifer Lopez, and number one hit song in the UK, "This is Love" featuring Eva Simons.

His songs and imagery have entertained and inspired millions, and the power of his words resonated deeply in his song "Yes We Can" that mobilized an entire generation to action during the 2008 presidential campaign. Demonstrating that music, brands and causes can be intertwined to entertain and inform, "Yes We Can" garnered an Emmy Award for "Best New Approaches in Daytime Entertainment."

In 2011, will.i.am executive produced and starred in his first prime time TV special "i.am FIRST: Science is Rock and Roll" to get young people excited about math and science education, as well as technology and science-related careers. Earlier this year he starred as a Coach on the hit reality TV show, "The Voice" UK edition on BBC One. While in London, will.i.am was a featured performer in "Concert for The Queen" in celebration of Queen Elizabeth II's Diamond Jubilee.

As a musician, producer, director and advocate for education, he is an enthusiastic user of technologies in both his professional and personal lives. In recognition of his ability to harness technology to enhance entertainment, creativity and communication, Intel Corporation appointed will as Director of Creative Innovation in 2011.

In collaboration with The Coca-Cola Company, will.i.am is on a mission to elevate the importance of recycling and to turn waste into a valued commodity through his EKOCYCLE brand. Launched in July, 2012, EKOCYCLE will give consumers more stylish options when shopping for fashion apparel, accessories and sporting goods that incorporate recycled plastic bottles and aluminum cans.

With a commitment to inspire kids to stay in school and go to college to become the leaders of tomorrow, will.i.am advocates regarding the importance and power of a good education through his i.am angel foundation's i.am scholarship. The i.am scholarship provides future leaders and innovators with comprehensive financial assistance to complete post-secondary education. The i.am angel foundation is also active in the U.K. through a STEM education and computer skills joint initiative with The Prince's Trust.

Recognized and honored by numerous industry organizations, will.i.am is the recipient of multiple Grammy Awards, a Latin Grammy Award, an Emmy Award, two NAACP Image Awards, a VH1 Do Something Award, the BMI President's Award and a 2008 Webby Award.

C. K. **WILLIAMS**

C. K. Williams (born Charles Kenneth Williams on November 2, 1936) is an American poet, critic and translator. Williams has won nearly every major poetry award. Flesh and Blood won the National Book Critics Circle Award in 1987. Repair (1999) won the 2000 Pulitzer Prize for Poetry, was a National Book Award finalist and won the Los Angeles Times Book Prize. The Singing won the National Book Award, 2003 and in 2005 Williams received the Ruth Lilly Poetry Prize.

C. K. Williams grew up in Newark, New Jersey and graduated from Columbia High School in Maplewood. He later briefly attended Bucknell University and graduated from the University of Pennsylvania. While at Penn he studied with the romantic scholar, Morse Peckham, and spent a great deal of time in the circle of young architects who studied with and worked for the great architect Louis Kahn. In an essay, "Beginnings," he acknowledges Kahn's dedication and patience as essential to his notion of the life of an artist.

Williams lived for a period in Philadelphia, where he worked for a number of years as a part-time psychotherapist for adolescents and young adults, a ghost-writer and editor, then began teaching, first at the YM-YWHA in Philadelphia, then at several universities in Pennsylvania, Beaver College, Drexel, and Franklin and Marshall. He subsequently taught at many other universities, including Columbia, NYU, Boston University, the University of California, both at Irvine and Berkeley, before finally becoming a professor at George Mason University, then moving in 1995 to Princeton University, where he has taught poetry workshops and translation ever since.

He met his present wife, Catherine Mauger, a French jeweler, in 1973, and they have a son who is now a noted painter, Jed Williams. He has a daughter from an earlier marriage, Jessie Burns, who is a writer. He lives half the year near Princeton, and the rest in Normandy in France.

He is a member of the American Academy of Arts and Letters.

His first book, *Lies*, was published in 1969, and since then he has published many collections of poetry, culminating in his *Collected Poems*, of which Peter Campion wrote in The *Boston Globe*: "Throughout the five decades represented in his new *Collected Poems*, Williams has maintained the most sincere, and largest, ambitions. Like Yeats and Lowell before him, he writes from the borderland between private and public life....[His poems] join skeptical intelligence and emotional sincerity, in a way that dignifies all of our attempts to make sense of the world and of ourselves. C. K. Williams has set a new standard for American poetry."

Another collection, *Wait*, appeared in 2010, and another, *Writers Writing Dying*, will come out in 2012.

He has written a memoir, *Misgivings*, which appeared in 2000, a collection of essays, *Poetry and Consciousness*, 1999, and a critical study of Walt Whitman, *On Whitman*, 2010. A new collection of essays, *In Time: Poets, Poems and the Rest*, will be published in 2012.

Williams is also an acclaimed translator, notably of Sophocles' *Women of Trachis* and Euripides' *The Bacchae*, as well as of the Polish poet Adam Zagajewski and the French poet Francis Ponge.

He has also published several children's books.

APES

One branch, I read, of a species of chimpanzees has something like territorial wars,
and when the…army, I suppose you'd call it, of one tribe prevails and captures an enemy,
"Several males hold a hand or foot of the rival so the victim can be damaged at will."

This is so disquieting: if beings with whom we share so many genes can be this cruel,
what hope for us? Still, "rival," "victim, "will"–don't such anthropomorphic terms
make those simians' social-political conflicts sound more brutal than they are?

The chimps Catherine and I saw on their island sanctuary in Uganda we loathed.
Unlike the pacific gorillas in the forest of Bwindi, they fought, dementedly shrieked,
the dominant male lorded it over the rest; they were, in all, too much like us.

Another island from my recent reading, where Columbus, on his last voyage,
encountering some "Indians" who'd greeted him with curiosity and warmth, wrote,
before he chained and enslaved them, "They don't even know how to kill each other."

It's occurred to me I've read enough–at my age all it does is confirm my sadness.
Surely the papers: war, terror, torture, corruption–they're like broken glass in the mind.
Back when I knew I knew nothing, I read all the time, poems, novels, philosophy, myth,

but I hardly glanced at the news, there was a distance between what could happen
and the part of myself I felt with: now everything's so tight against me I hardly can move.
The *Analects* say people in the golden age weren't aware they were governed; they just
lived.

Could I have passed through my own golden age and not even known I was there?
Some gold: nuclear rockets aimed at your head, racism, sexism, contempt for the poor.
And there I was, reading. What did I learn? Everything, nothing, too little, too much…
Just enough to get me here: a long-faced, white-haired ape with a book, still turning the
page.

C. K. **WILLIAMS**

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EDWARD **WILSON**

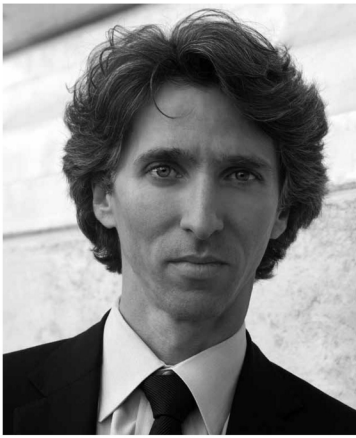
Edward Osborne Wilson is a world leading biologist and internationally recognized as one of the planet's most articulate authorities on the interrelatedness of knowledge disciplines and of life systems.

He is acknowledged for two interdisciplinary scientific disciplines (island biogeography and sociobiology), three unifying concepts for science and the humanities jointly (biophilia, biodiversity studies, and consilience), and one technological advance in the study of global biodiversity (the Encyclopedia of Life).

A native of Alabama, Wilson grew up in Mobile and received his bachelor's and master's degrees in biology from The University of Alabama (1949, 1950) and his doctoral degree in biology from Harvard University (1955).

Wilson has received more than 100 awards for his research on ants and biodiversity and for his writings addressed to both scientific and non-scientific audiences. He has received two Pulitzer Prizes in general non-fiction for his books *On Hunan Nature* (1979) and *The Ants* (1991); the Crafoord Prize from the Royal Swedish Academy of Sciences; the International Prize of Biology of Japan; and the Nonino and Serono Prizes for Letters and Sciences of Italy.

His work in the sciences, letters, the environment and conservation earned him prominence in the annals of the 21st Century. He was named one of the 25 most influential Americans by *Time* magazine and one of the world's 100 leading intellectuals by *Foreign Policy* magazine. He is the author of 28 books including the recent novel, *Anthill*, set in the woods of South Alabama; *The Social Conquest of Earth*; the soon-to-be-released profile of his boyhood hometown, *Why We Are Here: Mobile and the Spirit of a Southern City*.



DAMIAN **WOETZEL**

Damian Woetzel was a Principal Dancer at New York City Ballet and frequently performed internationally as a guest star and visiting artist with numerous companies including the Kirov Ballet and American Ballet Theatre, until his retirement from the stage in 2008. Woetzel currently serves as the Director of Arts Programs for the Aspen Institute, the Artistic Director of the Vail International Dance Festival, and as the Founding Director of the Jerome Robbins New Essential Works Program. Woetzel is also active as a director and producer outside these roles. Among his recent projects, Woetzel produced and directed an arts salute to Stephen Hawking at Lincoln Center for the World Science Festival, and directed the first performance of the White House Dance Series, which took place in the East Room of the White House and was hosted by First Lady Michelle Obama. Woetzel also works with Yo-Yo Ma on his Silk Road Connect program in the New York City Public Schools, and has twice directed culminating year-end performances; at the Museum of Natural History in 2010, and for the Central Park SummerStage series in 2011. Woetzel was appointed to the President's Committee on the Arts and Humanities by President Obama in 2009. In July 2012, Woetzel was honored with the inaugural Gene Kelly Legacy Award—an award jointly created by the Dizzy Feet Foundation and the Estate of Gene Kelly in honor of the 100th anniversary of Kelly's birth—for his contributions to the arts as a ballet star and director of dance and music performances.

In June 2011, Woetzel was named the Director of Arts Programs at the Aspen Institute. Under Woetzel's direction, the Aspen Institute Arts Program brings together leading artists, arts managers, sponsors, government officials

and patrons. Through these collaborations, the Program seeks to generate, exchange, and develop ideas and policies in order to encourage vibrancy and dynamism in all artistic realms, and to enrich civic culture in ways only the arts can.

Among the events curated by the Aspen Institute Arts Program under Woetzel's direction:

In November 2011, Woetzel curated the inaugural US-China Forum on the Arts and Culture in Beijing, in partnership with Asia Society and the Chinese People's Association for Friendship with Foreign Countries. The four day forum was the first in a series of cultural exchanges seeking to strengthen mutual understanding between Americans and Chinese through panel discussions, lectures, film screenings, museum tours, dinners and performance. American and Chinese artists and cultural representatives engaged in the forum included Joel Coen, Meryl Streep, Yo-Yo Ma, Alice Waters, Liu Ye, Ge You and others. Woetzel also directed a Public Forum in partnership with the Public Theater titled "Does Culture Make Us Who We are," hosted by Anne Hathaway with guests including Bill Irwin, David Brooks and Oskar Eustis.

In March 2012, Woetzel produced a panel with Howard Gardner, the Hobbs Professor of Cognition and Education at the Harvard Graduate School of Education, and Dr. Ellen Winner, Professor of Psychology at Boston College, and Senior Research Associate at Project Zero, examining the current state of the arts in education. Woetzel also hosted renowned artists Eric Fischl and Chuck Close in a conversation about artists and their audience at the Mary Boone Gallery in New York.

In June 2012, the Arts Program for the first time curated multiple sessions at the Institute's premiere public program, the Aspen Ideas Festival. For nineteen sessions, Woetzel brought renowned artists, policymakers, arts administrators as well as leading Chinese cultural representatives for discussions, film screenings and cultural exchanges focusing on how the arts impact society. Sessions included "Culture and Conflict" with Palestinian-born ballroom star and educator Pierre Dulaine and Dutch composer Merlijn Twaalfhoven; a conversation between renowned producer Julie Taymor and former Disney CEO and current Aspen Institute Arts Program chair Michael Eisner; "Radical Creative Spaces" with architect Elizabeth Diller; "Arts and the City: Making Cities Sing" with Rocco Landesman, Dennis Scholl, Darren Walker and Richard Florida; among many others.

Since 2006, Woetzel has been the Artistic Director of the summer Vail International Dance Festival, where he presents dance performances and commissions. He has instituted a number of initiatives as director, including bringing the educational arts program "Celebrate The Beat"—the Colorado associate of Jacques d'Amboise's National Dance Institute—to the Vail Valley, to reach local underserved children in the public schools.

Under Woetzel's direction, the festival has received wide acclaim for its innovation and growth as a nationally recognized showcase for dance, featuring such performances as the debut of Morphoses/The Wheeldon Company, and the launch of New York City Ballet MOVES. The annual International Evenings of Dance galas have become renowned for Woetzel's curation of first-time partnerships across companies and countries, as well as the presentation of young, emerging stars making their debuts in new repertory. In August 2012, The *New York Times*' Alastair Macaulay wrote that the 2012 Vail International Dance Festival presentations "were distinguished above all by catholic taste and brilliant programming. They merit superlatives" and that the International Evenings I gala "was simply the best gala I have attended in decades." Writing the same week, Wendy Perron of *Dance* Magazine compared Woetzel to the legendary impresario Serge Diaghilev, and praised Woetzel for engaging and educating audiences through spoken introductions to each work, and for his commitment to collaboration with live musicians.

Woetzel has also instituted a series of "UpClose" performances: lecture-demonstration events which combine rehearsal, performance and commentary by Woetzel and special guests. Recent UpClose performances have included: "UpClose: Stravinsky by Balanchine," an examination of the legendary collaboration between George Balanchine and Igor Stravinsky, co-hosted by Woetzel and New York City Ballet Master-in-Chief Peter Martins (2012); "UpClose: Premieres," which provided a first look at a series of works created in Vail by choreographers including Christopher Wheeldon and Emery LeCrone during the weeks of the 2011 Vail International Dance Festival; among many others.

In 2009 and 2010, Woetzel produced and directed the World Science Festival Gala Performances at Lincoln Center's Alice Tully Hall. For the 2010 event he created an arts salute to science honoring the theoretical physicist Stephen Hawking, featuring performances by Yo-Yo Ma, John Lithgow, and Kelli O'Hara among others.

In the fall of 2009, Woetzel helped create and began directing the Jerome Robbins Foundation's New Essential Works (NEW) Program, which supports choreographers and dance companies during the current financial crisis by giving grants to enable the production of new works.

In 2009, Woetzel launched as curator and director the new Studio 5 performance series at New York's City Center, which features in-depth examinations of today's most compelling dance artists and companies highlighted by in-studio performances and demonstrations. In 2009–2012, guests included David Hallberg, Christopher Wheeldon, Victoria Clark, Rob Berman, Angel Corella, Wendy Whelan, Edward Villella, among others; topics of discussion ranged from musical theatre to collaboration; and featured companies included American Ballet Theatre, the Paul Taylor Dance Company and Dance Theater of Harlem.

In June of 2010 Woetzel piloted "Arts Strike," a new effort to have celebrated artists engage educators and students, schools and communities, highlighting and sharing the unique power of the arts to empower, enrich and educate. The first events have taken place in Vail, Chicago, and Los Angeles, and have all featured Woetzel with Yo-Yo Ma in schools, engaging with students and their teachers to promote learning through the arts.

Woetzel works with Yo-Yo Ma on his Silk Road Connect program in the New York City Public Schools. In June 2010, Woetzel directed the culminating year-end event which took place at New York's Museum of Natural History, and featured the participation of the Silk Road Ensemble and 450 sixth-grade students. In June 2011, the culminating year-end event opened the Central Park SummerStage series. Titled "Night at the Caravanserai: Tales of Wonder," the performance again featured hundreds of sixth-grade students from New York-area public schools, Ma with his Silk Road Ensemble, vocalist Bobby McFerrin, the soprano Emalie Savoy, actor Bill Irwin, and author Jhumpa Lahiri, among others.

In April 2011, Woetzel organized an "arts strike" at Inner-City Arts in downtown Los Angeles with Yo-Yo Ma, The Silk Road Ensemble, and Memphis Jooker Charles "Lil Buck" Riley. The event included a demonstration and workshop for more than one hundred elementary school students from the Los Angeles Unified School District. Highlighting the event was a first-time duet directed by Woetzel between Ma and Lil Buck, who performed a Memphis Jookin' version of The Dying Swan with Ma accompanying on the cello; the performance was immortalized in a video shot by Spike Jonze which reached over one million views within weeks.

In the fall of 2010, Woetzel was a visiting Lecturer at Harvard Law School, where he co-taught a course on Performing Arts and the Law with Jeannie Suk.

Woetzel was the artistic director of the New York State Summer School for the Arts School of Ballet from 1994–2007.

Woetzel was a Principal Dancer at New York City Ballet from 1989 until his retirement from the stage in 2008. At New York City Ballet, Woetzel had works created for him by Jerome Robbins, Eliot Feld, Twyla Tharp, Susan Stroman, and Christopher Wheeldon among others, and danced more than 50 featured roles in the Company's repertory, including: George Balanchine's: Agon, Coppelia, Prodigal Son, Slaughter on Tenth Avenue, Stars and Stripes, Swan Lake; and Jerome Robbins': Afternoon of a Faun, Fancy Free, Dances at a Gathering, A Suite of Dances, and West Side Story Suite.

Woetzel originated featured roles in: Eliot Feld's *The Unanswered Question and Organon*, Peter Martins' *Jeu de Cartes* and *The Sleeping Beauty*, Jerome Robbins' *Ives, Songs* and *Quiet City*, Susan Stroman's "The Blue Necklace" from *Double Feature*, Twyla Tharp's *The Beethoven Seventh*, Christopher Wheeldon's *An American in Paris*, *Carousel (A Dance)*, *Evenfall*, *Morphoses*, and *Variations Sérieuses*. Woetzel also originated roles in ballets by Kevin O'Day, Richard Tanner, and Lynne Taylor-Corbett, among others.

Woetzel appeared in Dance in America's presentation of "Dinner with Balanchine," dancing Union Jack and Stars and Stripes. In October 1998, Mr. Woetzel appeared as one of the stars of the Cole Porter musical *Jubilee* in a special benefit performance at Carnegie Hall, during which he sang as well as danced. In May 1999, he starred as Prince Siegfried in Peter Martins' *Swan Lake* on the PBS national telecast "Live from Lincoln Center." Woetzel also appeared in the 2002 nationally televised Live from Lincoln Center broadcast "New York City Ballet's Diamond Project: Ten Years of New Choreography" on PBS and in the May 2004 Live from Lincoln Center broadcast of "Lincoln Center Celebrates Balanchine 100." Woetzel starred as the Cavalier in the film version of George Balanchine's *The Nutcracker™*, released in the winter of 1993.

During his career, Woetzel frequently performed internationally as a guest star and was a visiting artist with numerous companies including the Kirov Ballet and American Ballet Theatre. In his guest appearances, Woetzel danced principal roles in classics such as Don Quixote, Giselle, and La Bayadere, among others.

Woetzel has choreographed a number of ballets for New York City Ballet, among other companies. For New York City Ballet, he choreographed Ebony Concerto to Stravinsky, and Glazounov Pas de Deux to the composer's Les Ruses d'Amour. Woetzel also choreographed the "Polovtsian Dances" for New York City Opera's production of Prince Igor, and in 1998, he choreographed and starred in a new version of *An American in Paris* ballet for Marvin Hamlisch's Gershwin Centennial Gala.

Woetzel is the recipient of a Choo San Goh award for new choreography. He serves on the Artists Committee of the Kennedy Center Honors and as a judge for the Astaire Awards. He has also served as a juror for the Princess Grace Awards. Woetzel is a frequent speaker on the arts and arts policy. Woetzel was the 2008 Harman-Eisner Artist in Residence of the Aspen Institute, and in 2011, he became a member of the Knight Foundation's National Arts Advisory Committee. Woetzel also serves on the boards of directors of New York City Center, The Clive Barnes Foundation and The Sphinx Organization, and served on the recent Harvard Task Force on the Arts. In November 2009, President Obama appointed Woetzel to the President's Committee on the Arts and Humanities. In July 2012, Woetzel was honored with the inaugural Gene Kelly Legacy Award—an award jointly created by the Dizzy Feet Foundation and the Estate of Gene Kelly in honor of the 100th anniversary of Kelly's birth—for his contributions to the arts as a ballet star and director of dance and music performances.

Woetzel holds a Master in Public Administration Degree from Harvard's Kennedy School of Government.

Woetzel has been married to Heather Watts since 1999.

STEPHEN **WOLFRAM**

Stephen Wolfram has been responsible for three revolutionary developments: the *Mathematica* computation system, *A New Kind of Science*, and the Wolfram|Alpha computational knowledge engine.

Wolfram was educated at Eton, Oxford and Caltech, receiving his Ph.D. in theoretical physics at the age of 20. Wolfram's work on basic science led him to a series of fundamental discoveries about the computational universe of possible programs. Summarized in his best-selling 2002 book *A New Kind of Science*, these discoveries have not only launched major new directions in basic research, but have also led to breakthroughs in scientific modeling in physical, biological and social domains—as well as defining a broad new basis for technology discovery.

Launched in 1988, *Mathematica* has revolutionized the way technical computation is done, and has been responsible for countless advances over the past two decades. Starting from a set of fundamental principles devised by Wolfram, *Mathematica* has continually grown, integrating more and more algorithmic domains, and spawning such technologies as the Computable Document Format (CDF).

Building on *Mathematica* and *A New Kind of Science*, Wolfram in 2009 launched Wolfram|Alpha—an ambitious, long-term project to make as much of the world's knowledge as possible computable, and accessible to everyone. Used every day on the web and through apps by millions of people around the world, Wolfram|Alpha defines a fundamentally new kind of computing platform that is turning science-fiction computer intelligence into reality.

In addition to his scientific and technical achievements, Wolfram has been the CEO of Wolfram Research since its founding in 1987. Under Wolfram's leadership, Wolfram Research has become one of the world's most respected software companies, as well as a powerhouse of technical and intellectual innovation, and a major contributor to education and research around the world.

WILL **WRIGHT**

William Ralph "Will" Wright (born January 20, 1960, in Atlanta, Georgia) is an American video game designer and co-founder of the game development company Maxis, now part of Electronic Arts. In April 2009, he left Electronic Arts to run "Stupid Fun Club", an entertainment think tank in which Wright and EA are principal shareholders.

The first computer game Wright designed was Raid on Bungeling Bay in 1984, but it was SimCity that brought him to prominence. The game was released by Maxis, a company Wright formed with Jeff Braun, and he built upon the game's theme of computer simulation with numerous other titles including SimEarth and SimAnt.

Wright's greatest success to date came as the original designer for The Sims games series. The game spawned multiple sequels and expansions and Wright earned many awards for his work. His latest work, Spore, was released in September 2008 and features gameplay based upon the model of evolution and scientific advancement. The game sold 406,000 copies within three weeks of its release.

He was born as William Ralph Wright on January 20, 1960, in Atlanta. He is of French, English, Italian, and Native American descent.

After graduating at 16 from Episcopal High School, he enrolled in Louisiana State University, transferring two years later to Louisiana Tech. Beginning with a start at an architecture degree, followed by mechanical engineering, he fell into computers and robotics. He excelled in subjects he was interested in—architecture, economics, mechanical engineering, and military history—but was held back by his impractical goals such as language arts. His earlier dream of space colonization remained, and was joined by a love for robotics. After another two years at Louisiana Tech, in the fall of 1980, Wright moved on to The New School in Manhattan. He lived in an apartment over Balducci's, in Greenwich Village, and spent his spare time searching for spare parts in local electronics surplus stores. After one year at the New School, Wright returned to Baton Rouge without his degree, concluding five years of collegiate study.

During a summer break from college, he met his first wife Joell Jones, an artist currently living in California, on vacation to her hometown of Baton Rouge. In an interview published in February 2003, Will claims that games were absorbing so much of his time, he decided that perhaps making games was the way to go. Wright's first game was the helicopter action game Raid on Bungeling Bay (1984) for the Commodore 64.

Wright found that he had more fun creating levels with his level editor for Raid on Bungeling Bay than he had while actually playing the game. He created a new game that would later evolve into SimCity, but he had trouble finding a publisher. The structuralist dynamics of the game were in part inspired by the work of two architectural and urban theorists, Christopher Alexander and Jay Forrester.

"I'm interested in the process and strategies for design. The architect Christopher Alexander, in his book *A Pattern Language* formalized a lot of spatial relationships into a grammar for design. I'd really like to work toward a grammar for complex systems and present someone with tools for designing complex things."

Wright, in an interview with The *Times*, expressed belief that computers extend the imagination, and posits the emergence of the "metabrain", stating:

"Any human institutional system that draws on the intelligence of all its members is a metabrain. Up to now, we have had high friction between the neurons of the metabrain; technology is lowering that friction tremendously. Computers are allowing us to aggregate our intelligence in ways that were never possible before. If you look at Spore, people are making this stuff, and computers collect it, then decide who to send it to. The computer is the broker. What they are really exploring is the collective creativity of millions of people. They are aggregating human intelligence into a system that is more powerful than we thought artificial intelligence was going to be."

In 1986, he met Jeff Braun, an investor interested in entering the computer game industry, at what Wright calls "the world's most important pizza party." Together they formed Maxis the next year in Orinda, California. SimCity (1989) was a hit and has been credited as one of the most influential computer games ever made. Wright himself has been widely featured in several computer magazines—particularly *PC Gamer*, which has listed Wright in its annual 'Game Gods' feature, alongside such notables as Roberta Williams and Peter Molyneux.

Following the success of SimCity, Wright designed SimEarth (1990) and SimAnt (1991). He co-designed SimCity 2000 (1993) with Fred Haslam and in the meantime Maxis produced other "Sim" games. Wright's next game was SimCopter (1996). Although none of these games were as successful as SimCity, they further cemented Wright's reputation as a designer of "software toys"—games that cannot be won or lost. In 1992, Wright and his family moved to Orinda, California.

Wright has a great interest in complex adaptive systems and most of his games have been based around them or books that describe them (SimAnt: E.O. Wilson's *The Ants*, SimEarth: James Lovelock's *Gaia Theory*, SimCity: Jay Forrester's *Urban Dynamics and World Dynamics*, Spore: Drake's Equation and *The Powers of Ten*) Wright's role in the development of the concepts from simulations to games is to empower the players by creating what he dubs "possibility spaces", or simple rules and game elements that add up to a very complex design. All Maxis, and later games that Wright had a hand in designing, adhere to these design principles.

Maxis went public in 1995 with revenue of US$38 million. The stock reached $50 a share and then dropped as Maxis posted a loss. Electronic Arts bought Maxis in June 1997. Wright had been thinking about making a virtual doll house ever since the early 1990s, similar to SimCity but focused on individual people. Originally conceived of as an architectural design game called Home Tactics, Wright's idea changed when someone suggested the player should be rated on the quality of life experience by the homeowners. It was a difficult idea to sell to E.A., because already 40% of Maxis's employees had been laid off.

When Wright took his idea to the Maxis board of directors, Jeff Braun says, "The board looked at The Sims and said, 'What is this? He wants to do an interactive doll house? The guy is out of his mind.' " Doll houses were for girls, and girls didn't play video games. Maxis gave little support or financing for the game. Electronic Arts, which bought Maxis in 1997, was more enthusiastic. Wright's games are so different from E.A.'s other releases that it was hard to imagine the two being united in the same enterprise. But the success of SimCity had already established Sim as a strong brand, and E.A., which by then, fifteen years after its founding, was becoming a Procter & Gamble-style brand-management company, foresaw the possibility of building a Sim franchise.

E.A. published The Sims in February 2000 and it became Wright's biggest success yet. It eventually surpassed Myst as the best-selling computer game of all time and spawned numerous expansion packs and other games. He designed a massively multiplayer version of the game called The Sims Online, which was not as popular as the original. By November 2006, The Sims franchise had earned E.A. more than a billion dollars.

In a presentation at the Game Developers Conference on March 11, 2005, he announced his latest game Spore. He used the current work on this game to demonstrate methods that can be used to reduce the amount of content that needs to be created by the game developers. Wright hopes to inspire others to take risks in game creation.

As for his theories on interactive design, Wright says the following:

"Well, one thing I've always really enjoyed is making things. Out of whatever. It started with modeling as a kid, building models. When computers came along, I started learning programming and realizing the computer was this great tool for making things, making models, dynamic models, and behaviors, not just static models. I think when I started doing games I really wanted to carry that to the next step, to the player, so that you give the player a tool so that they can create things. And then you give them some context for that creation. You know, what is it, what kind of kind of world does it live in, what's its purpose? What are you trying to do with this thing that you're creating? To really put the player in the design role. And the actual world is reactive to their design. So they design something that the little world inside the computer reacts to. And then they have to revisit the design and redesign it, or tear it down and build another one, whatever it is. So I guess what really draws me to interactive entertainment and the thing that I try to keep focused on is enabling the creativity of the player. Giving them a pretty large solution space to solve the problem within the game. So the game represents this problem landscape. Most games have small solution landscapes, so there's one possible solution and one way to solve it. Other games, the games that tend to be more creative, have a much larger solution space, so you can potentially solve this problem in a way that nobody else has. If you're building a solution, how large that solution space is gives the player a much stronger feeling of empathy. If they know that what they've done is unique to them, they tend to care for it a lot more. I think that's the direction I tend to come from."

Wright believes that simulations as games can be used to improve education by teaching children how to learn. In his own words:

"The problem with our education system is we've taken this kind of narrow, reductionist, Aristotelian approach to what learning is. It's not designed for experimenting with complex systems and navigating your way through them in an intuitive way, which is what games teach. It's not really designed for failure, which is also something games teach. I mean, I think that failure is a better teacher than success. Trial and error, reverse-engineering stuff in your mind—all the ways that kids interact with games—that's the kind of thinking schools should be teaching. And I would argue that as the world becomes more complex, and as outcomes become less about success or failure, games are better at preparing you. The education system is going to realize this sooner or later. It's starting. Teachers are entering the system who grew up playing games. They're going to want to engage with the kids using games."

Wright will appear as a character in the video game Mr. T, where he will team up with Mr. T to fight Nazis.

Wright was given a "Lifetime Achievement Award" at the Game Developers Choice Awards in 2001. In 2002, he became the fifth person to be inducted into the Academy of Interactive Arts and Sciences' Hall of Fame. Until 2006, he was the only person to have been honored this way by both of these industry organizations. In 2007 the British Academy of Film and Television Arts awarded him a fellowship, the first given to a game designer.

He has been called one of the most important people in gaming, technology, and entertainment by publications such as *Entertainment Weekly*, *Time*, *PC Gamer*, *Discover* and *GameSpy*. Wright was also awarded the *PC Magazine* Lifetime Achievement Award in January 2005.

In 1980, along with co-driver and race organizer Rick Doherty, Wright participated in the U.S. Express, a cross-country race that was the predecessor to The Cannonball Run. Wright and Doherty drove a specially outfitted Mazda RX-7 from Brooklyn, New York to Santa Monica, California in 33:39, winning the illegal race. Wright only competed once in the race, which continued until 1983.

Since 2003, in his spare time, Wright has collected leftovers from the Soviet space program, "including a 100-pound hatch from a space shuttle, a seat from a Soyuz... control panels from the Mir", and the control console of the Soyuz 23, as well as dolls, dice, and fossils. During E3 2004 he passed off an old lapel pin commemorating the Soviet space program to a reporter.

"I'm uncollecting. I buy collections on eBay, and I disperse them out to people again. I have to be like an entropic force to collectors, otherwise all of this stuff will get sorted."

He once built competitive robots for BattleBots with his daughter, but no longer does so. As of November 2006, Wright still had remnant bits of machined metal left over from his BattleBots days strewn about the garage of his Oakland home. Wright was a former Robot Wars champion in the Berkeley-based robotics workshop, the Stupid Fun Club. One of Wright's bots, designed with the help of Wright's daughter Cassidy, "Kitty Puff Puff", fought against its opponents by sticking a roll of gauze onto its armature and circling around them, encapsulating them and denying them movement. The technique, *cocooning*, was eventually banned.

Following his work in BattleBots, he has taken steps into the field of human-robot interactions.

"We build these robots and we take them down to Berkeley and study the interactions that people have with the robots," says Wright. "We built this newer one that has a rapid-fire pingpong cannon. It will fire about 10 per second. So we give people this plastic bat and we say, 'It's set up to play baseball. Do you want to play baseball? It's going to shoot a little ball and you try to hit it.' And all of a sudden it's like da-da-da-da, and it's pelting them with balls."

After building his reputation as one of the most important game designers in the world, Wright in 2009 left Maxis, the Electronic Arts owned studio he founded. His first post-E.A. venture was the Stupid Fun Club.

In October 2010, Current TV announced that Will Wright will produce a new show for the network. The program, entitled Bar Karma, began airing in February 2011.

In October 2011, Will Wright became a member of the Board of Directors of Linden Lab, the creators of Second Life.

JOSHUA **WURMAN**

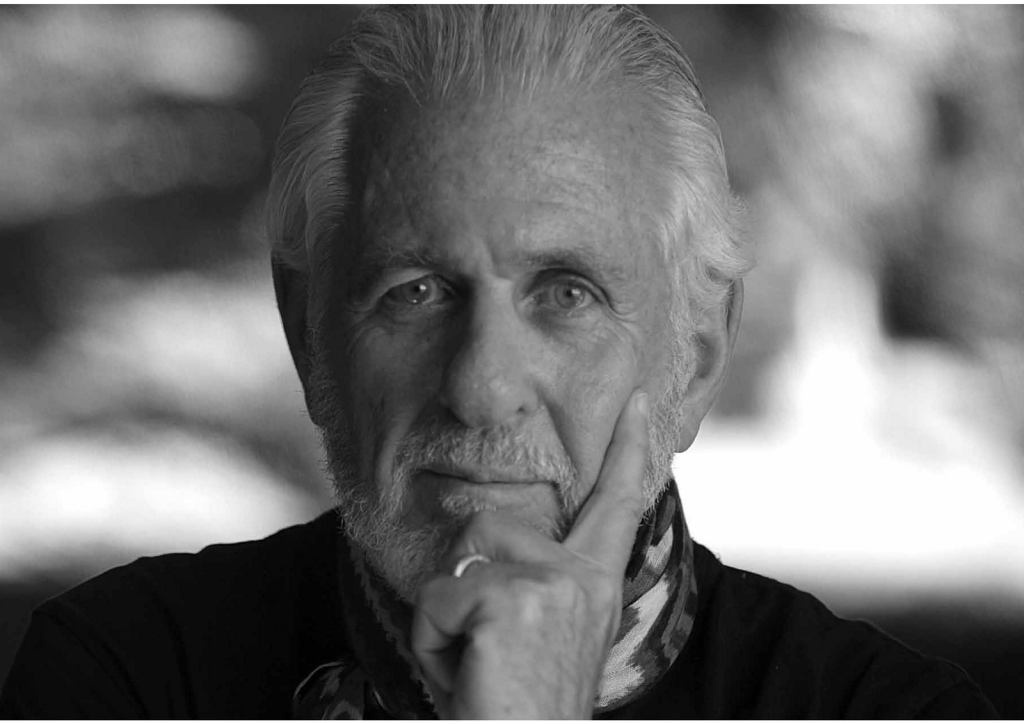
I grew up in Pennsylvania, bereft of any really meaningful opportunities to experience severe weather, hurricanes, even real deep snow. As a youth, I tried to impress friends and girls with my home weather station and insect collection. These efforts, among other factors, kept me well out of the running for homecoming king. Naturally, I moved on to a party school, the Massachusetts Institute of Technology (MIT) to search for a better social life. But hating schoolwork, I rushed through it, earning my MS at only 21. Then after some aimless additional years in school I dropped out for three years, working for the Air Force on nuclear winter computer simulations and other cheery subjects. Returning to MIT, I earned my Doctorate and moved to Colorado to work at the National Center for Atmospheric Research (NCAR) on bistatic radar networks, a new type of weather radar system that I had invented. However, after seeing real High Plains thunderstorms close up, and tornadoes, I got distracted and conceived of building a network of big, fast scanning radars that could drive right up to tornadoes and fires, inside hurricanes, and into other nice weather. The DOW program was born, and I moved down to Oklahoma to be a professor for a few years, chase tornadoes and hurricanes, file patents, teach and write papers. In the middle of this, I traveled to Asia on a research project and met my wife operating a weather radar on an island off the coast of Hong Kong and conned her into believing that Oklahoma was just like Hong Kong. After receiving tenure and the implied lifetime sentence at the university, I did the sensible thing: I quit and moved back to Boulder and founded my own non-profit research institution, the Center for Severe Weather Research (CSWR). My wife and I run CSWR, manage the DOWs as National Science Foundation (NSF) Facilities, and conduct research programs such as the VORTEX2 study and hurricane studies. We have four young children who, so far, show no unhealthy obsessive interests in tornadoes, hurricanes or radars. I've just finished the VORTEX2 tornado study (http://vortex2.org), which is the largest tornado research mission ever, funded mostly by NSF, employing about 120 scientists and crew in 50 vehicles. We had 11 radars, 4 balloon trucks, UAVs, 40 deployable instruments, 13 mobile mesonets, photogrammetry and microphysics teams, damage survey teams, basically more of anything that used to study tornadoes scientifically. Just imagine the lines for fuel and bathrooms in small-town gas stations. During WWW, I'll be keeping a nervous eye out for any hurricanes threatening to make landfall. If a hurricane looms, I'll be leading my team into the eye.

MAO **YUSHI**
Chinese economist, 2012 Milton Friedman Liberty Award. (He wrote an online column criticizing the communist and totalitarian policies of Mao Zedong (Chairman Mao) in China, attacked by Maoists in China.)
http://www.cato.org/special/friedman/yushi/index.html

YAO **MING**
Retired Chinese basketball player who last played for the Houston Rockets of NBA; investor.

TAN **DUN**
Grawemeyer, Oscar, and Grammy awarding winning Chinese contemporary classical composer
http://en.wikipedia.org/wiki/Tan_Dun

ZHANG **YONG HE**
Chinese-American architect, former head of architecture at MIT.

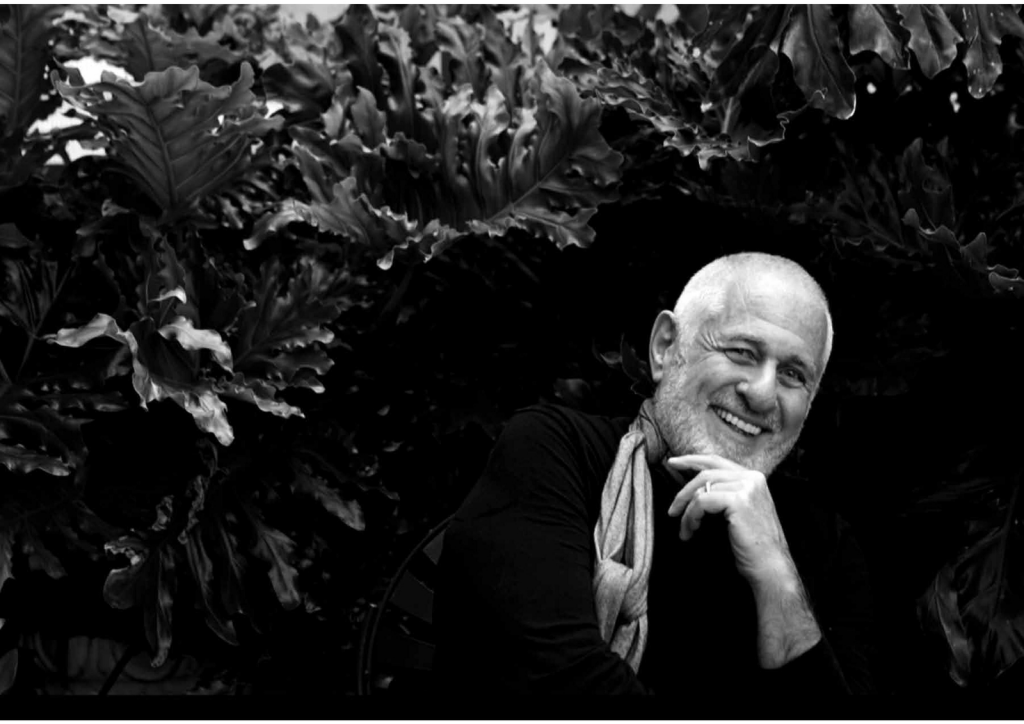


RICHARD SAUL **WURMAN**

Described by *Fortune* magazine as an "intellectual hedonist" with a "hummingbird mind," Richard Saul Wurman seeks ways to make the complex clear. Recognizing at an early age that his ignorance is his greatest asset, he has made it his mission to sort through the abundance of information that is available on every topic, and design the techniques to make it understandable.

In doing so he has continually sought to put himself in the presence of extraordinary people, including (all now all deceased), Francis Crick, Richard Feynman, Jonas Salk, Eva Zeisel, Louis I. Kahn, Charles Eames, Frank Stanton and Schuyler van Renssalaer Cammann, and Arnold Toynbee. There are many others. The only two bosses he had who didn't fire him were Lou Kahn and Charlie Eames.

As a result, Wurman has had many lives: as an author (83 books); FAIA Architect, 13-year partner in Murphy Levy Wurman Architects; cartographer (mapped 1/3 of the Mayan city of Tikal and current project 19.20.21.); teacher (Cambridge University, England; Princeton; Washington University, St. Louis; University of Southern California; University of California Los Angeles; City College of New York, and Dean, Cal Poly School of Design); urban designer (recipient of MIT's Kevin Lynch award in urban design); graphic designer (AIGA Gold Medal, membership in AGI and inducted into the Art Directors Hall of Fame); information theorist (*Information*



Anxiety, Follow the Yellow Brick Road) and in medicine (6 books on healthcare and creator and chairman of TEDMED, 1995–2010), and as a conference convener. The path of this journey has been paved by one surface: his curiosity.

The acknowledged father of Information Architecture, Wurman has written, designed and published 83 books on a range of topics, while creating conferences and new mapping projects. All contribute to a greater understanding of complex information. They spring from his particular brand of innovation: doing the opposite of what is rote or expected.

Wurman published his first two books in 1962. The first featured models of 50 world cities all constructed on a uniform scale, the other was the first book to be written on Louis Kahn. In 1967 he co-authored the first comparative statistical atlas of major American cities. His latest book is called *33: Understanding Change & the Change in Understanding*. It chronicles the adventures and musings of the eccentric main character, the Commissioner of Curiosity and Imagination.

Wurman created the *ACCESS* city guides, using graphics and logical editorial organization to make places such as New York, Tokyo, Rome, Paris and London understandable to visitors. Other volumes he created focus on topics such as baseball, football and the 1984 Olympics, the latter with over with 3.2 million copies sold. His road atlases employed similar techniques that elucidate U.S. geography and transportation networks. In addition he completed many one-off projects, such as his book *Twin Peaks Access*, which he co-authored with David Lynch. Several of his books are in the permanent collection of the Museum of Modern Art, New York.

Wurman began his career in conferences in 1972 when he chaired the International Design Conference in Aspen. He then co-chaired the first Federal Design Assembly in 1973 and the national AIA Conference in 1976. With each of these he changed the fundamentals of how gatherings were run. All these helped his creative molding of TED, TEDMED, and eg, the Entertainment Gathering.

Wurman created the TED conference in 1984, which he chaired through the 2002 meeting. TED brings together many of America's clearest thinkers in the fields of technology, entertainment and design. He created the eg conference in 2006 and the TEDMED conference in 1995, which he chaired through 2010. Other conferences he created and chaired include California 101, TEDSELL, TEDNYC, TED4Kobe in Japan and TEDCity in Toronto.

Now in 77, Wurman continues to quell his restlessness with a series of new projects. The WWW Conference will be an active gathering of some of the brightest thinkers of our time discussing the complexity of emerging patterns on our planet in improvised conversation – intellectual jazz. In partnership with Esri and @radical.media, 19.20.21. is a major cartographic initiative that endeavors to standardize a methodology for comparative urban data. His Urban Observatory project aims to establish, for the first time ever, a series of live and changing electronically connected urban observatories around the world.

Wurman received both his B.Arch. and M.Arch. degrees with highest honors from the University of Pennsylvania in 1959. While there, he was awarded the Arthur Spayd Brooks Gold Medal, the Thornton Oakley Award for Achievement in Creative Art, 2 Chandler grants and two graduate fellowships. He has also been awarded a Guggenheim Fellowship in Architecture and Design, three honorary doctorates, two Graham Fellowships and numerous grants from the National Endowment for the Arts. He is the 2012 Lifetime Achievement Award recipient given by The Smithsonian Cooper-Hewitt National Design museum. He was recently given the Gold Medal for Outstanding Contribution to Public Discourse by Trinity College Dublin, an honor shared in the past by Archbishop Desmond Tutu and Aung San Suu Kyi.

Wurman currently lives in Newport, RI with his wife, novelist Gloria Nagy, and their three yellow Labradors, Abraham, Isaac and Jacob. They have four children and six grandchildren.

MEMO TO PARTICIPANTS re: CONVERSATIONS

As most of you are aware, I created TED in 1984 and chaired it through 2002. During that time I created TEDMED in 1995 and the eg Conference in 2006. For all those meetings I developed an 18-minute talk and a series of rules called the *TED Commandments*.

Several of you have asked 'well what are the new guidelines as they relate to the WWW Conference'?

1 Participants have all been sent the schedule listing the person with whom they have been paired, attached again below.
2 If you go to the participants page on the web site, you can click on that person's name and link to his or her biographical information.
3 I have developed a list of 30 different premises or postulations that will begin you in improvised conversation.
4 I have tried this and it works.
5 You will be facing each other on comfortable couches and not the audience.
6 There will be approximately 150 people in the audience, which will be comprised of fellow participants, guests and individuals invited by sponsors.
7 Absolutely no preparation is necessary.
8 You will not be selling a book, charity, project or religion.
9 As long as the conversation holds my attention and my perceived attention of the audience, you will be in conversation. At the conclusion, I will with reasonable politeness call up the next two individuals.
10 If the conversation is fabulous but goes on so long as to potentially cause us to miss our lunch, I will also end it and the two of you can continue it over lunch.
11 There will be no lectern but there will be a side table for a cup of coffee or glass of water.
12 There is no strict time schedule but I will attempt to keep the order of the final schedule.
13 On occasion I might take the liberty part way into a given conversation to add a third person, another participant or simply another member of the audience, whom I know can add constructively to the conversation.
14 The entire meeting will be filmed as inconspicuously as possible from the far left and right of the stage and with one small camera in the audience.
15 At this moment there are no plans to live-stream any of the conference. There will be an app with access to a server to hold the conversations. It is planned that this will be available on 1 December and will include a running line of translation into several languages.
16 The app will also contain a large body of curated personal information about you. Further explanation about this will come to you next week.
17 I have personally worked out the breaks, lunches and dinners and I believe they will be of the highest quality and in rooms that will delight you, both at Esri and at The Mission Inn.
18 Obviously there is a lot of risk about the conversations, particularly the quality, spontaneity, clarity, improvisation and surprise.
19 The goal is to find some threads that have not emerged before as you speak with your partner, which will encapsulate a type of honesty and a non-predicted path in response to each other.
20 This has happened in my several tests of this idea.
21 To repeat, I am endeavoring to make the filming, ambiance, location and lack of press all focus on your comfort and the quality of your experience. This above all is my concern and my goal.
22 Improvised conversation in this manner is a new form but a wonderful conversation is perhaps the oldest human media for creative discourse. So in that sense, this is **a great leap backwards.**
23 It will be a wonderful salon and an absolutely immersive experience with extraordinary people.

MEMO TO PARTICIPANTS re: FUTURE APP

I trust each of you has read my 24-point memo called *WWW Conference Conversation Guidelines* with 24 points that I believe give the spirit of the meeting itself. I've had excellent response from many of you as well as from sponsors and attendees. This memo addresses the outcome of the conference, in other words, what I do with the filming of these approximately 30 conversations.

1 It will be filmed in black and white by a team directed by Jon Kamen and Sidney Beaumont of @radical.media, and John Halloran of John Halloran Associates.
2 It will be unedited. There will be a camera on each of the individuals in conversation, as well as a long camera on the three of us sitting on stage.
3 Michael Smolens and David Orban of dotSUB will then translate it into perhaps 10 languages and add a running translation in English, which will address the language needs of 90% plus of the world's population.
4 This will live on a server and be accessed by an app that has a release date at this juncture of 1 December. The app will also contain a great deal of additional information on each of the presenters.
5 The additional curated stuff—photos, videos, and links is what this memo is focused on.
6 Scrollmotion has already done two extraordinary versions of the organization and design of this app. They have offices in San Diego and New York City.
7 There will be a series of unique videos on which I will comment later, made where appropriate of you in situ.
8 The video of the entire conference of course can be accessed by pairings of speakers from a list and viewed as you would at the conference showing individuals in improvised conversation. However, one could also double click on a single name and go into this visual biography of each of the participants.
9 The demo can be found at http://vimeo.com/user7992663/review/47187545/29ddc526f0 The password is WWW. It shows an extremely brief version of C. K. Williams, the Pulitzer Prize winning poet, in which you cannot only see a bio, for which we will ask a major expansion, but also photographs of the covers of a few of his 11 books. We would also like to have all of his books, which you will be able to order form the app, some outtake videos, not from the conference but from other sources that we would identify, and that you will identify, as well as, in the case of C. K. Williams, many pages, a few shown here, of his personally edited writings of his poetry—something you can't find on YouTube, a presentation or in a book, or perhaps anywhere but this app.
10 The idea of this app is to get a behind the scenes, behind the curtain, personalized journey through each individual, which will also have a list of links to suggested articles, reviews, YouTubes and other material that will fill out this visual biography.
11 This is an important point: if you Google Richard Wurman, you come up with perhaps 450,000 citations. The number changes daily. This would amount to 40,000+ pages, which of course nobody looks at. Basically it's junk big data, and people mostly focus on one article and a wikipedia entry. The attempt here is to have the first primitive development of a platform for beginning to assuage some curiosity in the beginning of looking at a visual biography of at least these 50 people. If the platform works it's scalable. That's the idea of a new modality. If it works for people perhaps it will work for healthcare and other subjects.
12 I'm putting together a team of people consisting of Ali Smolens, who will help curate some of the materials for many of you, Paul Kandarian, a magazine writer friend of mine from Rhode Island, and three others plus Blaise Zerega, CEO of FORA.tv who has agreed to make some original, simple videos such as Frank Gehry walking around his office showing and discussing models of buildings that he has not built, or variations of for instance the 8 Spruce Street tower in New York or hopefully Craig Venter's laboratories in a walk-through, E.O. Wilson's offices, etc. etc.
13 So this is a request for the following: please start thinking about the stuff that you've never shown: everything from baby pictures, pictures of your pets, pictures of your office, pictures of your home, things that make you real. Multiple photographs of yourself, perhaps a strip of photographs of you taken in a photo booth at an amusement park that you have in a drawer. Writings that you've done that show your edits, something that shows you're real, human, and shows your process. Pictures of your laboratories. Agree to have somebody do a 5- or 10-minute walk through with you in your office or your lab or your place of work or your architectural studio. Videos or DVDs that for example I know Moshe Safdie has which he makes to describe what a building will look like in computer graphics to a client. I know he has a fantastic one of an apartment house in Singapore. And I'm sure Bjarke has similar things that he generally does not release. Covers of books about you, covers of books by you. A list of articles that you think critically describes you and links to YouTubes or other videos or other citations that you think and you have curated yourself that make you particularly interesting, not the half a million available on line. Julie Taymor most have lots of stuff as well as David Blaine.
14 We hope to have this put together, along with the entire conference, for release by 1 December and promote it immediately after Thanksgiving with the help of IDG, Flipboard (Mike McCue), Esri, IIR and others. I am going to ask for your cooperation out in Redlands at the conference and I will have additional copies of this and the other memo to give you when you register.
15 Attached are technical specifications for those of you who understand them yourself. Otherwise please show them to somebody in your office under the age of 30 who automatically understands them, who could help us translate whatever you send us in a usable format. I don't understand them myself but I'm sure some of you have a better handle on this than I do. These will make the process smooth and efficient and within budget.

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RSW@WURMAN.COM

From: Lisa Randall [redacted]]
Sent: 11/28/2012 4:17:19 PM
To: Jeffrey Epstein [jeevacation@gmail.com]
Subject: Fwd: Invite to Dialog 2014 (16 months away)

Importance: High

Is this worthwhile?

-------- Original Message --------
Subject: Invite to Dialog 2014 (16 months away)
Date: Wed, 28 Nov 2012 08:05:58 -0800
From: Auren Hoffman [redacted]>
To: <[redacted]

Dear Fouad,

Dear Lisa ï¿½

You are invited to join us at Dialog 2014 -- a two-day bipartisan retreat discussing how to change the world.

There will be no speeches ï¿½ just many moderated break-out discussions of 6-15 people on various topics. And we design the agenda around your ideas and needs.

Please let us know if you would like to join us,

/- Peter Thiel and Auren Hoffman/

p.s. and yes, we know Dialog 2014 is 16 months away, but we are giving you a chance to sign up now

DETAILS:

Youï¿½re invited to join us at the Dialog Retreat ... 150 people to change the world ... a participatory and entrepreneurial conversation on changing the world.

The *Dialog//*participants arenï¿½t modest. We want to change the world. But we donï¿½t want to spend our time being in a large audience listening to winded speeches. There are no speakers. No panels. All attendees participate in break-out facilitated discussions. And we *limit the discussion to only 150 global leaders*who can have an impact now and emerging leaders who can help implement the plans we develop.

*Dates**:*March 13-15, 2014
Location: Sundance Resort, Utah (40 minutes from the Salt Lake City airport)

/We've rented out the entire resort/

Register at:

http://dialog2014.eventbrite.com

password: dialog2014

You qualify for a significant discount on the retreat fee. On the registration page, click on the link that says 'Enter promotional code' and enter:

AcademicDialoger

/note: the invite is only for Lisa Randall and is not transferable as we are limited to only 150 participants. There are no sponsors. We increase the retreat fee weekly to reward the people that sign up early. And this retreat is 100% off-the-record. /

We hope you can join us.

Dialog participantsï¿½

/ï¿½ partial list of people who will be participating in the 2013 Dialog Retreat (all are references): /

*Veronica Allende Serra**ï¿½ Founding Partner, Pacific Investments. Chm, Portal de Documentos. Boards: Allied Advanced Technologies, Wow! Nutrition, Mercado Libre, ISmart Foundation.*

*Susan **Athey*-- Professor of Economics, Harvard University. Chief Economist, Microsoft. 2007 Winner of John Bates. Clark Medal.

*Byron **Auguste*-- Director and Head of Social Sector Office, McKinsey & Co. Chm, Hope Street Group.Boards: William and Flora Hewlett Foundation; Pacific Council on International Policy; Center for American Progress.

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*Nick Beim*ï¿½ GP, Matrix. Boards: Gilt Groupe, TheLadders, Care.com, Conductor, Intent Media, BuyWithMe.

*Nicolas **Berggruen*-- President, Berggruen Holdings.

*Charles Best*ï¿½ CEO, DononrsChoose.

*Elizabeth Blackburn*ï¿½ Prof of Biology and Physiology, UCSF. 2009 Winner of Nobel Prize in Medicine. President, American Association of Cancer Research.

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*John Burbank*ï¿½ CEO, Passport Capital.

*John Burbank*ï¿½ President, Nielsen Strategic Initiatives. Fmr CEO of Online, Nielsen. Fmr CMO, Nielsen. Fmr CMO, AOL.

*Leah Busque*ï¿½ Founder, TaskRabbit.

*Marc Cenedella*ï¿½ CEO, TheLadders.

*Stephen Cohen*ï¿½ cofounder, Palantir.

*Gio Colella *ï¿½ CEO, Castlight Health. Fmr CEO, RelayHealth.

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*Mitch Daniels **ï¿½ President, Purdue University. Governor, State of Indiana (2005-2013). Fmr Director, Office of Management and Budget (2001-2003). *

Lanny Davis-- FmrSpecial Counsel to the President (under Clinton).Author of Scandal and The Emerging Democratic Majority.

*Ken Denman*ï¿½ CEO, Machine Perception Technologies. Fmr CEO of Openwave. Fmr CEO of iPass (IPAS). Fmr CEO, AuraServ Communications. Fmr SVP MediaOne. National Markets.

*Marc Ecko*ï¿½ Chief Creative Officer, Marc Ecko Enterprises. Award-winning artist.

*RP Eddy *ï¿½ CEO, Ergo. Fmr Director, White House National Security Council. Fmr Chief of Staff to U.N. Ambassador Richard Holbrooke. Sr Fellow, Manhattan Institute.

*Juan Enriquez*ï¿½ CEO, Biotechonomy. Founding Director of the Life Sciences Project, Harvard Business School. Boards: Cabot Corp, Craig Venter Institute. Fmr CEO, Mexico City ï¿½s Urban Development Corporation.

*Jeff Epstein*ï¿½ fmr CFO, Oracle. Fmr CFO, DoubleClick. Fmr CFO, King World Productions. Boards: Priceline.com, Stanford University Hospital.

*Niall Ferguson*ï¿½ Prof History, Harvard. Author of /The Worldï¿½s Banker: The History of the House of Rothschild/,/The Cash Nexus/,/Empire, Colossus/,/The War of the World, The Ascent of Money/, and others.

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*Jared Genser*ï¿½ MD, Persesus Strategies. Founder, Freedom Now. International lawyer for Aung San Suu Kyi.

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*Reid Hoffman*ï¿½ Chairman and founder, LinkedIn. Partner, Greylock. Boards: DoSomething, Kiva, Endeavor Global, Mozilla. Zynga.

*Jacob Hsu*ï¿½ CEO, Symbio.

*Daisuke Iwase*ï¿½ cofounder and COO, Lifenet Insurance (top life insurance company in Japan).

*Christian Johansson*ï¿½ Secretary of Department of Business and Economic Development (DBED), State of Maryland. Fmr CEO, Economic Alliance of Greater Baltimore.

*David Kamenetzky*ï¿½ Group Head, Mars & Co.

*PV **Kannan*ï¿½ CEO, 24/7 Customer.

*Andy **Karsner*ï¿½ CEO, Manifest Energy. Fmr U.S. Asst Sec of Energy for Energy Efficiency and Renewable Energy (2005-2009). Fmr Managing Director, Enercorp. Boards: Applied Materials, Conservation International.

*Garry Kasporov*ï¿½ Fmr World Chess Champion. Chm, United Civil Front of Russia.

*Neal **Katyal*ï¿½ Partner, Hogan Lovells. Fmr Acting Solicitor General for the United States (2010-2011). Professor of Law, Georgetown U. Lead counsel for the plaintiff in Supreme Court case Hamdan vs. Rumsfeld.

*Terry Kawaja *ï¿½ CEO, Luma Partners.

*Juliette Kayyem*ï¿½ Foreign Affairs Columnist, Boston Globe. Lecturer in Public Policy, Harvard. Asst Sec. for Intergovernmental Affairs, U.S. Dept. of Homeland Security.

*Jeff Kearl*ï¿½ Chm, SkullCandy.

Peter Kellner-- MD, Richmond Management. Cofounder, Endeavor. Fmr partner, VectisGroup.

Chris Kelly-- Fmr Chief Privacy Officer and Head of Global Public Policy at Facebook . Fmr Chief Privacy Office, Excite@Home.

*Pradeep **Khosla*ï¿½ Chancellor, UC San Diego. Fmr Dean of College of Engineering, Carnegie Mellon.Boards: Quantpoint, BioMatricore, BitArmor, Childreni¿½s Institute, IIT Foundation, Mellon-Pitt Corp.

*Charlie Kim*ï¿½ CEO, NextJump.

*David Kirkpatrick*ï¿½ Author, /The Facebook Effect/. Fmr head technology writer, FORTUNE.

*Henry Kravis*ï¿½ Co-CEO of KKR. Chm, First Data. Boards: Claremont McKenna College, Metropolitan Museum of Art, Mount Sinai Medical Center, Council on Foreign Relations, Columbia Business School, Rockefeller University, others. Fmr Chair, Partnership for New York City.

*Marie-Josee Kravis*ï¿½ Boards: Publicis, LVMH. Boards: Memorial Sloan-Kettering Cancer Center, Robin Hood Foundation, Council on Foreign Relations, Qatar Museum Authority. President, Museum of Modern Art board of directors. Fmr Board: Ford, IAC, CIBC.

*Will Lansing*ï¿½ CEO, FICO (NYSE: FICO). Fmr CEO, InfoSpace. Fmr CEO, NBC Internet. Fmr COO, Prodigy Communications.

*Renaud Laplanche*ï¿½ CEO, Lending Club.

Laura and Gary Lauder-- General Partners, Lauder Partners. Cofndrs, Socrates Society.

*Jenna Lee*ï¿½ Anchor, Fox News. Host, /Happening Now/ on Fox News.

*Jorge Lemann*ï¿½ Fmr Owner, AmBev (largest brewery in Latin America) and now one of the largest shareholders in Anheuser-Busch InBev. Boards: Lojas Americanas, Gillette, Swiss Re, Burger King.

*Max Levchin*ï¿½ fmr CEO, Slide. Fmr co-founder, PayPal.

*Jonathan Levin*ï¿½ Prof and Chair of Dept of Economics, Stanford. 2011 Winner of the John Bates Clark Medal.

*Ann Lewis *ï¿½ President, NoLimits. Fmr Director of Communications to the U.S. President (1997-2000).

*Rob LoCasio*ï¿½ CEO, LivePerson (NASDAQ: LSPN).

*Jeremy Liew*ï¿½ GP, LightSpeed Venture Partners. Investor in: Bonobos,

CarDomain, Flixster, Focus, Kixeye, Kongregate, LivingSocial, Playdom, RockYou, ShoeDazzle, and others.

*Joe Lonsdale*ï¿½ CEO, Adepar. cofounder, Palantir.

*Doreen Lorenzo *ï¿½ President, Frog Design.

*Bob **Luskin*-- Partner and Co-Chair of Litigation Dept, Patton Boggs.Attorney to Karl Rove and Lance Armstrong. Fmr Chief Counsel to the Organized Crime & Racketeering Section of DOJ .

*Jorn Lyseggen*ï¿½ CEO of Meltwater.

*John Maeda*ï¿½ President, Rhode Island School of Design. Author, /Laws of Simplicity./

*Divesh Makan*ï¿½ CEO, Iconiq Capital.

*Meyer **Malka**ï¿½ co-CEO, Lemon. *

*Andy McAfee*ï¿½ Principal Research Scientist at the Center for Digital Business, MIT. Author of /Race Against the Machine. /

*General Stan **McChrystal**ï¿½ Ret. 4-star U.S. General. Led all U.S. forces in Afghanistan. *Fmr Commander, Joint Special Operations Command.*Current Principal, *McChrystal*Group. Sr. Fellow, Yaleï¿½s Jackson Institute for Global Affairs.*

*Andrew McLaughlin**ï¿½ Fmr VP, Tumblr. Fmr Deputy CTO of the United States, White House. Fmr Dir of Public Policy, Google. Boards: Public Knowledge, Code for America. *

*Dmitri **Mehlhorn**ï¿½ COO, *StudentsFirst*.*

*Lenny **Mendonca*-- Director, McKinsey. Head of McKinseyï¿½s strategy practice. Chm, McKinsey Global Institute. Chm, Bay Area Council. Board: McKinsey & Co, Economic Institute of the Bay Area, Bay Area Science and Innovation Consortium, The New America Foundation, Common Cause, Committee for Economic Development, ChildrenNow, and DonorsChoose.

*Eugene Meyer*ï¿½ President, Federalist Society.

*Chris Michel**ï¿½ GP, Nautilus Ventures. Award-winning photographer. *Fmr*CEO, Affinity Labs. *Fmr*CEO, Military.com. Boards: International Data Group, Dale Carnegie, *Kixeye*, *Castlight*Health, USO, *Marine*Corps University Foundation. *

*Katie Mitic **ï¿½ Fmr Head of Platform Marketing, Facebook. Fmr SVP, Palm. Fmr VP Product Strategy, Yahoo! Fmr Fndr and CEO, Four11. Boards: eBay, Special Olympics International. *

Wes Moore-- Author, ï¿½The Other Wes Mooreï¿½. Fmr. Special Assistant to Secretary of State Rice. Fmr Director of Information Operations, 82nd Airborne Division, US Army, Afghanistan 2005-2006.

*Nader Mousavizadeh*ï¿½ CEO of Oxford Analytica.

*Luke Muehlhauser*ï¿½ Exec Director, Singularity University.

*Matt Mullenweg *ï¿½ Founder, Wordpress.

Roger Myerson-- Prof of Economics, U of Chicago. 2007 winner of Nobel Prize in Economics.

*Scott Nathan*ï¿½ Partner, Baupost Group.

Meghan Oï¿½Sullivan-- Professor, Harvard Kennedy School of Govt. Fmr Deputy National Security Advisor for Iraq and Afghanistan, President George W. Bush. Mbr, Trilateral Commission.

*Chamath **Palihapitiya*ï¿½ CEO, Social+Capital. fmr VP Growth, Mobile, and International at Facebook. Fmr GM of AIM at AOL. Boards: SecondMarket, FixYa, Lemon, Integrated Plasmonics. Co-Owner, Golden State Warriors.

*Eli **Pariser**ï¿½*Fmr President, MoveOn.Cofndr, Avaaz.org. Boards: MoveOn, Avaaz, New Organizing Institute and Simonï¿½s Rock College.

*Mark Penn*ï¿½ Corp VP of Strategic Projects (reports to the CEO), Microsoft. Fmr CEO, Burson-Marsteller. President, of polling firm Penn, Schoen and BerlandAssociates. Fmr Chief Strategist, Hillary Clinton for President 2008. Author, Microtrends. Fmr pollster to President Clinton. Fmr pollster to Prime Minister Tony Blair.

*Lois Quam*ï¿½ Executive Director, Global Health Initiative ï¿½ part of the State Department and she reports directly to Secretary Clinton. Fmr CEO of Public and Senior Markets, UnitedHealth Group ($30 billion division).

*Dan Rosensweig *ï¿½ CEO, Chegg. Fmr CEO, Guitar Hero. Fmr COO, Yahoo.

*Robert Rubin*ï¿½ Co-Chairman, Council on Foreign Relations. Fmr U.S. Secretary of the Treasury (1995-1999). Fmr Director, National Economic Council (1993-1995). Chm, Local Initiatives Support Corporation (LISC). Fmr Co-Chairman, Goldman Sachs.

*Sal Russo*ï¿½ Founder, Tea Party Express. Partner, Russo Marsh.

*Tod Sacerdoti*ï¿½ CEO, BrightRoll. Board: ReTargeter.

*Amy Salzhauer *ï¿½ CEO, Ignition.

*Cami Samuels*ï¿½ General Partner, Versant Ventures. Boards: Achaogen, APT Pharmaceuticals, Kythera Biopharmaceuticals, Semprae Laboratories.

Ken Sawyer-- CEO, Saints Ventures (manages over $1 billion in capital). Selected to Forbes Midas List. Boards: Continuous Computing, HK Systems, Cleargauge, Travel Intelligence, Envivio, Alliance Consulting, Acsis and Laureate Pharmaceuticals.

*Jessica Schell*ï¿½ EVP BD and Strategic Planning, Universal Pictures. Fmr SVP Digital Strategy and Business Development, NBC Universal. Board: World Wide Biggies.

*Barry Silbert *ï¿½ CEO of SecondMarket.

*Josh Silverman*ï¿½ President of US Consumer Services, American Express. Fmr CEO, Skype. Fmr CEO, Shopping.com. Fmr CEO and Fndr, eVite.

*Sukhinder Singh Cassidy*ï¿½ Chm, JOYUS. Fmr CEO, Polyvore. Fmr President of Asia Pacific and Latin America, Google. Boards: TripAdvisor (TRIP) and Formspring.

*Megan Smith*ï¿½ VP Business Development, Google. Fmr CEO, PlanetOut.

*Charles **Songhurst*-- GM and Head of Strategy and M&A, Microsoft. MD, Katana Capital.

*Angelo Sotira*ï¿½ CEO, DeviantArt.

Bret Stephens-- Member of Editorial Board, Wall Street Journal. Main Foreign Affairs Columnist, Wall Street Journal. Fmr Editor-in-Chief, Jerusalem Post.

*Simon Stevens*ï¿½ EVP, UnitedHealth Group. Fmr CEO, Ovations (revenues of $31 billion). Fmr Health Policy Director to British Prime Minister Tony Blair.

*Henry Sweica*ï¿½ CEO, Talpion Fund Management. Fmr co-founder, Highbridge Capital Management.

Alexander Tamas- Partner, DST. Boards: Forticom, mail.ru

Peter Thiel-- CEO of Thiel Capital. Managing Director, Founders Fund. Fmr founder and CEO of PayPal. Boards: Facebook and Palantir.

*Steve Wayne *ï¿½ CEO, Jensen Group.

*Will Wechsler*ï¿½ Deputy Asst. Sec of Defense for Counternarcotics and Global Threats.

*Adam Weiss**ï¿½ co-CEO, Scout Capital. *

*Katharine Weymouth**ï¿½ Publisher, Washington Post.*

*Michael Wolf*ï¿½ CEO, Activate. fmr President and COO, MTV Networks. Fmr Prtnr, McKinsey. Former Senior Partner, Booz Allen & Hamilton.

*Paul Wolpe*ï¿½ Director, Center of Ethics. Prof of Bioethics, Emory. Sr Bioethicist, NASA. Co-Editor, American Journal of Bioethics.

*Jed York*ï¿½ CEO of San Francisco 49ers.

*Lauren Zalaznick*ï¿½ Chairman, Entertainment & Digital Networks and Integrated Media, NBCUniversal. She oversees Bravo, Oxygen Media, Style, PBS Sprout, Telemundo, iVillage, Swirl, Daily Candy, and Fandango.

*Eric Zinterhofer ï¿½ *co-CEO, Searchlight Capital. Chm, Charter Communications. Fmr Sr Partner, Apollo Management. Boards: Central European Media Enterprises, Dish TV India.

*Karl-Theodor zu Guttenberg*ï¿½ fmr Minister of Defense, Germany. Fmr Minister of Economics and Technology, Germany.

From: [redacted] [redacted]
Sent: 11/28/2012 5:28:55 PM
To: Jeffrey Epstein [jeevacation@gmail.com]
Subject: Re: Invite to Dialog 2014 (16 months away)

Importance: High

So let me understand. You are suggesting tourism?
Sent from my Verizon Wireless BlackBerry

From: Jeffrey Epstein <jeevacation@gmail.com>
Date: Wed, 28 Nov 2012 11:28:51 -0500
To: Lisa Randall [redacted]>
Subject: Re: Invite to Dialog 2014 (16 months away)

sundance is nice ,, go

On Wed, Nov 28, 2012 at 11:17 AM, Lisa Randall [redacted] wrote:
Is this worthwhile?

-------- Original Message --------
Subject: Invite to Dialog 2014 (16 months away)
Date: Wed, 28 Nov 2012 08:05:58 -0800
From: Auren Hoffman <[redacted]>
To: <[redacted]>

Dear Fouad,

Dear Lisa –

You are invited to join us at Dialog 2014 -- a two-day bipartisan retreat discussing how to change the world.

There will be no speeches … just many moderated break-out discussions of 6-15 people on various topics. And we design the agenda around your ideas and needs.

Please let us know if you would like to join us,

/- Peter Thiel and Auren Hoffman/

p.s. and yes, we know Dialog 2014 is 16 months away, but we are giving you a chance to sign up now

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Daisuke Iwase– cofounder and COO, Lifenet Insurance (top life insurance company in Japan).

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*PV **Kannan*– CEO, 24/7 Customer.

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Juliette Kayyem– Foreign Affairs Columnist, Boston Globe. Lecturer in Public Policy, Harvard. Asst Sec. for Intergovernmental Affairs, U.S. Dept. of Homeland Security.

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Max Levchin– fmr CEO, Slide. Fmr co-founder, PayPal.

Jonathan Levin– Prof and Chair of Dept of Economics, Stanford. 2011 Winner of the John Bates Clark Medal.

*Ann Lewis *– President, NoLimits. Fmr Director of Communications to the U.S. President (1997-2000).

Rob LoCasio– CEO, LivePerson (NASDAQ: LSPN).

Jeremy Liew– GP, LightSpeed Venture Partners. Investor in: Bonobos, CarDomain, Flixster, Focus, Kixeye, Kongregate, LivingSocial, Playdom, RockYou, ShoeDazzle, and others.

Joe Lonsdale– CEO, Adepar. cofounder, Palantir.

*Doreen Lorenzo *– President, Frog Design.

*Bob **Luskin*-- Partner and Co-Chair of Litigation Dept, Patton Boggs.Attorney to Karl Rove and Lance Armstrong. Fmr Chief Counsel to the Organized Crime & Racketeering Section of DOJ .

Jorn Lyseggen– CEO of Meltwater.

John Maeda– President, Rhode Island School of Design. Author, /Laws of Simplicity./

Divesh Makan– CEO, Iconiq Capital.

*Meyer **Malka**– co-CEO, Lemon. *

Andy McAfee– Principal Research Scientist at the Center for Digital Business, MIT. Author of /Race Against the Machine. /

*General Stan **McChrystal**– Ret. 4-star U.S. General. Led all U.S. forces in Afghanistan. *Fmr Commander, Joint Special Operations Command.*Current Principal, *McChrystal*Group. Sr. Fellow, Yale's Jackson Institute for Global Affairs.*

*Andrew McLaughlin**– Fmr VP, Tumblr. Fmr Deputy CTO of the United States, White House. Fmr Dir of Public Policy, Google. Boards: Public Knowledge, Code for America. *

*Dmitri **Mehlhorn**– COO, *StudentsFirst*.*

*Lenny **Mendonca*-- Director, McKinsey. Head of McKinsey's strategy practice. Chm, McKinsey Global Institute. Chm, Bay Area Council. Board: McKinsey & Co, Economic Institute of the Bay Area, Bay Area Science and Innovation Consortium, The New America Foundation, Common Cause, Committee for Economic Development, ChildrenNow, and DonorsChoose.

Eugene Meyer– President, Federalist Society.

*Chris Michel**– GP, Nautilus Ventures. Award-winning photographer. *Fmr*CEO, Affinity Labs. *Fmr*CEO, Military.com. Boards: International Data Group, Dale Carnegie, *Kixeye*, *Castlight*Health, USO, *Marine*Corps University Foundation. *

*Katie Mitic **– Fmr Head of Platform Marketing, Facebook. Fmr SVP, Palm. Fmr VP Product Strategy, Yahoo! Fmr Fndr and CEO, Four11. Boards: eBay, Special Olympics International. *

Wes Moore-- Author, "The Other Wes Moore". Fmr. Special Assistant to Secretary of State Rice. Fmr Director of Information Operations, 82nd Airborne Division, US Army, Afghanistan 2005-2006.

Nader Mousavizadeh– CEO of Oxford Analytica.

Luke Muehlhauser– Exec Director, Singularity University.

*Matt Mullenweg *– Founder, Wordpress.

Roger Myerson-- Prof of Economics, U of Chicago. 2007 winner of Nobel Prize in Economics.

Scott Nathan– Partner, Baupost Group.

Meghan O'Sullivan-- Professor, Harvard Kennedy School of Govt. Fmr Deputy National Security Advisor for Iraq and Afghanistan, President George W. Bush. Mbr, Trilateral Commission.

*Chamath **Palihapitiya*– CEO, Social+Capital. fmr VP Growth, Mobile, and International at Facebook. Fmr GM of AIM at AOL. Boards: SecondMarket, FixYa, Lemon, Integrated Plasmonics. Co-Owner, Golden State Warriors.

*Eli **Pariser**–*Fmr President, MoveOn.Cofndr, Avaaz.org. Boards: MoveOn, Avaaz, New Organizing Institute and Simon's Rock College.

Mark Penn– Corp VP of Strategic Projects (reports to the CEO), Microsoft. Fmr CEO, Burson-Marsteller. President, of polling firm Penn, Schoen and BerlandAssociates. Fmr Chief Strategist, Hillary Clinton for President 2008. Author, Microtrends. Fmr pollster to President Clinton. Fmr pollster to Prime Minister Tony Blair.

Lois Quam– Executive Director, Global Health Initiative – part of the State Department and she reports directly to Secretary Clinton. Fmr CEO of Public and Senior Markets, UnitedHealth Group ($30 billion division).

*Dan Rosensweig *– CEO, Chegg. Fmr CEO, Guitar Hero. Fmr COO, Yahoo.

Robert Rubin– Co-Chairman, Council on Foreign Relations. Fmr U.S. Secretary of the Treasury (1995-1999). Fmr Director, National Economic Council (1993-1995). Chm, Local Initiatives Support Corporation (LISC). Fmr Co-Chairman, Goldman Sachs.

Sal Russo– Founder, Tea Party Express. Partner, Russo Marsh.

Tod Sacerdoti– CEO, BrightRoll. Board: ReTargeter.

*Amy Salzhauer *– CEO, Ignition.

Cami Samuels– General Partner, Versant Ventures. Boards: Achaogen, APT Pharmaceuticals, Kythera

Biopharmaceuticals, Semprae Laboratories.

Ken Sawyer-- CEO, Saints Ventures (manages over $1 billion in capital). Selected to Forbes Midas List. Boards: Continuous Computing, HK Systems, Cleargauge, Travel Intelligence, Envivio, Alliance Consulting, Acsis and Laureate Pharmaceuticals.

Jessica Schell– EVP BD and Strategic Planning, Universal Pictures. Fmr SVP Digital Strategy and Business Development, NBC Universal. Board: World Wide Biggies.

*Barry Silbert *– CEO of SecondMarket.

Josh Silverman– President of US Consumer Services, American Express. Fmr CEO, Skype. Fmr CEO, Shopping.com. Fmr CEO and Fndr, eVite.

Sukhinder Singh Cassidy– Chm, JOYUS. Fmr CEO, Polyvore. Fmr President of Asia Pacific and Latin America, Google. Boards: TripAdvisor (TRIP) and Formspring.

Megan Smith– VP Business Development, Google. Fmr CEO, PlanetOut.

*Charles **Songhurst*-- GM and Head of Strategy and M&A, Microsoft. MD, Katana Capital.

Angelo Sotira– CEO, DeviantArt.

Bret Stephens-- Member of Editorial Board, Wall Street Journal. Main Foreign Affairs Columnist, Wall Street Journal. Fmr Editor-in-Chief, Jerusalem Post.

Simon Stevens– EVP, UnitedHealth Group. Fmr CEO, Ovations (revenues of $31 billion). Fmr Health Policy Director to British Prime Minister Tony Blair.

Henry Sweica– CEO, Talpion Fund Management. Fmr co-founder, Highbridge Capital Management.

Alexander Tamas- Partner, DST. Boards: Forticom, mail.ru

Peter Thiel-- CEO of Thiel Capital. Managing Director, Founders Fund. Fmr founder and CEO of PayPal. Boards: Facebook and Palantir.

*Steve Wayne *– CEO, Jensen Group.

Will Wechsler– Deputy Asst. Sec of Defense for Counternarcotics and Global Threats.

*Adam Weiss**– co-CEO, Scout Capital. *

*Katharine Weymouth**– Publisher, Washington Post.*

Michael Wolf– CEO, Activate. fmr President and COO, MTV Networks. Fmr Prtnr, McKinsey. Former Senior Partner, Booz Allen & Hamilton.

Paul Wolpe– Director, Center of Ethics. Prof of Bioethics, Emory. Sr Bioethicist, NASA. Co-Editor, American Journal of Bioethics.

Jed York– CEO of San Francisco 49ers.

Lauren Zalaznick– Chairman, Entertainment & Digital Networks and Integrated Media, NBCUniversal. She oversees Bravo, Oxygen Media, Style, PBS Sprout, Telemundo, iVillage, Swirl, Daily Candy, and Fandango.

*Eric Zinterhofer – *co-CEO, Searchlight Capital. Chm, Charter Communications. Fmr Sr Partner, Apollo Management. Boards: Central European Media Enterprises, Dish TV India.

Karl-Theodor zu Guttenberg– fmr Minister of Defense, Germany. Fmr Minister of Economics and Technology, Germany.

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From: jeffrey E. [jeevacation@gmail.com]
Sent: 7/4/2017 4:53:13 PM
To: Weingarten, Reid [redacted]
Subject: Re: Fw: The new iterations of Ghislaine Maxwell

Importance: High

On Tue, Jul 4, 2017 at 6:46 PM Weingarten, Reid [redacted] wrote:

Number?

Sent from my BlackBerry 10 smartphone.

From: [redacted]
Sent: Saturday, July 1, 2017 12:49 PM
To: [redacted]
Cc: Ainbanklaw Info; [redacted] Denyse Sabagh; [redacted] Michael Baxter; [redacted] Patrick M. Regan; [redacted]; Robert Barnett; Weingarten, Reid; [redacted] Ellen Kerns;
Subject: Re: The new iterations of Ghislaine Maxwell

We know of course that Saturdays are reserved for Matthew Horton.

On Saturday, July 1, 2017, 12:06:29 PM EDT, [redacted] wrote:

Rich Beckler,
Ken Adams,

Do you remember when I'd asked you what your daughters did for a living? Especially last night Mr. Beckler, as most Friday nights, no?

Yes, they are the new iterations of Ghislaine Maxwell; for you Richard Beckler, this originated from my being a former Stone Ridge classmate of his elder daughter Katie Beckler, and because he was on the Board of Stone Ridge during this period in time when my every family, friend, acquaintance and association was being contacted, bribed in one form or another, and turned against me (see below); as for Ken Adams, it stemmed from my having contacted him for representation in my 2011-filed case against IBM also during this period of time when my every communication were being tracked.

You both are interesting; you let us see what's to become of the Scalia 35 (see below; at bottom, Ghislaine Maxwell's Jeffrey Epstein in context.)

*

We start from this following precept: (the repeating 9/11s)

1. "Toward a New World Order" speech by Pres. George H.W. Bush – 9/11 (1990)

2. WTC Attack – 9/11 (2001)

3. BENGHAZI Attack – 9/11 (2012)

But you have to remember that H. W. Bush was planted:

AUTHOR PETER DALE SCOTT: Sometimes you have little deep events that most people don't even notice. One of those would be the Halloween Massacre. The older people remember the Saturday Night Massacre which happened under Nixon. I'm talking about the Halloween Massacre of October 31, 1975, and probably people watching this show have never heard of it.

That was under Ford, and Ford may have condoned it because it was trying to help restore his popularity. He was going way down in the polls. But it was a very important series of events all on the same night. The head of the CIA was fired, William Colby, replaced by a relatively unknown man called George H. W. Bush who then went on to authorize something that Colby had refused to authorize - the Team B report - the Team B to recalculate the Soviet threat and it was pre-determined. They were going to find that it was much bigger than the professionals angled like Raymond [inaudible] that I mentioned.

They said Russia is less of a threat now than it used to be. Well, that was terrible news for the industrial complex so the Team B came in and said oh, no, no, no, it's much more of a threat than it used to be, and that's why we got this huge military build-up. It started actually under Carter but we think of it as the Reagan build-up, and that of course is a major factor in having ended the Soviet Union because the Soviet Union tried to match it with a weaker economy. And that arms race which was not about threats but was about fighting economic war, that was an arms race which you could say that the Soviet Union lost because they couldn't keep it up. Their economy went more and more downhill because they were deflecting resources away from vital domestic functions. But really I'm trying to talk here about the Halloween Massacre...

Just the change in the CIA was a major historical event but it wasn't very visible. The second thing that happened was they fired Jim Schlesinger as Secretary of Defense... It was being done by [President Ford's] Chief of Staff and his assistant who are two names barely known then but quite famous since. Chief of staff was Donald Rumsfeld and the assistant was Dick Cheney. And that was the first real intrusion of the Rumsfeld-Cheney team into American politics. And they became the real heart of what I consider the Deep State in the 1980s when they were planning for Continuity of Government which was a plan for emergency rules like warrantless surveillance and warrantless detention and the militarization of homeland security. All those things were planned all through the '80s - COG planning by Donald Rumsfeld and Dick Cheney. Even when Rumsfeld wasn't in the government, he was authorized by Reagan to do this planning.

And why is that important to our history? Because in 2001, these two men were now in the government - Vice President and Secretary of Defense - the two top people in Washington on September the 11th, 2001 when Bush was down in Florida - George W. Bush - and what did they do on that day? They implemented the plans they had been planning for 20 years. Another major event in American history but it's not usually told that way.

We implemented - it's in the 9/11 Commission Report that COG plans were implemented on that day. This is a huge change in our country. We now have an ARMY command, NORTHCOM, to take charge of America - North America, the way SOUTHCOM is in charge of South America and CENTCOM is in charge of Central Asia.

This used to be illegal... We had the posse comitatus acts which said, yes, if there's a real emergency you could call up the ARMY to deal with the emergency, but you cannot do it on a permanent basis but we now do do it on a permanent basis. We haven't even bothered to repeal the posse comitatus. We are in a state of emergency that was declared on September the 14th, 2001. And it's still enforced. It has to be renewed every year. Obama did it every year just as George Bush renewed it every year.

What are the roots of this? Well there are the legitimate roots that go back to fear of an atomic decapitation of the government back in the Truman era, so legitimate COG planning goes back to Truman and Eisenhower, but the illegitimate use of COG to deal with any emergnecy you like, that goes to the Reagan administration and it really goes back to the [Halloween] Massacre where Rumsfeld and Cheney put their thumbprint on American politics for the first time.

-- interview of Peter Dale Scott, @ min. 32:00,
https://www.youtube.com/watch?v=hNqDAYWYFuQ&t=2433s

This all suggests that the start of the 9/11 agenda pre-dated him as well. I see now that there was a seemingly relevant 1990 event as well. "On September 11, 1970 -- a date that only took on haunting overtones with the attacks on New York and Washington in 2001 -- Nixon became the first U.S. president to try to protect air travelers from extremists who sensed gaping vulnerabilities in security for commercial airliners, issuing a statement listing a string of measures including the introduction of 100 air marshals on U.S. planes. "Most countries, including the United States, found effective means of dealing with piracy on the high seas a century and a half ago," Nixon said. "We can -- and we will -- deal effectively with piracy in the skies today."
The President had been jolted into action by the simultaneous hijackings of planes in Europe headed to the United States. Jets belonging to TWA, Pan Am and Swissair were seized by the Popular Front for the Liberation of Palestine. The group also attempted to hijack a jet over London belonging to the Israeli airline El Al but was thwarted by security guards on board.
The Pan Am seizure ended quickly, but the passengers on the TWA and Swissair jets were diverted to a British air base in Jordan and the drama only ended after days of tense diplomacy, when the hostages were all released in a deal in which the Swiss, German, British and Israeli governments let Palestinian prisoners go." (http://www.cnn.com/2015/07/27/politics/terrorism-1970s-richard-nixon/index.html)

This 9/11 response sounds quite normal of course. But fast forward and the two secret service individuals chosen for an April 2001 interview by a PWC staff member on behalf of what becomthe IBM Center for the Business of Government were (1) Steve Colo who happened to be the head of the division at SAIC that falsely labeled me a threat and added my name to some sort of Do Not Admit list at the end of a 5 month temp assignment in 2005 into early 2006. The consequence of the SAIC designation for me was the following:

(I write) "The SAIC designation took advantage of a devilish stratagem in which as a national security employee (having filed out a SF-86 form, governed actually by the GSA - https://www.gsa.gov/portal/forms/download/116390 - for government clearance) working a designated contract in a classified facility, being designated a disturbance/dissident/threat to operations, makes one, in turn, a threat to national security - with all the surveillance/targeting that enables." In essence I was made an enemy of the State and was tracked, my family and friends turned, my opportunities seized to include the opportunity to rear family as demonstrated especially in the 2007 sabotage of my third trimester pregnancy and then the targeting and eventual capture of children I used to babysit - in 2011, they were predominantly tweens - to be used for sexual blackmail and other forms of leverage. The reason for the use of children in this barbaric way was to

expend "ops" that were already in effect and had been used to control many of the politicians that have been allowed to rise to the top (see info on the Franklin Scandal for example), and similarly according to the laws of compromise, the following which has been recently developing into highly coordinated murder "ops":

(I write) "The progress that was made from the absorbing of my (small) network (and this through sources and methods - money and other pleasureful compensations given to those willing to participate in and/or coordinate violence against me and my loved ones to include children leading only to now their enabled targeting and the absorbing of whatever may be their networks - well, you see below (and this only the very tip of the iceberg) how many people they've been able to engulf and what advances have been made by the quite elaborate criminal class employing these tactics; and one also begins to better understand the events surrounding Justice Scalia's passing and what's to come for the 35 guests in Scalia's private party. As for Scalia's passing, it was decidedly suspicious as noted by William Ritchie: (The Washington Post prints) "As a former homicide commander, I am stunned that no autopsy was ordered for Justice Scalia," William O. Ritchie, former head of criminal investigations for D.C. police, wrote in a post on Facebook on Sunday... Ritchie also raised questions about the marshals' actions: "How can the Marshal say, without a thorough post mortem, that he was not injected with an illegal substance that would simulate a heart attack… Did the US Marshal check for petechial hemorrhage in his eyes or under his lips that would have suggested suffocation? Did the US Marshal smell his breath for any unusual odor that might suggest poisoning? My gut tells me there is something fishy going on in Texas."

As for SAIC, the following also pertains:

(I write) "If you first see SAIC as what's called a systems integrator (author Tim Shorrock's phrase), and also the formerly married Bud and Sue Horton and their two grown sons Matthew Horton and Ben Lanier as aids of an implementation, you can better see the bigger picture:

(1) Sue Horton left IBM in early 2007-ish for an executive position at Tetra Tech which soon entered into joint venture with SAIC (Sue's employer prior to IBM, btw) on an enormous (billion dollar) 2011 Hillary Clinton State Department award (http://www.prnewswire.com/…/saic-tetra-tech-joint-venture-a…);

(2) that Bud Horton left IBM in early 2009-ish for an executive position at Accenture which soon thereafter entered into joint venture with SAIC spin-off Leidos, and Cerner, on an enormous (billion dollar) 2015 DoD award (http://www.healthcareitnews.com/…/dod-names-ehr-contract-wi…);

(3) that the Sue Horton contract was used to grow and fortify the Afghan heroin trade (as well as corrupt law enforcement) although the stated intention was of course the opposite... ("[SAIC and Tetra Tech's] joint venture, Integrated Justice Systems International, LLC (IJSI), has been awarded a contract to provide worldwide civilian police and criminal justice assistance to the U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL)... [specifically} to provide INL with program management, criminal justice, and life and mission support to countries emerging from conflict or otherwise facing instability challenges. Under this new contract, IJSI will provide technical assistance, training, logistics and infrastructure services to support the Department of State's efforts to strengthen criminal justice systems in select partner countries.")... yet, just months shy of contract end, the NY Times reported: "Tasked With Combating Opium, Afghan Officials Profit From It;" "Penetrating Every Stage of Afghan Opium Chain, Taliban become a Cartel;" and "Corrupt Combatants Fight for Control of Lucrative Afghan Drug Trade;" see also here an overview of the growth of Afghan opium production from the start of the US occupation (2001) to the present, and especially from contract start (2011) to end (2016): http://www.globalresearch.ca/the-spoils-of-war-afghanist…/91;

(4) and that the award Bud Horton helped secure just as Sue's contract was coming to an end was not only born from what looks like Franklin Scandal compromises, but it is this contract that seems intent on implementing bioterrorism as the new form of explosive terrorism."

(Note that both members of this family were awarded BILLION dollar contracts; that's quite exceptional, no?)

As for terrorism as an US industry, it's hardly better seen than through the following which is information of course we all know:

We note that in-between Bush #41's 9/11/1990 speech(with Dick Cheney as his Secretary of Defense) and the 9/11/2001 attack on the WTC were little more than Clinton's 8 years in the White House. We look also to The American Deep State by Peter Dale Scott for evidence of ties between the actions of the Clinton administration and (1) the 1993 attack on the WTC and (2) the 1998 attack on the US embassy in Nairobi, Kenya which demonstrate that the Clinton administration in no uncertain terms sponsored terrorism:

(Writes Scott) "The homicidal crime suggested by Fenton's meticulous research is one both difficult and painful to contemplate. It has to be considered in the light of the earlier instances of protection we have surveyed:

1. the protection given to Salameh and Abouhalima in the 1990 Kahane murder, leaving them free to participate in the 1993 World Trade Center bombing;

2. the failure for two or three years to process Ali Mohamed's documents seized in 1990, which could have prevented the 1993 World Trade Center bombing;

3. the release of Ali Mohamed from Royal Canadian Mounted Police detention in 1993, leaving him free to participate in the 1998 Nairobi Embassy bombing;

4. the treatment of Ali Mohamed as an "unindicted coconspirator" in the 1993 WTC bombing case and Landmarks case, leaving him free to participate in the 1998 Nairobi Embassy bombing.

(pp. 76-77, The American Deep State)

Scott had earlier examined these attacks in especial connection to the September 11, 2001 attack on the WTC:

(Writes Scott) "For indeed it is certain that on various occasions U.S. agencies have intervened, letting al-Qaeda terrorists proceed with their plots. This alarming statement will be dismissed by some as "conspiracy theory." Yet in this chapter, I will show that this claim doesn't to arise from theory, but from facts that are true, even though they have been systemically suppressed or under-reported in the American mainstream media. I am describing a phenomenon that occurred not just once, but repeatedly, almost predictably. We shall see that, among the al-Qaeda terrorists who were first protected and then continued their activities were the following:

1. Ali Mohamed, identified in the 9/11 Commission Report as the leader of the 1998 Nairobi Embassy bombing;

2. Mohammed Jamal Khalife, Osama bin Laden's close friend and, while in the Philippines, financier of both Ramzi Yousef (principal architect of the first World Trade Center [WTC] attack) and his uncle

Khalid Sheikh Mohammed;

3. Khalid Sheikh Mohammed, identified in the 9/11 Commission Report as "the principal architect of the 9/11 attacks";

4. Khalid al-Mihdhar and Nawaf al-Hazmi, two of the alleged 9/11 hijackers, whose presence in the United States was concealed from the FBI by CIA officers for months before 9/11.

It might sound from these citations that the 9/11 Commission marked a new stage in the U.S. treatment of these terrorists, and that the report now exposed those terrorists who in the past had been protected. On the contrary, a principal purpose of my chapter is to show that

1. one purpose of protecting these individuals had been to protect a valued intelligence connection (the "al-Qaeda connection," if you will);
2. one major intention of the 9/11 Commission Report was to continue protecting this connection;
3. those on the 9/11 Commission staff who were charged with this protection included at least one commission member (Jamie Gorelick), one staff member (Dietrich Snell), and one important witness (Patrick Fitzgerald) who earlier had figured among the terrorists' protectors.

In the course of writing this chapter [Scott continues], I came to another disturbing conclusion I had not anticipated. This is that a central feature of the protection has been to defend the 9/11 Commission's false picture of al-Qaeda as an example of non-state terrorism, ignoring not just the CIA but also the royal families of Saudi Arabia and Qatar. In reality, as I shall show, royal family protection from Qatar and Saudi Arabia (concealed by the 9/11 Commission) was repeatedly given to key figures like Khalid Sheikh Mohammed, the alleged "principal architect of the 9/11 attacks." The establishment claims that the wars fought by America in Asia since 9/11 have been part of a global "war on terror." But this "war on terror" has been fought in alliance with Saudi Arabia, Qatar, and Pakistan - precisely the principal political and financial backers of the al-Qaedist networks the United States has supposedly been fighting. Meanwhile the most authentic opponents in the region of these Sunni al-Qaedists - the governments of Iraq, Libya, Syria, and Iran - have found themselves overthrown (in the case of Iraq and Libya), subverted with U.S. support (in the case of Syria), or sanctioned and threatened as part of an "axis of evil" (in the case of Iran). We should not forget that, just one day after 9/11, "Rumsfeld was talking about broadening the objectives of our response and 'getting Iraq.'"

(pp. 44-45, The American Deep State)

Clinton's daughter is now poised to work global health initiatives which I would suggest is little more than a cover for on-going terrorism "ops".

To return to Steve Colo - in the interview he speaks of a partnership between the Secret Service, the FBI, and South Carolina's SLED (State Law Enforcement Division) to open a Computer Crime Center. Bud Horton (mentioned above) (long-affiliated with IT Security; his title at Accenture was Chief technology officer of it's cyber security practice) happened to have just moved to South Carolina from Loudoun County after being implicated in a continuing child sex scandal (see details below). Further, cyber-crime just so happens to be another of the arenas in which our Intelligence Community coordinates with the Russians: "The US cooperates with the FSB and Russia's interior ministry on counter-terrorism, organized crime, bio-terrorism, and cyber-crime." -- p. 243, Expelled: A Journalist's Descent into the Russian Mafia State, by Luke Harding) Most would interpret this quote to suggest that the nations work together to prevent these various threats. The reality is more the opposite; trust me when I say that the US doesn't work "ops" alone - the 2005 London Bombings is one notable example of a instance in which the US coordinated with also British intelligence in the

perpetration of an attack.) I just tweeted this morning actually the following in regards to US coordinations with the Russians: "One must know a renowned Rus mafiaso was granted entry https://en.wikipedia.org/wiki/Vyacheslav_Ivankov#Moving_to_the_United_States … be4 the real story of today's US-Rus relations is slowly known" in response to the following comment @turndeaux: Peter Dale Scott, who writes about the Deep State, says Russia issue is "a bona fide security issue, not a diversion".

About Bud Horton and the Loudoun County matter - in attempts to make a long story short, the following email chain:

On Monday, June 26, 2017 10:57 AM, [redacted] wrote:

Sheriff Chapman,
Loudoun Count, VA

Did you ever consider that Loudoun was a target? That your community was induced to walk it's own children down the plank as compensation for what Loudoun had done to the young Dima Yakovlev? Because now child exploitation is deeply embedded within your community with your own people (your own police, your own prosecutors, your own public defenders and private attorneys) protecting this very system that will be used to take the futures of your Loudoun children (see more of the details below). Is it possible that that's how this happened, and you saw it not unfolding before your eyes? Or was it simply money and just another good enough justification?

Forwarded Message

On Monday, June 26, 2017 10:24 AM, [redacted] wrote:

Changeis,

You reported in May of 2014 that you hired Bob Richel formerly of the DEA as Vice President of Corporate Development. In an April 2014 interview by the Loudoun County Police (those in the mouth of the lion but not quite aware of it yet but to have foreseen the ways in which the 2008 death of the Russian born 21 month-old Dima Yakovlev (renamed Chase Harrison by his Purcellville, VA adoptive parents) would have been used as "justification" for a (quite profitable) counter-offensive...) of Henry "Bud" Horton (characterized by Loudoun County as a "victim" of the recent "False statement to Law Enforcement Officer (LEO)" of him sexually exploiting the 15 year-old Anjulee Gunther), Henry "Bud" Horton named Bob Rachel as one of the DEA guys he used to work with. This takes on unusual significance in light of the below, no?

(How lovely, by the way, this following information and the ways in which it helps us understand many of the hidden influences: "Halliburton is also involved with the Russian mob. They're got sort of two things going on. One is oil and the other is drug trafficking. Halliburton is a story all by itself." (says Stan Goff, http://narconews.com/goffmccormick1.html))

On Saturday, June 24, 2017 2:43 PM, [redacted] wrote:

Mr. Satz,
State's Attorney, Broward County, Fl

I'm forwarding the below information as it pertains to Mrs. Lesley Simms and more importantly the ones with whom she continues to coordinate.

As you may know, she was once close with an individual named Matthew Horton with whom she attended George Mason University, and through Matthew, Ms. Simms became well-acquainted with Matthew's parents Henry "Bud" Horton and Sue Popovich Horton who helped secure her a position at IBM upon her graduation from GMU. Both of these latter individuals (Bud and Sue Horton) were involved in the 2007 murder of my son, and they in collusion with their son Matthew continue in the exploitation of children Anjulee and Xian Gunther. The powers that be intend now for these children to (continue to) follow in the footsteps of Ms. Simms, and to that end, I would advise that you become acquainted with (1) the ways in which Ms. Simms subsidized her law school education and off course (2) her current and related endeavors especially as they relate to drug trafficking and terror financing (see below email to Mr. Martin of the St. Augustine Record).

On Friday, June 23, 2017 8:36 AM, [redacted] wrote:

Mr. Martin,
St. Augustine Record

Quite an interesting article about the litigation between Deputy Banks and Rusty Rogers (see: Deputy Banks' attorney claims FDLE agent's credibility 'destroyed') It must also be explored, of course, that Officers Rodgers was once well respected for his investigation and exposure of a terrorist financing network that permeated the sunny state of Florida - (the NY Times reports) "Agent Rodgers joined the state's elite investigative unit, the Florida Department of Law Enforcement, where he quickly earned agent-of-the-year honors — and a meeting with the governor — for helping dismantle a terrorist financing network that stretched from Florida to the Middle East" - and that terrorism is very much a well-protected U.S. industry (see below).

God forbid some poor should get away with disrupting the delicate state of secreted operations; as you yourself report, "As written in [Plaintiff Banks'] motion: "Defendant Rodgers' false, misleading and inconsistent testimony throughout the discovery process is so pervasive and extreme, and involves so many material issues, it has destroyed Defendant's credibility on all issues..." And here we see the "whole-of-government" attempts to restore balance.

*

As for the second Secret Service agent interviewed by the IBM Center for the Business of Government, his name is Dana Brown. He just so happened to have filled out his career with the Federal Air Marshall Service (October 2003-August 2008 as Director/Chief of Staff) followed by the TSA (March 2006-January 2009 as Asst. Administrator-Law Enforcement/Integrity Officer) states his LinkedIn profile. That he worked his way around to that which was largely put in place by the 1970 9/11 mini-event seems to me rather significant although I don't see all the details yet. I also don't yet see exactly who it was that birthed this lengthy 9/11 initiative we're suffering. It seems clear, however, that it was birthed prior to 1970.

The initiative has adjusted in some ways over time, but homage to 9/11 remains strong. Certain of the people deeply involved in these manipulations thought it was kismet that an individual well-suited to head the newly ordained Department of Homeland Security (that as we all know was the result of legislation rushed through Congress in the aftermath of the 9/11 (2001) attack) was born on the magical September 11th (this is Jeh Johnson); similarly, it is again being deemed a sign that the new Director of the National Science Foundation (NSF) (chosen and positioned as she was) is first-named France (last name Cordova) and that this name so perfectly relates to US intentions to use the NSF to forward "ops" that will solidify a US-France working relationship in the same way the

2005 London Bombings helped solidify the US-British working relationship. These France going-ons are in higher gear (I've noticed) since Macron was elected but it was prepped for long ago. I was working for IBM under IBM project manager Cathie Skoog at the NSF when my third trimester pregnancy was sabotaged. The story of this sabotage and what followed is (briefly) this:

I've long-alleged that John and Avery Gunther (whose children I used to babysit) agreed to a quid pro quo exchange of financial compensation for help destroying my credibility on behalf of IBM against whom I'd filed a 2010 EEOC (Equal Employment Opportunity Commission) charge and a subsequent May 2011 civil suit.

Per the May 11, 2011 Complaint, McGuire v. John and Avery Gunther:

3. On April 6, 2011 Mr. and Mrs Gunther, with uncontrolled greed and total disregard for the rights and feelings of Ms. Nadine McGuire as well as those of their children, AFG and XWG, maliciously and with ill-intent, wrongfully completed and executed a Complaint and Motion for Preliminary Injunction requesting formal protection against Ms. Nadine McGuire.

4. Over the course of the previous few months, Mr. and Mrs. Gunther, colluding with persons against whom Ms. Nadine McGuire is currently furthering litigation, including but not limited to plaintiff's mother, Pauline Scala McGuire, and from whom they received and/or have been promised to receive monetary incentives, hid their relationships with said individuals, further lied about having those relationships in direct conversation with Ms. Nadine McGuire and Court testimony on May 4, 2011, and wrongfully completed and executed a Complaint and Motion for Preliminary Injunction against Ms. Nadine McGuire in cooperation and collaboration with said persons, resulting in the issuance of a Temporary Restraining Order against Ms. Nadine McGuire issued on April 6, 2011.

- Initial Complaint, 5/11/11, McGuire v. John and Avery Gunther, Case No.:2011 CA 003703 B, DC Superior Court, Judge Gregory Jackson presiding

In regards to the suit against IBM (McGuire v. IBM, 1:11CV528, US District Court of Virginia), the only suit in which Pauline Scala McGuire was listed as a defendant, the most important claim was one of “assault” that led to the 2007 death of my son. Per the filing:

Plaintiff, Grace Nadine McGuire, realleges the allegations of paragraphs 1-65 hereof as if fully set forth within and further alleges:

66. Defendant Palmisano's conduct in ascertaining the drug that was used on the plaintiff to end her pregnancy and take the life of her child on April 22, 2007, constitutes an intentional touching of the plaintiff by defendant Palmisano, and was undertaken deliberately and with actual malice towards the plaintiff and her unborn child.

67. Defendant Skoog, Susan Horton and Scala's conduct in coordinating the circumstances, creating physical proximity and the administering of the drug to the plaintiff that ended her pregnancy and took the life of her child on April 22, 2007 constituted an intentional touching of the plaintiff by said defendants, and was undertaken deliberately and with actual malice towards the plaintiff and her unborn child.

... 69. As the direct and proximate result of defendant Palmisano, Skoog, Susan Horton, and Scala's conduct, the plaintiff suffered a severe placental abruption, which terminated her pregnancy and ended the life of her unborn child, causing the plaintiff to suffer damages including but not limited to the loss of her child, loss of affection, grief, sorrow, extreme mental torment and emotional distress.

- Initial Complaint, filed 5/16/11, McGuire v. IBM, et al, Case No.: 1:11CV528, US District Court of Virginia - Eastern Division, Alexandria, Judge Leonie Brinkema presiding

This is to say that John and Avery Gunther helped IBM defend against an allegation of murder, and in this way they are accomplices to a cover-up. This is also to say that the characterization provided by John and Avery Gunther in their April 2011 Superior Court filing for a Protection Order against me and their admissions in this filing of having provided derogatory information to various persons and/or entities in the DC area to include school administrators, psychologists, and law enforcement, were more to harm me, especially in my chances to hold IBM accountable, than to protect either themselves or children Anjulee and Xian Gunther.

I also long-allege that the relationship that developed from this initial quid pro quo led to John and Avery Gunther being similarly compensated for what turned into the sexual exploitation of their two daughters. For more on child sexual exploitation for the sake of personal and professional leverage, see especially the following:

Nick Bryant | The Franklin Scandal & The Elite's Pedophilia Cover Up,
https://www.youtube.com/watch?v=68gvGGPjm0o&t=978s

That the NSF won't acknowledge the abuse, and won't respond even to my FOIA requests, and otherwise has gone to extents to protect Cathie Skoog and her co-conspirators at IBM and otherwise is all that was needed to have adequately turned the organization towards the interests of the Deep State. Now it is simply a matter of the Deep State continuing to put the NSF to use.

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Jeffrey Epstein in context:

(As sent to the Wash Post)

I send you this in response to the recent column entitled Believe in the Process by Kenneth Starr. Perhaps rethink any public affiliation with Ken Starr; although his demeanor on paper is undoubtably consoling, it is also a bit intoxifying when it would be best now if we keep our wits about us, no?

I say this from the following perspective - Ken Starr of the Starr Report, attorney for (1) Erik Prince of Blackwater and (2) convicted pedophile Jeffrey Epstein in context:

The Starr Report buried behind salacious detail of the Lewinsky affair almost nothing of Whitewater, Travelgate, or otherwise what many consider the murder of Vince Foster (Foster, albeit the subject of a different investigation was also under the purview of attorney Starr and formal investigation of the results of Starr's investigation were drowned out by the details of the Lewinsky affair.) This is a bit strange considering the Lewinsky affair was a moral failing and not an actionable criminal one as would have been the others had any proof surfaced.

Starr later defended Blackwater against wrongful deaths suit initiated by the families of the 2004 Fallujah Ambush victims - "In October 2006, Blackwater hired one of the nation's heaviest-hitting lawyers to represent it - Kenneth Starr, the independent counsel in the 1999 impeachment of President Bill Clinton over the Monica Lewinsky sex scandal... Starr and his colleagues argued that Blackwater was "constitutionally immune" from such lawsuits and said that if the Fallujah case were allowed to proceed, "Blackwater will suffer irreparable harm." In the eighteen-page petition to the Supreme Court, Blackwater argued that there are no other such lawsuits against private

military/security companies in state courts "because the comprehensive regulatory scheme enacted by Congress and the President grant military contractors like Blackwater immunity from state-court litigation." (pp. 234-235, Blackwater). (Author Ken Davis writes) "The four men had spent the night before they set off at marine base Camp Fallujah. But the men kept their distance from the leathernecks. Had they spoken to the marines, the Blackwater team might have learned that the Americans were already in the midst of a major offensive meant to assert control over the increasingly restive city, where elements of the radical Islamist movement and remnants of Saddam's army were beginning to aggressively strike back. at the American occupation" (p. 306, The Hidden History of American at War), and perhaps this is the only thing that makes sense of the fact that "Under the terms of its contract, Blackwater was supposed to supply these convoy security missions with two SUVs, each carrying three guards per vehicle; a driver, one man riding shotgun, and a third man in back with a heavy machine gun. Instead, the foursome set out that morning with just two men per car, each vehicle missing their rear gunner. The SUVs were only outfitted with a steel plate as extra armor. And the men had not been given maps." (p. 305).

Starr went on to defend Jeffrey Epstein abasing allegations of child sex trafficking - "Along with a dream team of attorneys that included Gerald Lefcourt, Roy Black, and Ken Starr, [Alan Dershowitz] was successful in getting federal investigators not to charge Epstein with moving his victims across state lines and other associated crimes. The federal non-prosecution agreement Epstein's legal team negotiated with the U.S. Attorney for the Southern District of Florida immunized all named and unnamed "potential co-conspirators" in Epstein's child trafficking network, which includes those who allegedly procured minors for Epstein and also any powerbrokers who may have molested them" (-http://gawker.com/flight-logs-put-clinton-dershowitz-on-ped…). Otherwise, Epstein's eventual 18 month sentence by the state of Florida was exceptionally light under the circumstances to include the number of victims who came forward with testimony. This is best understood in the context of children being used as a means to government-sponsored sexual blackmail and other forms of leverage.

See here Erik Prince in greater context: (the similarities between him and once (secretly) favored child Bin Laden)

The coordinations among global intelligence to make rather than eliminate terror as seen thru "assets" bin Laden (as M. Noriega before him) & Erik Prince:

About BL: "Some CIA officers will later say that [BL] serves as a semi-official liaison between the GIP [Saudi intel.] and warlords like Sayyaf."
(www.historycommons.org/entity.jsp?entity=ahmed_badeeb_1)

About EP: "Handcuffed by politics, the CIA had not been able to cultivate relationships with the key but messy leaders. Fortunately, Blackwater had no such political restrictions." (p. 54, Civilian Warriors by E. Prince)

We see also:

About BL: "Bin Laden established camps inside Khyber Pakhtunkhwa in Pakistan and trained volunteers from across the Muslim world to fight against the Soviet-backed regime, the Democratic Republic of Afghanistan" (Wikipedia)

About EP: "In his autobiography, he states that during the Yugoslav Wars in the early 1990s, he realized the need for private training facilities for special operations… Prince moved to Virginia

Beach and personally financed the formation of Blackwater Worldwide in 1997. He bought 6,000 acres (24 km2) of the Great Dismal Swamp of North Carolina and set up a school for special operations" (Wikipedia)

Erik Prince is (becoming) no less an Amer. intelligence success story than bin Laden (in support of Terrorism as Geostrategy & a New World Order - see below). In short: (we note the repeating 9/11s, every 11 years): "Toward a NWO" speech by Bush #41 - Sept. 11 ('90); The WTC - Sept. 11 ('01); Benghazi - Sept. 11 ('12). (There is rhy. & reason also 2 the rise of ISIS.)

***

About training camps:

I watched so to speak the creating of little torture pockets around the world as justified by Obama's desire to close Gitmo. The White House reports (2/23/16): "We'll continue to securely and responsibly transfer to other countries the 35 detainees already approved for transfer. This process involves extensive and careful coordination across our federal government to ensure that our national security interests are met when an individual is transferred to another country. We insist, for example, that foreign countries institute strong security measures." But are these not just the seeds of new training camps (growing concentrated and lauded violent temperaments) & was that not someone's exact intent?

In real-time (and as perpetrated on captured children):

3/19/14, sent to the now defunct FB page of D. Cheney:
Dick Cheney,

I wonder if it's possible that there is coordination with other countries concerning enhanced interrogation techniques, in the form of training perhaps?

Specifically, here in the United States, my sense is that there may be the use of vulnerable populations, with the intension to gain favor with and/or intimidate others, especially members of the international community.

*

And:

On Saturday, June 21, 2014 6:37 AM, [redacted] wrote:
To: [redacted]

Deputy Lyddy,

Her energy is very weak. She is physically exhausted, VERY sleep deprived, and HUNGRY.

[These were continuing experimentations in reversed-engineered SERE; the agreed upon techniques, taken from various regions of the world to be distributed to the various regions of the world, had to be deemed not torture and this is where organizations like the APA stepped in, then (during the Bush administration), and afterwards. See here for example: "And I think, you know, what's really important in the debate going forward among psychologists is the extent to which psychologists loaned their names and loaned their credentials and their Ph.D.s to this kind of activity and essentially were used by the Bush administration to provide a kind of "get out of jail free" card for

the people who were, you know, doing these interrogations, because the logic, which I think Mark had mentioned, is, you know, this circular logic. So long as there are trained psychologists from the SERE program who are on site at these interrogations who are saying that these detainees can withstand this treatment, are not being harmed psychologically, then it's not torture. So, you know, you've got this sort of [inaudible] tortured — tortured logic, which is the phrase that has come up, but it's this sort of self-justifying loop in which professionals are loaning their credentials to this kind of activity. And you see the same thing in the Office of Legal Counsel, where you have, you know, lawyers loaning their credentials to approving what are clear violations of the Geneva Conventions." (https://www.democracynow.org/2009/4/21/the_story_of_mitchell_jessen_associates)]

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CRIMINAL LAW: CRIME VICTIMS' RIGHTS DURING CRIMINAL INVESTIGATIONS? APPLYING THE CRIME VICTIMS' RIGHTS ACT BEFORE CRIMINAL CHARGES ARE FILED

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Highlight

This Article addresses whether crime victims should have rights during criminal investigations, using the Crime Victims' Rights Act (***CVRA***) as the focal point for our discussion. This is a critical issue, as many criminal cases may never proceed to formal charging. If crime victims have no rights during criminal investigations, then many crime victims will never have any rights at all.

The issue of whether crime victims have rights in the criminal justice process recently came to a head when the Justice Department released a memorandum contending that the ***CVRA*** does not extend crime victims any rights until prosecutors choose to file formal criminal charges. This led the ***CVRA***'s Senate cosponsor, then-Senator Jon Kyl, to fire off an angry letter to the Justice Department attacking its position. In our Article, we side with the Act's cosponsor. We believe that, properly understood, the ***CVRA*** does extend crime victims' rights during criminal investigations.

Our Article proceeds in four parts. First, it highlights the importance of applying the Act before the formal filing of charges by illustrating how dozens of victims in a notorious federal sex abuse case were deprived of the ability to participate meaningfully in the criminal process when federal prosecutors narrowly interpreted their responsibilities under the Act. Second, the Article reviews the purpose, text, structure, and history of the ***CVRA***, concluding that they all support the conclusion that crime victims have rights during criminal investigations. Third, our Article critiques the Department's memorandum, demonstrating that the Department's analysis is unpersuasive. Fourth and finally, the Article provides a specific approach for determining when rights should attach - specifically when federal law enforcement agencies have identified a crime with sufficient precision to send a "target" letter to a criminal defendant. We also observe that federal and state prosecutors have already accorded rights to victims before formally filing charges, which further undermines the Department's overly narrow construction of the Act.

Text

DAVID SCHOEN

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[*61]

Introduction

In recent years, federal and state enactments have given crime victims extensive rights to participate in criminal cases. Many of these rights apply only after the filing of criminal charges, such as the victim's right to be heard during court proceedings. A crime victim's right to deliver an impact statement at sentencing, for instance, can only be exercised after a prosecutor has filed charges against a defendant and obtained a conviction. Other rights, however, can apply even before the formal filing of charges. As one example, the Crime Victims' Rights Act (***CVRA***) [1] extends to federal crime victims the right to "confer" with prosecutors. But can victims exercise this right before charges have been filed?

This question has tremendous practical importance. In many cases, prosecutors negotiate pleas well before any charges are ever drafted. If crime victims' rights enactments do not extend rights to victims until the formal filing of charges, then crime victims can be effectively excluded from the plea bargaining process. Yet the exclusion of victims in early stages of a criminal case affects more than just the content of a plea deal. Crime victims will also lose other important rights in the process if the formal filing of charges is the necessary trigger for those rights. If, for example, prosecutors work out a nonprosecution agreement with an offender, they need not notify his victims of what they are doing or of the fact that potential charges will never be filed.

The issue of pre-charging rights has most prominently surfaced in connection with federal cases. In 2010, the Department of Justice's Office of Legal Counsel (OLC) weighed in on the issue and released a legal opinion arguing that victims of federal crimes have no ***CVRA*** rights during a federal criminal investigation. [2] The Justice Department took the position that rights under the ***CVRA*** do not apply until prosecutors formally initiate criminal proceedings by filing a complaint, information, or indictment. The Department claims to find support for that limiting interpretation of the statute in its plain language and legislative history.

Shortly after the Department released its opinion, one of the ***CVRA***'s congressional sponsors, then-Senator Jon Kyl, sent a letter to Attorney General Eric Holder strenuously objecting to the Department's conclusions. Senator Kyl directly stated his view that "when Congress enacted the **[*62]** ***CVRA***, it intended to protect crime victims throughout the criminal justice process - from the investigative phases to the final conclusion of a case." [3] Senator Kyl contested the Department's analysis of the statute and, in particular, its use of statements from him during Congress's consideration of the ***CVRA***.

This Article sides with the ***CVRA***'s cosponsor and concludes that crime victims' ***CVRA*** rights attach before formal charging. Both the ***CVRA***'s plain language and its legislative history lead inexorably to this conclusion, as every court that has considered this issue has concluded. This Article also contends that, as a matter of sound public policy, crime victims should have rights before the formal filing of criminal charges.

This Article proceeds in four parts. Part I frames the issues under discussion by defending the importance of extending rights to crime victims during criminal investigations. Part I also provides background on victims' rights and gives a concrete illustration of a case in which the question of pre-charging rights for crime victims has arisen - specifically, the Jeffrey Epstein sex abuse case before a federal court in Florida. In that case, girls victimized by Epstein have argued that they should have been consulted about a federal nonprosecution agreement; Department attorneys have responded that because prosecutors never filed charges, government officials had no formal obligations to inform the girls.

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[1] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, ***118 Stat. 2260, 2261-65 (2004)*** (codified as amended at *18 U.S.C. § 3771* (2012) and *42 U.S.C. § 10603*(d)-(e) (2006)).

[2] The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, *35 Op. O.L.C. 1* (Dec. 17, 2010) [hereinafter OLC ***CVRA*** Rights Memo], available at *http://goo.gl/fHmCL4*.

[3] Letter from Jon Kyl, U.S. Sen., to Eric H. Holder, Jr., Att'y Gen. (June 6, 2011), reprinted in 157 Cong. Rec. S3608 (daily ed. June 8, 2011) (statement of Sen. Jon Kyl).

Part II reviews the ***CVRA***'s purpose, text, structure, and legislative history. This review establishes that the ***CVRA*** extends rights to crime victims before formal charges are filed.

Part III critiques OLC's position that the ***CVRA*** extends rights to victims only after prosecutors have lodged charges in court. The Department's proffered arguments do not withstand close scrutiny, particularly in light of the fact that the ***CVRA*** covers federal agencies involved in the "detection" and "investigation" of crime, [4] and specifically authorizes crime victims to file ***CVRA*** motions in situations where "no prosecution is underway." [5]

Part IV then proposes a specific approach for determining when crime victims' ***CVRA*** rights attach. This Part explains that the rights should attach when federal law enforcement or prosecuting agencies have identified a federal crime and a particular victim with sufficient precision that they would send a "target" letter to a criminal defendant in similar circumstances. If prosecutors have sufficient information to provide notice **[*63]** to a potential criminal of his rights, they can do the same for his victims. This Part also notes that the Department of Justice and state prosecutors already successfully provide rights to victims before charging. This successful experience strongly suggests that providing rights to victims early in the criminal justice process will not be unduly burdensome.

I. The Issue of Rights for Crime Victims During Criminal Investigations

To consider the question of whether victims should have rights during criminal investigations, some understanding of the underlying purposes of victims' rights enactments will be useful. These enactments are typically designed to make victims participants in all phases of the criminal justice process. [6] Congress drafted the ***CVRA***, for example, broadly to make crime victims participants in criminal cases. The Jeffrey Epstein sex abuse case demonstrates the importance of victim participation even before charges are filed.

A. A BRIEF HISTORY OF CRIME VICTIMS' RIGHTS

The crime victims' rights movement has sought to make crime victims important participants in the criminal justice process. The movement began in the wake of the Warren Court revolution, which extended new rights to criminal defendants. [7] With the courts paying increasing attention to criminal defendants, crime victims' advocates began to argue that the victims themselves had been overlooked. [8] The movement gained great visibility in the early 1980s when President Ronald Reagan appointed the President's Task Force on Victims of Crime. [9] The Task Force published a report concluding that "the criminal justice system has lost an essential balance… . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed." [10]

The Task Force chronicled how crime victims were treated in all stages of the criminal justice process, from the police investigation through **[*64]** court proceedings, and ultimately to any parole or other release of the criminal. The Task Force

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[4] *18 U.S.C. § 3771*(c)(1).

[5] Id. § 3771(d)(3).

[6] See Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, Victims in Criminal Procedure 3-39 (3d ed. 2010) (describing reforms from a historical perspective); see also, e.g., *18 U.S.C. § 3771*(a) (2012).

[7] See Beloof, Cassell & Twist, supra note 6, at 3-39 (describing the history of victims' rights in American law and the early days of the modern movement).

[8] See, e.g., William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 Am. Crim L. Rev. 649, 651-55 (1976).

[9] Exec. Order 12,360, *47 Fed. Reg. 17,975* (Apr. 27, 1982); see also President's Task Force on Victims of Crime, Final Report, at ii (1982).

[10] *President's Task Force on Victims of Crime, Final Report, supra* note 9, at 114.

then made a series of recommendations for all criminal justice agencies, including the police, prosecutors, and the courts. [11] The recommendations were designed to allow crime victims to receive information about, and to participate in, criminal cases.

In its most far-reaching recommendation, the Task Force proposed amending the U.S. Constitution to protect victims' rights. [12] The proposed ***amendment*** would have built on existing constitutional rights for criminal defendants by extending similar rights to crime victims. [13]

After the publication of the report, crime victims' advocates secured the passage of a series of state constitutional and legislative reforms. These measures guaranteed victims' rights in the criminal process, such as the right to be notified of court proceedings, to attend those proceedings, and to speak at appropriate points in the process, such as plea bargaining and sentencing. The measures were embodied in state statutes and, in more than thirty states, state constitutional "bills of rights" for crime victims. [14] While many of the measures had narrow participatory rights, [15] some of the ***amendments*** also contained more open-ended language, promising victims a right to fair treatment "throughout the criminal justice process." [16]

After successfully passing many state constitutional ***amendments***, crime victims' rights advocates sought to achieve the Task Force's broadest recommendation: to secure protection for victims' rights in the U.S. Constitution. In 1996, victims' advocates proposed a Victims' Rights ***Amendment*** in a Rose Garden ceremony attended by President Bill Clinton. [17] The proposed ***amendment*** contained a list of rights for crime victims, largely paralleling the rights contained in state victims' rights **[*65]** ***amendments***. [18] Congress considered the ***amendment*** several times, but it never obtained the requisite two-thirds support in both houses to secure the ***Amendment***'s approval. [19] Critics quarreled not so much with the goals of the ***amendment*** but rather with the necessity of constitutionalizing such rights. [20]

B. THE CRIME VICTIMS' RIGHTS ACT

Unable to obtain the necessary supermajority to pass a federal constitutional ***amendment***, in April 2004, crime victims' rights advocates decided to focus on federal legislation protecting crime victims. In exchange for backing off from their efforts to pass a constitutional ***amendment***, crime victims' advocates received near-universal congressional support for a "broad and

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[11] See id. at 56-82.

[12] Id. at 114.

[13] Id. at 114-15.

[14] For a map depicting the states with (and without) such ***amendments***, see State Victim Rights ***Amendments***, Nat'l Victims' Constitutional ***Amendment*** Passage, *http://goo.gl/znI4YW* (last visited Nov. 26, 2013); for discussion, see infra Part IV.D (discussing legislative reforms in a number of states).

[15] See, e.g., Cal. Const. art. I, § 28; Mich. Const. art. I, § 24; N.C. Const. art. I, § 37. For a detailed discussion of how one state constitutional ***amendment*** is intended to operate, see generally Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights ***Amendment***, *1994 Utah L. Rev. 1373.*

[16] E.g., Ariz. Const. art. II, § 2.1(A)(1); Mich. Const. art. I, § 24(1); Tex. Const. art. I, § 30(a)(1); see Cal. Const. art. I, § 28(b)(1) ("throughout the criminal or juvenile justice process").

[17] John M. Broder, Clinton Calls for Victims' Rights in Constitution, L.A. Times, June 26, 1996, at A1. For detailed discussions of the legislative efforts, see Paul G. Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed ***Amendments*** in Light of the Crime Victims' Rights Act, *2005 BYU L. Rev. 835, 847-50.*

[18] See Cassell, supra note 17, at 848-49. For the pros and cons of the ***amendment*** as originally introduced, compare Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights ***Amendment***, *1999 Utah L. Rev. 479* [hereinafter Cassell, Barbarians at the Gates?], and Steven J. Twist, The Crime Victims' Rights ***Amendment*** and Two Good and Perfect Things, *1999 Utah L. Rev. 369,* with Robert P. Mosteller, The Unnecessary Victims' Rights ***Amendment***, *1999 Utah L. Rev. 443.* For a more recent discussion of a newer version of the ***amendment***, see Paul G. Cassell, The Victims' Rights ***Amendment***: A Sympathetic, Clause-by-Clause Analysis, *5 Phoenix L. Rev. 301 (2012).*

encompassing" statutory victims' bill of rights. [21] Victims' advocates sought to expand on the protections found in other previously-enacted victims' rights statutes, including, notably, the Victims' Rights and Restitution Act of 1990. [22] That statute had also included a bill of rights for crime victims, yet because of limited enforcement mechanisms, crime victims had been unable to secure court protection of the rights listed in the statute. [23]

The statute that Congress passed to solve these problems - the Crime Victims' Rights Act of 2004 - gave victims "the right to participate in the **[*66]** system." [24] It extended broad rights to crime victims, including "the right to be treated with fairness and with respect for the victim's dignity and privacy" [25] and "the reasonable right to confer with the attorney for the Government in the case." [26] It also commanded that these rights must be afforded by the Justice Department "and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime." [27] The ***CVRA*** also contained specific enforcement mechanisms. The Act provided that rights can be "asserted" by "the crime victim or the crime victim's lawful representative, and the attorney for the Government … ." [28] The courts were also required under the Act to "ensure that the crime victim is afforded the rights" given by the law. [29]

Congress appeared to have at least two goals in mind in passing the ***CVRA***. The first was simply to ensure that crime victims understood what was happening in the criminal justice process. This goal is apparent from the fact that the ***CVRA*** gives crime victims rights to notification about various court hearings, as well as more general rights to confer with prosecutors and to be treated with fairness. [30] The ***CVRA***'s Senate sponsors explained:

In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on [defendants'] rights, and by a court system that simply did not have a place for them. [31]

In passing the ***CVRA***, Congress sought to change the system's obliviousness to crime victims that often "left crime victims and their families victimized yet again." [32]

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[19] Hon. Jon Kyl et al., On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, *9 Lewis & Clark L. Rev. 581, 588-91 (2005).*

[20] Proposed Constitutional ***Amendment*** to Protect Crime Victims, S.J. Res. 1: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 128-29 (2003) (statement of Sen. Patrick Leahy); see also Steven J. Twist & Daniel Seiden, The Proposed Victims' Rights ***Amendment***: A Brief Point/Counterpoint, *5 Phoenix L. Rev. 341, 356, 378 (2012)* (illustrating that the necessity dispute has endured to the present day).

[21] 150 Cong. Rec. 7295 (2004) (statement of Sen. Dianne Feinstein); see also Kyl et al., supra note 19, at 591-93.

[22] Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, ***104 Stat. 4820*** (codified as amended at *42 U.S.C.§§10601,* 10606-07 (2006)).

[23] See, e.g., *United States v. McVeigh, 106 F.3d 325, 328 (10th Cir. 1997)* (per curiam) (refusing to enforce a victim's right to attend a trial); Cassell, Barbarians at the Gates?, supra note 18, at 515-22 (discussing McVeigh).

[24] 150 Cong. Rec. 7297; see *18 U.S.C. § 3771* (2012). For a description of victim participation, see Beloof, Cassell & Twist, supra note 6, at 728-33.

[25] *18 U.S.C. § 3771*(a)(8).

[26] Id. § 3771(a)(5).

[27] Id. § 3771(c)(1).

[28] Id. § 3771(d)(1).

[29] Id. § 3771(b)(1).

[30] See id. § 3771(a).

[31] 150 Cong. Rec. 7296 (2004) (statement of Sen. Dianne Feinstein).

A second overarching purpose of the ***CVRA*** was to allow crime victims to play a role in the criminal justice process. Through the ***CVRA***, Congress intended to make victims "independent participants" in the criminal justice process. [33] The ***CVRA*** extends to crime victims a series of "rights" in the criminal justice process - rights that the victims have **[*67]** independent standing to assert. [34] Congress viewed these provisions as establishing a victim's right "to participate in the process where the information that [victims] and their families can provide may be material and relevant … ." [35]

Congress appears to have had both intrinsic and instrumental reasons for wanting crime victim participation. Congress clearly thought that such participation was valuable in its own right. Senator Kyl embodied this belief and explained his decision to become involved in the crime victims' rights movement because of his discovery that victims:

were suffering through the trauma of the victimization and then being thrown into a system which they did not understand, which nobody was helping them with, and which literally prevented them from participation in any meaningful way. I came to realize there were literally millions of people out there being denied these basic rights … . [36]

But Congress also thought crime victim participation in the criminal justice system could be instrumentally useful. For example, in protecting a victim's right to be heard by those determining a defendant's sentence, a victim might be able to provide important information that could alter that sentence. As a result, the sentence might reflect a fuller appreciation of the danger posed by a defendant, and the judge might take appropriate steps to prevent others from being victimized. [37]

Congress also intended to ensure that crime victims were not revictimized in the criminal justice process - that is, that they would not suffer what scholars have called "secondary harm" in the process. [38] The concern is that victims suffer when they are excluded from the criminal justice process. Congress sought to end that suffering by making victims meaningful participants in criminal cases. [39]

C. AN ILLUSTRATION OF THE PRE-CHARGING ISSUE: THE JEFFREY EPSTEIN CASE

Given the potentially expansive scope of victims' rights under both state provisions and the ***CVRA***, a critical question arises about how to apply them: Do the rights come into existence only after prosecutors formally file **[*68]** criminal charges? Or do they attach at some earlier point in the process? Does v. United States, a federal case in the U.S. District Court for the Southern District of Florida, usefully illustrates the issue. [40] In that case, the U.S. Attorney's Office for the Southern District of Florida

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[32] Id.

[33] Id. at 7302 (statement of Sen. Jon Kyl).

[34] Compare *18 U.S.C. § 3771*(d), with Susan Bandes, Victim Standing, *1999 Utah L. Rev. 331, 344-45* (illustrating the debate surrounding victim standing prior to adoption of the ***CVRA***).

[35] 150 Cong. Rec. 7296 (statement of Sen. Dianne Feinstein).

[36] Id. at 7298 (statement of Sen. Jon Kyl).

[37] Id.

[38] See, e.g., Douglas Evan Beloof, The Third Model of Criminal Process: The Victim Participation Model, *1999 Utah L. Rev. 289, 294-96;* Richard A. Bierschbach, Allocution and the Purposes of Victim Participation Under the ***CVRA***, 19 Fed. Sent'g Rep. 44, 46 (2006).

[39] 150 Cong. Rec. 7298 (statement of Sen. Jon Kyl).

[40] *Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).* In the interest of full disclosure, two of the authors of this Article (Cassell and Edwards) are co-counsel for the victims in this case. The statement of the facts in this Article draws heavily on the victims' allegations as they have detailed in their pending motion for summary judgment in the case. See Jane Doe #1 & Jane Doe #2's *Motion for Finding of Violations of the Crime Victims' Rights Act and Request for a Hearing on Appropriate Remedies at 3-23, Does, 817 F. Supp. 2d 1337* (No. 9:08-cv-80736-KAM) [hereinafter Jane Doe Motion] (providing fifty-three proposed facts in the case). The U.S. Attorney's Office has generally disputed some of these allegations without offering specifics as to what happened. See, e.g., United States' Response to Jane Doe #1 & Jane Doe #2's *Motion for Finding of Violations of the Crime Victim Rights Act and Request for a Hearing on Appropriate Remedies at 34-43, Does, 817 F. Supp. 2d 1337* (No. 9:08-cv-80736-KAM) [hereinafter United States' Response]. As of this writing, Epstein has declined to intervene in the case to dispute the allegations.

developed considerable evidence that Jeffrey Epstein, a billionaire with extensive political and social connections, [41] had sexually molested more than thirty young girls between 2001 and 2007 at his West Palm Beach mansion. [42] The U.S. Attorney's Office entered into contentious plea negotiations with Epstein over how the case should be resolved. The prosecutors initially sought a resolution that would have required Epstein to plead guilty to at least a felony sex offense. After pressure from Epstein, for reasons that have never been clearly explained, [43] the U.S. Attorney's Office agreed to enter into a nonprosecution agreement. Under the agreement, the U.S. Attorney's Office agreed not to prosecute him and, in exchange, Epstein agreed to plead guilty to two state felonies for soliciting prostitution with a minor. After entering those guilty pleas, Epstein was sentenced to only eighteen months in state jail. [44] No federal charges were ever filed and **[*69]** Epstein spent much of the jail term on "work release" to his luxurious office. [45]

The U.S. Attorney's Office did not tell Epstein's victims about the nonprosecution agreement until well after it had taken effect. To the contrary, even after the nonprosecution agreement had been signed, the Office continued to tell the victims that the case was still "under investigation" and that they should be "patient." [46] When the victims learned of the agreement, two of them (Jane Doe Number One and Jane Doe Number Two) filed suit in federal court under the Crime Victims' Rights Act, arguing that the prosecutors had violated their ***CVRA*** right to confer as well as their right to be treated fairly. [47] The victims contended that prosecutors should have conferred with them about the nonprosecution agreement before it became final.

In response, the U.S. Attorney's Office argued primarily that it was under no obligation to extend the victims any rights under the ***CVRA***. It was the Government's blunt position that "***CVRA*** rights do not attach in the absence of federal criminal charges filed by a federal prosecutor." [48] In short, the Government argued it was not required to confer in any way with the victims, or even treat them fairly, because the ***CVRA*** was not yet in play. The issue is thus squarely framed: Is the Government correct in its assertion that it has no ***CVRA*** obligations in cases like the Epstein case where federal prosecutors never lodged federal charges against a suspect? In view of the ***CVRA***'s prominence, resolution of this issue may shed important light on the nature of crime victims' enactments and the breadth of the role that crime victims should have in the criminal justice process.

II. The ***CVRA***'s Application Before Formal Charges are Filed

To analyze the issue of whether the ***CVRA*** extends rights to crime victims before prosecutors have formally filed charges, it is useful to look at the ***CVRA***'s purposes, language, and judicial interpretations. This Part looks at each of these three issues in turn.

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[41] See, e.g., Paul Harris, Prince Andrew's Link to Sex Offender Jeffrey Epstein Taints Royalty in US, Guardian (Mar. 12, 2011), http://goo.gl/0I4vAE; Landon Thomas Jr., Jeffrey Epstein: International Moneyman of Mystery, N.Y. Mag., http://goo.gl/11Cayc (last visited Nov. 26, 2013).

[42] See Jane Doe Motion, supra note 40, at 3-4; Abby Goodnough, Questions of Preferential Treatment Are Raised in Florida Sex Case, N.Y. Times, Sept. 3, 2006, at A19.

[43] The U.S. Attorney responsible for the plea deal later revealed that after negotiations started, "what followed was a year-long assault on the prosecution and the prosecutors" by Epstein. Letter from R. Alexander Acosta, former U.S. Att'y, to Whom It May Concern (Mar. 20, 2011), reprinted in Conchita Sarnoff, Behind Pedophile Jeffrey Epstein's Sweetheart Deal, Daily Beast (Mar. 25, 2011, 3:17 AM), http://goo.gl/kyveiF. Acosta, however, claimed that the pressure did not influence the ultimate disposition of the case. Id.

[44] Landon Thomas Jr., From Paradise to County Jail: A Billionaire Financial Adviser Will Serve 18 Months in Sex Case, N.Y. Times, July 1, 2008, at C1.

[45] See Michele Dargan, Feds Say They Treated Epstein Victims Fairly, Palm Beach Daily News (Apr. 8, 2011, 7:23 PM), http://goo.gl/rTGDed; Conchita Sarnoff, Billionaire Pedophile Goes Free, Daily Beast (July 20, 2010, 7:05 PM), http://goo.gl/MSTi17.

[46] See Jane Doe Motion, supra note 40, at 14, 16 (internal quotation marks and citations omitted).

[47] See Emergency Victim's Petition for Enforcement of Crime Victim's Rights Act, 18 U.S.C. Section 3771 at 2, Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011) (No. 9:08-cv-80736-KAM).

[48] United States' Response, supra note 40, at 7.

HOUSE_OVERSIGHT_017610

[*70]

A. THE ***CVRA***'S PURPOSES

An analysis of the ***CVRA***'s application before prosecutors have filed charges must begin by assessing the ***CVRA***'s purposes because any interpretation of the ***CVRA*** that is divorced from the statute's purposes would run the risk of defeating the statute's aims. It is axiomatic that courts should "give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." [49]

As discussed above, [50] one important goal of the ***CVRA*** was to keep crime victims informed about any developments in the criminal justice process. But the need to be informed does not begin with the filing of a formal criminal charge. A crime victim needs to know what is happening before formal charging - during a criminal investigation, for example - just as much as she needs to know what is happening in court. Indeed, she may have a greater need to know, as she may be concerned that the criminal who harmed her is still on the loose, posing a danger to her.

Similarly, concerning the second purpose - facilitating victim participation [51] - without a right to pre-charging involvement, victims may be effectively shut out of the process entirely. The Epstein case provides a useful illustration of why the ***CVRA*** must be understood to extend rights to victims prior to indictment. The prosecutors handling the investigation reached an agreement with Epstein that barred federal prosecution of sex offenses committed against dozens of victims, including Jane Doe Number One and Jane Doe Number Two. If ***CVRA*** rights did not extend to the negotiations surrounding the agreement, then the victims never would have had any ability to participate in the resolution of the case. [52]

A construction of the ***CVRA*** that extends rights to victims before charges are filed would be entirely consistent with the ***CVRA***'s participatory purpose. If victims have the ability to participate in a pre-charging plea bargaining process, for example, victims can help ensure that prosecutors do not overlook anything that should be covered in the plea deal. For example, victims might be able to obtain agreement to a "no contact" order or valuable restitution - points that the prosecutor might fail **[*71]** to consider in crafting a plea. Similarly, allowing victims to participate early in the process avoids retraumatizing victims. Again, as the Epstein case usefully illustrates, it may be extremely difficult for victims to discover after the fact that potential criminal charges against a criminal who has abused them have been secretly bargained away. Jane Doe Number One and Jane Doe Number Two, for example, were outraged when they discovered prosecutors had entered into an agreement blocking any prosecution of sex offenses Epstein committed against them - and all without telling them. [53]

In short, the purposes animating the ***CVRA*** all suggest that the Act was meant to, and should, extend rights to crime victims before formal charges are filed.

B. THE ***CVRA***'S PLAIN LANGUAGE

While the general purposes of the ***CVRA*** support a broad interpretation of the Act, it is important to examine whether those purposes have been expressed in the Act's language. Without a linkage to the Act's text, the general purpose might not provide

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[49] *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1409 (2010)* (quoting *United States v. Bornstein, 423 U.S. 303, 310 (1976))* (internal quotation marks omitted).

[50] See supra notes 24-27.

[51] See supra notes 28-29.

[52] Even the Justice Department seems to recognize this point. As a matter of policy, the Department extends to victims the right to confer with prosecutors in situations where plea discussions occur before charges have been brought. U.S. Dep't of Justice, Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance 41-42 (2011 ed., rev. May 2012) [hereinafter Attorney General Guidelines].

[53] Without disclosing confidential attorney-client communications, this fact is readily apparent from victims' filings in the Epstein case. See, e.g., Jane Doe Motion, supra note 40, at 17 (stating that the victims relied on the U.S. Attorney's Office representatives "to their detriment[,]" that if they knew the true facts, "they would have taken steps to object" to the plea agreement, and that they believed criminal prosecution to be "extremely important").

a sound basis for interpretation. [54] But the ***CVRA***'s plain language makes clear that Congress intended for the law to provide at least some rights to crime victims throughout the criminal justice process, even before the filing of criminal charges.

According to its text, the ***CVRA*** provides eight specifically enumerated rights for crime victims and an additional right to be reasonably notified of these rights. [55] Some of these rights presuppose the formal filing of criminal charges. For instance, the ***CVRA*** extends to victims the "right to reasonable, accurate, and timely notice of any public court proceeding." [56] That particular right obviously does not apply before charges are filed, as no "court proceedings" exist before a defendant is charged.

But the ***CVRA*** also promises crime victims rights that are not specifically tied to court proceedings. Perhaps most expansively, the ***CVRA*** guarantees victims the "right to be treated with fairness and with **[*72]** respect for the victim's dignity and privacy," [57] a broad right that does not appear to be directly linked to a filed court case. Similarly, the ***CVRA*** promises victims the "reasonable right to confer with the attorney for the Government in the case." [58] In this section, the ***CVRA***'s drafters appear to have eschewed a reference to court proceedings, using a broader term instead. Of course, a "case" can refer both to a judicial case before a court and an investigative case pursued by a law enforcement officer. It is common usage to say such things as, "The police officer investigated and solved the case." Dictionary definitions of the word "case" support this varied interpretation. [59]

If there remained any doubts about whether the ***CVRA*** applies during the investigative part of the criminal justice process, two other provisions in the ***CVRA*** resolve them. The ***CVRA*** specifically directs that "officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the ***CVRA***]." [60] Of course, there would be no reason to direct that agencies involved in the "detection" and "investigation" of crime have ***CVRA*** obligations if the Act did not extend to pre-charging situations. Congress thus directly envisioned the victims' rights law to apply during the "detection" and "investigation" phases of criminal cases.

Similarly, the ***CVRA***'s venue provision instructs that crime victims who seek to assert rights in pre-charging situations should proceed in the court where the crime was committed: "The rights described in subsection (a) [of the ***CVRA***] shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." [61] Here again, it is hard to see why this provision would be necessary unless the ***CVRA*** applies before the formal filing of charges.

For all these reasons, the ***CVRA***'s plain language indicates that the victims have protected rights under the Act even before charges are filed.

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C. COURTS RECOGNIZE THAT CRIME VICTIMS HAVE ***CVRA*** RIGHTS BEFORE CHARGING

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[54] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).

[55] *18 U.S.C. § 3771*(a) (2012) (enumerating eight rights); id. § 3771(c)(1) (requiring government officers use "their best efforts" to notify victims of their rights).

[56] Id. § 3771(a)(2).

[57] Id. § 3771(a)(8).

[58] Id. § 3771(a)(5) (emphasis added).

[59] See, e.g., Black's Law Dictionary 243-44 (9th ed. 2009) (defining, among the definitions of "case," a "test case" as "[a] criminal investigation" as in "the Manson case"); Webster's Third New International Dictionary of the English Language Unabridged 345 (1993) (defining "case" as "a circumstance or situation (as a crime) requiring investigation or action by the police or other agency").

[60] *18 U.S.C. § 3771*(c)(1) (emphasis added).

[61] Id. § 3771(d)(3) (emphasis added).

Because crime victims lack a right to appointed counsel, many victims have difficulty litigating the scope of their rights. [62] But in a few cases, victims have been able to secure counsel to argue that they have rights in the criminal justice process during the investigation of federal crimes. When those cases have reached the issue of whether the ***CVRA*** applies before charges have been filed, courts have uniformly agreed with the victims' position.

Perhaps the leading case to date to assess this question is the Fifth Circuit's decision in In re Dean. [63] There, a wealthy corporate criminal defendant reached a generous plea deal with the Government - a deal that the Government filed for approval with the district court without conferring with the victims. Citing procedural rights under the ***CVRA***, the victims requested that the trial court reject the plea agreement. [64] The District Court for the Southern District of Texas specifically concluded that victims' ***CVRA*** rights could apply during the investigation of the crime: "There are clearly rights under the ***CVRA*** that apply before any prosecution is underway." [65] The district court concluded, however, that the Government had not violated the ***CVRA*** because it had secured judicial permission to dispense with notification to victims. [66]

The victims sought appellate review in the Fifth Circuit. [67] There, the court concurred with the district court that ***CVRA*** rights apply before trial. Unlike the district court, however, it held that the Government had violated the victims' rights:

The district court acknowledged that "there are clearly rights under the ***CVRA*** that apply before any prosecution is underway." Logically, this includes the ***CVRA***'s establishment of victims' "reasonable right to confer with the attorney for the Government." At least in the posture of this case (and we do not speculate on the **[*74]** applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain. [68]

The Fifth Circuit then remanded the matter to the district court to determine the appropriate remedy for the violation of the victims' rights. [69]

The Fifth Circuit's decision in Dean has been cited favorably in four recent district court decisions, which provides further support for the conclusion that the ***CVRA*** applies before charges have been filed. In United States v. Rubin, [70] victims of a federal securities fraud argued that they had ***CVRA*** rights even before prosecutors filed a superseding indictment covering the specific crimes affecting the victims. Citing Dean, the District Court for the Eastern District of New York agreed that the rights

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[62] John W. Gillis & Douglas E. Beloof, The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts, *33 McGeorge L. Rev. 689, 693 (2002).*

[63] *527 F.3d 391 (5th Cir. 2008).* Other aspects of the case are discussed in Paul G. Cassell & Steven Joffee, The Crime Victims' Expanding Role in a System of Public Prosecution: *A Response to the Critics of the Crime Victims' Rights Act, 105 Nw. U. L. Rev. Colloquy 164, 172-76 (2011).*

[64] *In re Dean, 527 F.3d at 392.*

[65] United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at 11 (S.D. Tex. Feb. 21, 2008).

[66] Id. at 1, 19.

[67] For discussion of the difficulties crime victims face to obtain appellate review of their claims, see generally Paul G. Cassell, Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision, *87 Denv. U. L. Rev. 599 (2010).*

[68] *In re Dean, 527 F.3d at 394* (internal citations omitted).

[69] *Id. at 396.* On remand, the district court held additional hearings in which the victims participated, satisfying their ***CVRA*** rights. See *United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009).*

[70] *558 F. Supp. 2d 411 (E.D.N.Y. 2008).*

were expansive and could apply before charges were filed but were subject to the outer limit that the Government has at least "contemplated" charges. [71]

Similarly, in United States v. Oakum, [72] the District Court for the Eastern District of Virginia considered a claim that ***CVRA*** rights did not apply until after a defendant had been convicted. In rejecting that argument, the court agreed with the Dean court that victims acquire rights even before a prosecution begins. [73]

The District Court for the Northern District of Indiana held to the same effect in In re Petersen. [74] There, the court held that a victim's right to be treated with fairness and with respect for [his or her] dignity and privacy "may apply before any prosecution is underway and isn't necessarily tied to a "court proceeding' or "case.'" [75] The court, however, found that the "conclusory allegations" in the victims' petition did not "create a plausible claim for relief under the ***CVRA***." [76]

[*75] Perhaps the most extensive discussion of this issue has come from the Epstein case discussed earlier. [77] Overruling the Government's argument that the ***CVRA*** only applies after the formal filing of charges, Does v. United States held that "the statutory language clearly contemplates pre-charge proceedings." [78] The court in Does explained that "court proceedings involving the crime are not limited to post-complaint or post-indictment proceedings, but can also include initial appearances and bond hearings, both of which can take place before a formal charge." [79] The court also noted that the ***CVRA***'s "requirement that officials engaged in "detection [or] investigation' [of crimes] afford victims the rights enumerated in subsection (a) surely contemplates pre-charge application of the ***CVRA***." [80] Finally, the court in Does noted that "if the ***CVRA***'s rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime." [81]

In sum, the relevant case law unanimously agrees that the ***CVRA*** extends rights to crime victims before charges have been filed.

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[71] *Id. at 419* (internal citation omitted). Rubin's suggestion about limitations that apply to pre-indictment assertions of rights is discussed at notes 184-187 and 193 infra and accompanying text.

[72] No. 3:08cr132, *2009 WL 790042* (E.D. Va. Mar. 24, 2009).

[73] Id. at 2.

[74] No. 2:10-CV-298 RM, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010).

[75] Id. at 2 (citing *In re Dean, 527 F.3d 391, 394 (5th Cir. 2008);* United States v. BP Prods. N. Am. Inc., H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)).

[76] Id. Petersen also held that one specific ***CVRA*** right - the right to confer - only applies after charges have been filed. Id. But the authorities Petersen cites for that proposition prove no such thing. Confusingly, Petersen cited the Fifth Circuit's ruling in Dean for support; but (as just explained above) Dean held exactly the opposite. Similarly, Petersen cites other cases involving the right to confer after charges have been filed. Id. But none of these cases actually presented the issue of the ***CVRA***'s application to pre-indictment situations, since charges had already been filed in each of these cases. See, e.g., *In re Stewart, 552 F.3d 1285, 1289 (11th Cir. 2008).*

[77] *Does v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).*

[78] *Id. at 1341.*

[79] Id.

[80] *Id. at 1342.*

[81] Id. Recently, the district court in the Does case also rejected Government efforts to dismiss the action. The district court found that, if the victims could prove the factual allegations they have made, then they would be entitled to relief, including potentially the relief of invalidating the nonprosecution agreement that Epstein obtained from the Government. Does v. United States, No. 9:08-cv-80736-KAM, 2013 WL 3089046, at 3 (S.D. Fla. June 19, 2013).

HOUSE_OVERSIGHT_017614

III. The Justice Department's Unpersuasive Position

Despite the ***CVRA***'s broad remedial purposes, its expansive language referring to investigations, and the unanimous case law extending rights to victims prior to defendants being charged, the OLC released a memorandum in 2011 concluding that ***CVRA*** rights attach only "from the time that criminal proceedings are initiated (by complaint, information, or indictment)." [82] OLC's analysis is unpersuasive. Although OLC's opinion **[*76]** invokes the ***CVRA***'s definition of crime "victim," its legislative intent, and its structure, a closer reading of each demonstrates little support for the notion that crime victims must await the formal filing of charges before accruing ***CVRA*** rights.

A. OLC'S MISREADING OF THE ***CVRA***'S DEFINITION OF "VICTIM"

OLC's lead argument is that the ***CVRA***'s definition of "victim" presupposes that criminal charges have been formally filed. [83] The ***CVRA*** defines a "victim" who is protected as "a person directly and proximately harmed as a result of the commission of a Federal offense." [84] Focusing on the word "offense," OLC concedes that it does not "conclusively resolve" the question of when rights attach. Nevertheless, OLC claims that the word "naturally suggests that a person's status as a "crime victim' can only be determined after there has been a formal decision to charge a defendant with a particular Federal offense." [85] OLC goes on to elaborate:

Under this reading, the earliest that a "crime victim" under the Act could be identified would be upon the filing of a criminal complaint - that is, at the earliest point at which there is a sworn written statement of probable cause to believe that a particular defendant committed an identified Federal offense and hence the first point at which it is possible with any certainty to identify a "crime victim" directly and proximately harmed by the commission of that offense. [86]

OLC is disingenuous in asserting that the "first point" at which a person has been harmed by a federal crime arises only after a criminal complaint has been filed. The Department routinely makes such determinations at earlier points in criminal cases, such as when it sends a "target letter" to a defense attorney during a grand jury investigation. [87] Indeed, OLC remarkably ignores the fact that the Department is directly required to identify victims of a crime before the filing of a criminal complaint, both by statute and through internal policy directives.

The Victims' Rights and Restitution Act of 1990 (VRRA) [88] requires the Department to identify victims before the filing of a criminal complaint. **[*77]** Passed in 1990, the VRRA provided crime victims with a set of procedural rights similar to those found in the ***CVRA***, along with rights to notification about victim services. [89] In 2004, the ***CVRA*** repealed and replaced the section of the VRRA listing procedural rights, while leaving other parts of the VRRA intact. [90] Under the remaining parts of

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[82] OLC ***CVRA*** Rights Memo, supra note 2, at 1. Although the opinion is dated December 17, 2010, it was publicly released on May 20, 2011. See Letter from Jon Kyl, supra note 3.

[83] OLC ***CVRA*** Rights Memo, supra note 2, at 6.

[84] *18 U.S.C. § 3771*(e) (2012) (emphasis added).

[85] OLC ***CVRA*** Rights Memo, supra note 2, at 5.

[86] Id.

[87] A target letter explains the procedural process underlying an indictment and places the defendant on notice of the general nature of the government's criminal investigation. See U.S. Dep't of Justice, Title 9: U.S. Attorneys' Criminal Resource Manual § 160, [hereinafter Criminal Resource Manual] available at *http://goo.gl/YHLDke* (providing an example target letter); infra Part III.A (developing this point further).

[88] Pub. L. No. 101-647, ***104 Stat. 4820*** (codified as amended at *42 U.S.C. §§10601,* 10606-07 (2006)).

[89] See supra notes 22-23 and accompanying text.

[90] Justice for All Act of 2004, Pub. L. No. 108-405, § 102(a), ***118 Stat. 2260, 2261 (2004)*** (codified at *18 U.S.C. § 3771*(a) (2012)).

HOUSE_OVERSIGHT_017615

the VRRA, the Justice Department must inform victims of federal crimes of services that are available to them, including "emergency medical and social services," counseling, and support. [91] The Department is further obligated to keep victims fully informed about "the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation." [92] These rights to notice about "emergency medical and social services" [93] as well as to the "status of the investigation of the crime" [94] obviously require the Department to identify victims of federal crimes before formal charges have been filed. Indeed, the VRRA makes this point clear by directing the Department to not only notify the victim about the status of the investigation but also about the later "filing of charges against a suspected offender." [95] The VRRA then extends victims' rights to information through the rest of the criminal justice process by requiring the Department to provide notice to victims of such things as the imposed sentence and the defendant's release. [96]

The VRRA not only requires the Department to identify victims during the investigation of a crime, it also defines those victims in a very similar fashion to the ***CVRA***. The VRRA defines "victim" as a "person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." [97] Thus, the Department is already routinely identifying persons who have been "harmed" by federal crimes shortly after the commission of those crimes and well before formal charging.

The Attorney General has also promulgated internal guidelines requiring Justice Department components to identify victims rapidly after a crime. The Attorney General Guidelines for Victim and Witness Assistance provide that "Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken **[*78]** without interfering in the investigation. Generally, this point in time is defined by the opening of a criminal investigation." [98]

Given the way the two statutes work, it would make no sense to artificially confine the ***CVRA***'s reach until after the filing of a criminal complaint. Before then, victims will have often received information from the Department about the status of the investigation. They might wish to confer with prosecutors about how the case is proceeding, and the ***CVRA*** extends to them a right to confer. [99] Similarly, while the Department is notifying victims about the services they may receive and the status of an investigation, it is important that the victims be treated fairly. The ***CVRA*** extends the right to be treated fairly. [100] Indeed, it would be absurd to think that Congress wanted to permit the Justice Department to treat crime victims unfairly until criminal charges have been filed.

Instead of recognizing Congress's intent, OLC's 2011 memorandum simply cites to a series of cases in which courts concluded that a victim of uncharged conduct should not be afforded statutory protections. [101] Yet none of these cases - United States v. Turner, [102] Searcy v. Paletz, [103] or Searcy v. Skinner [104] - provide strong support for OLC's position. Turner is a particularly

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[91] See *42 U.S.C. § 10607*(c).

[92] Id. § 10607(c)(3)(A).

[93] Id. § 10607(c)(1)(A).

[94] Id. § 10607(c)(3)(A).

[95] Id. § 10607(c)(3)(C).

[96] Id. § 10607(c)(3)(G).

[97] Id. § 10607(e)(2).

[98] Attorney General Guidelines, supra note 52, at 7 (internal citations omitted); see also *42 U.S.C. § 10607*(b).

[99] *18 U.S.C. § 3771*(a)(5) (2012) (preserving "the reasonable right to confer with the attorney for the Government in the case").

[100] Id. § 3771(a)(8) (preserving "the right to be treated with fairness and with respect for the victim's dignity and privacy").

[101] OLC ***CVRA*** Rights Memo, supra note 2, at 6 n.6.

[102] *367 F. Supp. 2d 319 (E.D.N.Y. 2005).*

poor fit. Although OLC's memorandum characterizes Turner as excluding victims of uncharged conduct, [105] the magistrate judge adopted an inclusive reading of the statute precisely because of his reservations about the ***CVRA***'s legislative history and plain language. The judge suggested that "any person who self-identifies as [a victim]" could be presumed to qualify for protection under the ***CVRA*** as a preliminary matter. [106] In fact, the line quoted by the Department is lifted out of context. The full sentence reads: "While the offense charged against a defendant can **[*79]** serve as a basis for identifying a "crime victim' as defined in the ***CVRA***, the class of victims with statutory rights may well be broader." [107]

Paletz and Skinner similarly provide scant support for the Department's position. In Skinner, a prison inmate attempted to bring a pro se civil suit against another inmate for allegedly attacking him during incarceration. [108] In dismissing the suit in an unpublished decision, the district court recognized that the Government had expressly declined to bring charges against the other inmate and concluded that the ***CVRA*** did not create a "mechanism to bring an action against Defendant directly." [109] In Paletz, that same inmate brought a similar pro se claim against another inmate, the Federal Bureau of Prisons, the FBI, and the U.S. Attorney General. [110] In a parallel, unpublished decision, the district court dismissed the suit, noting that the ***CVRA*** is designed to give victims certain rights "within the prosecutorial process against a criminal defendant." [111]

Because Skinner and Paletz involve (apparently frivolous) civil suits, they say nothing about the ***CVRA***'s reach in criminal cases, and any language to that effect would be pure dicta. Moreover, the courts' terse analysis in both cases does not contain any substantive discussion of whether ***CVRA*** rights apply in criminal cases before the filing of charges. Instead, the courts simply cited to language from a Second Circuit decision that stated that the ***CVRA*** does not give victims any rights against defendants until those defendants have been convicted [112] - a holding clearly limited to restitution, as many other ***CVRA*** rights clearly apply before conviction. [113] Reviewing these two cases in an extended, published opinion, the U.S. District Court for the Southern District of Texas noted that reading these two decisions as standing for the proposition that charges must be filed for ***CVRA*** rights to attach "appears inconsistent with the ***CVRA*** recognition of certain subsection (a) rights that apply during investigation, before any charging instrument is filed." [114] As a result, OLC **[*80]** vastly overstates its position when it asserts

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[103] No. 6:07-1389-*GRA-WMC, 2007 WL 1875802* (D.S.C. June 27, 2007).

[104] No. 6:06-1418-*GRA-WMC, 2006 WL 1677177* (D.S.C. June 16, 2006).

[105] OLC ***CVRA*** Rights Memo, supra note 2, at 6 n.6.

[106] *Turner, 367 F. Supp. 2d at 327* ("Instead, I have taken and will continue to follow an inclusive approach: absent an affirmative reason to think otherwise, I will presume that any person whom the government asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in § 3771.").

[107] *Id. at 326.*

[108] Skinner, 2006 WL 1677177, at 1-2.

[109] Id. at 2.

[110] Searcy v. Paletz, No. 6:07-1389-GRA-WMC, 2007 WL 1875802, at 1-2 (D.S.C. June 27, 2007).

[111] Id. at 2.

[112] Id. ("However, "the ***CVRA*** does not grant victims any rights against individuals who have not been convicted of a crime.'" (quoting *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 564 (2d Cir. 2005))).*

[113] Of course, a defendant cannot be ordered to pay restitution as part of his sentence until he has been found guilty. See *18 U.S.C. § 3664* (2012) (describing sentencing procedures for ordering restitution).

[114] United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at 12 n.7 (S.D. Tex. Feb. 21, 2008).

that "most courts … have declined to extend enforceable rights under the ***CVRA*** to alleged victims of conduct that did not lead to criminal proceedings." [115] All the courts that have actually reached the issue have concluded exactly the opposite. [116]

B. OLC'S DISTORTION OF THE ***CVRA***'S STRUCTURE AND LEGISLATIVE HISTORY

The next section of OLC's memorandum maintains that the ***CVRA***'s structure and legislative history lead to the conclusion that the ***CVRA*** is "best understood" as extending rights after charges have been filed. Here again, OLC's analysis is truncated at best and misleading at worst.

OLC begins this part of its analysis by observing that some of the rights in the ***CVRA*** are limited to court proceedings. OLC notes, for example, that the ***CVRA*** gives victims the "right to reasonable, accurate, and timely notice of any public court proceeding … involving the crime." [117] But the fact that some of the rights listed in the ***CVRA*** apply to court proceedings hardly means that all of the rights are to be so restricted. The federal criminal justice process includes stages that are pre-charging, post-charging, and post-conviction. It would hardly be surprising to find that a statute that Congress intended to be "broad and encompassing" [118] covered events occurring after the filing of charges.

Indeed, OLC appears to recognize that at least three of the rights listed in the ***CVRA*** could easily apply before charges are filed: (1) the "right to be reasonably protected from the accused"; (2) the "reasonable right to confer with the attorney for the Government in the case"; and (3) the "right to be treated with fairness and with respect for the victim's dignity and privacy." [119] None of these rights explicitly refer to court "proceedings" or other events (such as parole hearings) that necessarily occur after the filing of formal charges. [120]

[*81] For purposes of this Article, it is appropriate to focus on the last two of these three rights: the right to confer and the right to fair treatment. The first of these three rights - the right to be reasonably protected - is already clearly extended by another statute to crime victims before the filing of charges. While OLC does not acknowledge this fact, the VRRA extends the first right to crime victims, directing that a "responsible official shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender." [121] Because a "suspected" offender obviously exists before the filing of criminal charges, the VRRA envisions the right to protection being provided as soon as is practical after a victim suffers from the commission of a crime. Additionally, the sections of the Attorney General Guidelines for Victim and Witness Assistance addressing the VRRA direct that Justice Department components must provide reasonable protection even before the filing of criminal charges. [122] So, under the VRRA, the Justice Department should

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[115] OLC ***CVRA*** Rights Memo, supra note 2, at 5-6. Notably, the Department does not embrace the language from Huff found within the Skinner and Paletz decisions because presumably such an approach would be contrary to many of the rights found in the ***CVRA***.

[116] See infra Part I.C.

[117] OLC ***CVRA*** Rights Memo, supra note 2, at 6 (emphasis added) (quoting *18 U.S.C. § 3771*(a)(2)).

[118] 150 Cong. Rec. 7295 (2004) (statement of Sen. Dianne Feinstein).

[119] OLC ***CVRA*** Rights Memo, supra note 2, at 7-8, 10 (quoting *18 U.S.C. § 3771*(a)(1), (5), (8)).

[120] OLC appears to have overlooked another right that could well apply before charges are filed: the right to be notified of one's rights under the ***CVRA***. See *18 U.S.C. § 3771*(c)(1) (requiring prosecutors to "make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the ***CVRA***]"); *United States v. Rubin, 558 F. Supp. 2d 411, 428 (E.D.N.Y. 2008)* (discussing potential application of the right to notification of rights before charges are filed). For purposes of this Article, it is not necessary to explore this right in detail. If other ***CVRA*** rights apply before charges are filed, a fortiori this right does as well. If a victim has a right, presumably the victim should be notified of the existence of that right.

[121] *42 U.S.C. § 10607*(c)(2) (2006) (emphasis added).

[122] See Attorney General Guidelines, supra note 52, at 7-8, 26-28.

HOUSE_OVERSIGHT_017618

already be providing reasonable protection for a victim before an offender is indicted, regardless of how the ***CVRA*** is interpreted. [123]

The VRRA, however, does not contain a right to confer and a right to fair treatment and respect for the victim's dignity. Therefore, if victims are going to receive these statutory rights before trial, these rights must be found in the ***CVRA***. With regard to the ***CVRA*** provision that victims have the "reasonable right to confer with the attorney for the Government in the case," [124] OLC contends that "the phrase "in the case' implies the pendency of a judicial proceeding." [125] To bolster its conclusion, OLC then cites Black's Law Dictionary, which includes among its several definitions of the word "case" the definition "a civil or criminal proceeding." [126] But OLC does not acknowledge that Black's Law Dictionary also defines and exemplifies a "case" more broadly as a "criminal investigation <the **[*82]** Manson case>." [127] Thus, Black's Law Dictionary does not help resolve the dispute as to which of the two meanings should be used, as there are clearly differing meanings. While OLC's reading may be a permissible one, so is a pro-victim reading.

OLC also turns to the ***CVRA***'s legislative history to bolster its conclusion. But, here again, its analysis is misleading. OLC relies on a passage from Senate floor colloquy between Senators Jon Kyl and Dianne Feinstein regarding the ***CVRA***'s scope. In OLC's recounting of the legislative history, the floor statements "emphasize that the right to confer relates to the conduct of criminal proceedings after the filing of charges." [128] For instance, OLC quotes Senator Kyl stating that "under this provision, victims are able to confer with the Government's attorney about proceedings after charging." [129]

This is a truncated and deceptive description of the legislative history, so much so that Senator Kyl sent an angry letter to Attorney General Eric Holder complaining about the distortion. On June 6, 2011, the Senator wrote to "express [his] surprise that [OLC is] so clearly quoting [his] remarks out of context." [130] Senator Kyl then went on to observe that the colloquy began by noting that the right to confer "is intended to be expansive." [131] The Senator further discussed various "examples" of when the right to confer applied, including "any critical stage or disposition of the case. The right, however, is not limited to these examples." [132] It was against that backdrop that Senator Kyl gave the example of conferring about proceedings "after charging."

In his letter to Attorney General Holder, Senator Kyl also noted that he had:

made clear that crime victims had rights under the ***CVRA*** even before an indictment is filed. For example, … I made clear that crime victims had a right to consult about both "the case' and "case proceedings' - i.e., both about how the case was being handled before being filed in court and then later how the case was being handled in court "proceedings.' [133]

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[123] Exactly what "reasonable protection" means, however, remains uncertain. See generally Mary Margaret Giannini, Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused, *78 Tenn. L. Rev. 47 (2010)* (suggesting the right has not been adequately defined and proposing ways to do so).

[124] *18 U.S.C. § 3771*(a)(5).

[125] OLC ***CVRA*** Rights Memo, supra note 2, at 8.

[126] Id. (citing Black's Law Dictionary, supra note 59, at 243).

[127] Black's Law Dictionary, supra note 59, at 244.

[128] OLC ***CVRA*** Rights Memo, supra note 2, at 9.

[129] Id. (emphasis added) (quoting 150 Cong. Rec. 7302 (2004) (statement of Sen. Jon Kyl) (internal quotation marks and citation omitted).

[130] Letter from Jon Kyl, supra note 3.

[131] Id. (quoting 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein)).

[132] Id.

[133] Id.

Senator Kyl further commented that he had discussed the ***CVRA***'s potential application in grand jury proceedings, an application that required the Act **[*83]** to extend rights before indictment. [134] Thus, if anything, the legislative history does not support OLC's conclusion - it contradicts it. [135]

OLC should have had no doubt as to the intent of Senator Kyl and his cosponsors at the time of the Act's passage. Shortly after shepherding the ***CVRA*** through the Congress, Senator Kyl cowrote a law review article about the Act. [136] In that article, he directly indicated that the ***CVRA*** applies before charges are filed. Senator Kyl and his coauthors wrote:

While most of the rights guaranteed by the ***CVRA*** apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim's dignity and privacy each may arise without regard to the existence of legal proceedings. [137]

Remarkably, OLC cited Senator Kyl's law review article (in a footnote), but then concluded without explanation that the ***CVRA*** cosponsor's views were for some reason different than Congress's. [138]

OLC also appears to acknowledge that its interpretation of the ***CVRA*** could well contradict what it describes as prosecutorial "good practice." [139] OLC noted that some Justice Department components (for example, the Environmental and Natural Resources Division) had advocated that the right to confer should apply during pre-charging plea discussions. [140] OLC then acknowledged that limiting the right to confer until after formal charging could "reduce the impact of a victim's participation in subsequent court proceedings." [141] OLC attempted to dodge this problem by explaining: "The question before us, though, is not whether it would be advisable as a matter of good practice … for Government attorneys to confer with victims pre-charge when appropriate … ." [142] OLC then explained that even under its narrow interpretation of the statute, "the ***CVRA*** would still ensure that **[*84]** the victim has an opportunity to be heard by the court, and by the Government, before the court accepts the plea." [143]

But OLC failed to recognize that its interpretation of the ***CVRA*** rendered the right to be heard a nullity in many important cases - including, notably, the Epstein case. [144] Where prosecutors and defense attorneys work out a nonprosecution agreement that agreement will never be presented to a court for review. Thus, in cases where the need for victim participation may be the greatest - that is, in cases where the Government is considering never filing any charges - OLC's interpretation would bar victims from having any rights at all.

Even in situations where a prosecutor works out a plea agreement, OLC's interpretation is problematic. As OLC recognizes, prosecutors and defense counsel commonly work out pre-indictment plea agreements (particularly in white-collar cases), under

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[134] Id.

[135] Attorney General Holder never sent a response to Senator Kyl's letter. But Assistant Attorney General Ronald Weich sent a belated response. Letter from Ronald Weich, Assistant Att'y Gen., to Jon Kyl, U.S. Sen. (Nov. 3, 2011) (on file with authors). That response did not address Senator Kyl's concern that his remarks were being quoted out of context.

[136] See generally Kyl et al., supra note 19.

[137] Id. at 594.

[138] OLC ***CVRA*** Rights Memo, supra note 2, at 8 n.7.

[139] Id. at 10.

[140] Id. at 9 (citations omitted) (discussing an interdepartmental memorandum addressing this question).

[141] Id. at 10.

[142] Id.

[143] Id.

[144] The OLC opinion was publicly released on May 20, 2011. Perhaps not coincidentally, this release date was shortly before the Government filed its response in the Epstein case.

which a defendant will plead guilty to certain charges. [145] Then, the parties jointly present to the district court a criminal "information" (that is, a recitation of the charges drafted by the prosecutor but never presented to the grand jury [146]) and a plea agreement, asking the court to file the criminal information and simultaneously accept the guilty plea. As the OLC memorandum acknowledges, a crime victim would have the right to object to the plea agreement, because the ***CVRA*** gives crime victims the "right to be reasonably heard" at any public proceedings involving a plea. [147] But under OLC's interpretation of the ***CVRA***, a crime victim has no right to notice of court hearings until the charges are filed. Thus, if the information and plea are filed simultaneously, as is often the case, two scenarios are possible. A victim could have no prior right to notice of the proceeding at which the plea was being accepted, or alternatively (if the act of filing the information in the course of accepting a plea triggers a notification right), the district court would be required to stop in the middle of proceedings and ensure that notification was belatedly provided. Of course, these difficulties are all avoided if the right to confer is properly construed as attaching before charges are filed, such as during plea negotiations between prosecutors and defense attorneys.

[*85] More importantly, extending the right in this fashion will not be unduly burdensome for federal prosecutors. After the OLC memorandum was made public, the Department amended the Attorney General Guidelines for Victim and Witness Assistance to require prosecutors to make reasonable efforts toward a goal of providing victims with a meaningful opportunity to offer their views before plea agreements are formally reached. [148] "In circumstances where plea negotiations occur before a case has been brought, Department policy is that this should include reasonable consultation prior to the filing of a charging instrument with the court." [149] Thus, Department policy already extends pre-charging rights to victims. The ***CVRA*** should be understood as having the same scope.

OLC also notes that the ***CVRA*** right "to be treated with fairness and with respect for the victim's dignity and privacy" is a right that could apply before charges are filed. [150] Indeed, OLC is forced to concede (as district courts have recognized) that the "right to be treated with fairness and with respect for the victim's dignity and privacy may apply with great force during an investigation, before any charging instrument has been filed." [151]

OLC nonetheless maintains that the right to fairness only applies after charges have been filed. OLC relies on the canon of statutory construction noscitur a sociis, meaning that words are known by their companions, [152] for its interpretation of the ***CVRA***. OLC argues that because the other seven enumerated rights are limited to post-charging situations, the eighth right should be as well. Of course, this argument assumes that OLC's construction of the other seven rights is correct - a point very much in dispute. [153] If, for example, the right to confer applies before charges are filed, then presumably noscitur a sociis would cut the other way - the right to fairness should likewise be construed as applying before charges are filed.

Moreover, OLC omits from its discussion of the fairness provision any assessment of the ***CVRA***'s purposes. In construing a statute, a court must consider the "purpose and context" of the statute. [154] In describing the fairness provision, Senator Kyl

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[145] See OLC ***CVRA*** Rights Memo, supra note 2, at 9 (acknowledging the potential effect of the ***CVRA*** on plea negotiations).

[146] See *Fed. R. Crim. P. 7(b)*.

[147] *18 U.S.C. § 3771*(a)(4) (2012); OLC ***CVRA*** Rights Memo, supra note 2, at 6-7.

[148] Attorney General Guidelines, supra note 52, at 41-42.

[149] Id. at 41.

[150] OLC ***CVRA*** Rights Memo, supra note 2, at 10 (quoting *18 U.S.C. § 3771*(a)(8)).

[151] Id. (quoting United States v. BP Products North America Inc., No. H-07-434, 2008 WL 501321, at 11 (S.D. Tex. Feb. 21, 2008) (internal quotation marks omitted)).

[152] Id. at 11.

[153] See supra Part III.A.

[154] *Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1331 (2011).*

emphasized that it conferred a "broad" **[*86]** right. [155] The reason for adopting such a broad right was that "too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in the executive or judiciary branch, to treat victims of crime with the respect they deserve." [156] OLC's failure to consider the purposes underlying the ***CVRA*** is a glaring oversight.

OLC never attempts to explain why the ***CVRA***'s drafters would want victims to have a right to fair treatment once criminal charges were filed but possess no such right before the filing of criminal charges. Clearly, many victims can and do suffer secondary victimization during criminal investigations, such as when sexual assault victims are treated inappropriately by law enforcement agents. [157] It would contradict the purpose of preventing victim mistreatment in the criminal justice system to artificially limit the right to fairness to the point at which charges are filed. The right to fairness logically applies at all stages of the criminal justice process.

C. OLC'S INEFFECTIVE RESPONSE TO THE ***CVRA***'S COVERAGE AND VENUE PROVISIONS

At the end of its memorandum, OLC finally discusses what it identifies as the two strongest arguments for construing the ***CVRA*** as applying before charging: the coverage provision and the venue provision. OLC acknowledges, as it must, that the ***CVRA***'s coverage extends to any federal employee engaged in "the detection, investigation or prosecution of crime." [158] Such employees "shall make their best efforts to see that crime victims are notified of, and accorded, the rights" afforded by the statute. [159] Notably, this duty applies to individuals not just in the Justice Department (where all federal prosecutors are located) but other agencies as well, such **[*87]** as environmental crimes investigators in the Environmental Protection Agency (EPA). [160]

This coverage provision would seem to answer any lingering question about whether the ***CVRA*** applies before charging. In directing that federal employees engaged in the "detection" and "investigation" of crime must respect victims' rights, Congress wanted broad rights extending beyond just the prosecution of a case. As the district court concluded in the Epstein case, this provision "surely contemplates pre-charge application of the ***CVRA***." [161]

OLC gamely maintains, however, that Congress was simply trying to provide that federal law enforcement agents should provide rights to victims when a criminal case moves to its prosecution phase. OLC noted the uncontroversial point that law enforcement agents "often develop a relationship of trust with crime victims during the investigation that continues as they assist crime victims in negotiating active criminal proceedings." [162] OLC then asserted:

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[155] 150 Cong. Rec. 7303 (2004) (statement of Sen. Jon Kyl).

[156] Id.

[157] See Susan Estrich, Real Rape 50-51 (1987) (describing how a rape victim's sexual history may be used against her in court proceedings); Beloof, supra note 38, at 309-10 (collecting examples of victims' issues that arise during the investigative process); see also *President's Task Force on Victims of Crime, Final Report, supra* note 10, at 57-62 (making recommendations for how police should treat victims during the criminal justice process).

[158] OLC ***CVRA*** Rights Memo, supra note 2, at 15 (quoting *18 U.S.C. § 3771*(c)(1) (2012)) (internal quotation marks omitted).

[159] *18 U.S.C. § 3771*(c)(1).

[160] See Kyl et al., supra note 136, at 615 ("Notice should be given to the fact that it applies not just to the Department of Justice, but to all "departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime.'" (citation omitted)).

[161] *Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011).*

[162] OLC ***CVRA*** Rights Memo, supra note 2, at 15.

HOUSE_OVERSIGHT_017622

Given this continuing active role that agents typically play during criminal prosecutions, we find the fact that the ***CVRA*** assigns responsibility to them, together with the attorney for the Government, to … accord them their rights under the ***CVRA*** to be entirely consistent with our conclusion that those rights arise only once the Government has initiated criminal proceedings. [163]

But OLC's contorted position never explains why Congress found it necessary to break out three separate phases of the criminal justice process: the "detection," "investigation," and "prosecution" of crime. If the congressional intent was simply to cover, for example, FBI agents or EPA agents during the post-charging phase of a case, it could have simply omitted those words from the ***CVRA***. An FBI agent, for example, would be engaged in the "prosecution" of the case when assisting the victim after the formal filing of charges. On OLC's reading of the statute, the words "detection" and "investigation" become meaningless, contrary to the well-known canon of construction verba cum effectu sunt accipienda, which means that, if possible, every word and every provision is to be given effect. [164]

OLC also suggests that the "most significant" argument supporting pre-charging application of rights is the venue provision, which allows **[*88]** crime victims to assert ***CVRA*** rights "in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." [165] The Department contends that this language refers quite narrowly to the "period of time between the filing of a complaint and the initiation of formal charges." [166] In support of its position, the Department cites a Fourth Circuit case interpreting the ***Sixth Amendment*** right to counsel, which held that a "prosecution" for purposes of that ***Amendment*** does not begin when a criminal complaint is filed. [167] In OLC's view, the venue provision's direction that victims should assert rights when "no prosecution is underway" applies only to the limited time between when the Government files a complaint against a defendant and some later point when the "prosecution" actually begins. OLC notes that the filing of a complaint triggers an initial appearance, where crime victims can have important interests at stake, such as the right to be heard about a defendant's release on bail. OLC believes it is only to such post-complaint, yet pre-indictment, proceedings (i.e., the initial appearance) that the venue provision's "no-prosecution-underway" language covers.

As a preliminary matter, OLC's interpretation of the word "prosecution" in the Department's narrow construction of the venue provision is a twisted one, at odds with the way that term is conventionally used. The filing of a complaint is typically viewed as the start of a criminal prosecution. For example, the leading criminal procedure hornbook states that "with the filing of the complaint, the arrestee officially becomes a "defendant' in a criminal prosecution." [168]

Moreover, having specifically rejected the filing of the criminal complaint as the starting point for a "prosecution" within the ***CVRA***'s venue provision, OLC refuses to consider the implications of its alterative starting point: the formal filing of an indictment. OLC states that "a prosecution of a felony must commence with the return of an indictment by a grand jury," citing the Federal Rules of Criminal Procedure. [169] Yet OLC does not pause to recognize that, while felonies proceed by way of indictment, misdemeanors can proceed not only by indictment but also by complaint. [170] The ***CVRA*** draws no distinction between misdemeanor and **[*89]** felony offenses, broadly extending its protections to victims of any federal offense. [171] Thus, under OLC's interpretation that the filing of a complaint does not trigger the ***CVRA***, many victims who are entitled to

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[163] Id.

[164] See, e.g., *Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).*

[165] OLC ***CVRA*** Rights Memo, supra note 2, at 14 (quoting *18 U.S.C. § 3771*(d)(3) (2012)).

[166] Id.

[167] Id. (citing *United States v. Alvarado, 440 F.3d 191, 200 (4th Cir. 2006)).*

[168] Wayne R. LaFave et al., Criminal Procedure § 1.2(g), at 11 (5th ed. 2009) (emphasis added).

[169] OLC ***CVRA*** Rights Memo, supra note 2, at 14 (citing *Fed. R. Crim. P. 7(a)(1)*).

[170] *Fed. R. Crim. P. 58(b)(1)* ("The trial of a misdemeanor may proceed on an indictment, information, or complaint." (emphasis added)).

[171] See *18 U.S.C. § 3771*(e) (2012).

HOUSE_OVERSIGHT_017623

CVRA protections - i.e., victims of misdemeanor offenses prosecuted by way of complaint - will never have proper venue to assert those rights because, according to OLC's strained argument, no prosecution ever started in their cases.

Even limiting the focus to felony cases, OLC misleadingly describes the ***Sixth Amendment*** case law. It is not immediately clear why one would look to the right to counsel to determine the breadth of the term "prosecution" in the ***Sixth Amendment***. The right to counsel is not the only right found in that ***Amendment***. The ***Amendment*** also extends, for example, a right to a speedy trial in all criminal "prosecutions." [172] The case law on the speedy trial right makes clear that the right "may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge." [173]

In any event, the right to counsel cases are quite clear in providing that a ***Sixth Amendment*** "prosecution" can (and often does) begin well before an indictment. [174] The Supreme Court has directly held that the ***Sixth Amendment***'s right to counsel attaches "at or after the time that judicial proceedings have been initiated against [a person] - "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" [175] Thus, under this controlling precedent, some earlier point in time before indictment is the triggering point of a ***Sixth Amendment*** "prosecution."

The cases that OLC cites are not to the contrary. It is true that some federal appeals courts have stated that the mere filing of a criminal complaint does not trigger a ***Sixth Amendment*** right to counsel. [176] But there is a split of authority on this question, as OLC acknowledges in a footnote. [177] More importantly for purposes of this Article, the cases holding **[*90]** that the mere filing of a complaint does not start a ***Sixth Amendment*** prosecution also make clear that a later court hearing would start such a prosecution. For instance, in the Fourth Circuit case cited by OLC, United States v. Alvarado, the court reasons that "the main reason a law enforcement officer files [] a complaint is to establish probable cause for an arrest warrant. The criminal process is still in the investigative stage, and the adverse positions of government and defendant have yet to solidify." [178] Relying on that reasoning, the Fourth Circuit refused to find that the right to counsel had attached merely because a police officer had filed a complaint to get an arrest warrant. But the Fourth Circuit distinguished that situation from "the initiation of adversary judicial proceedings against the defendant." [179] An initial appearance would be such an adversary proceeding - i.e., it would be a "prosecution" under the ***Sixth Amendment***. In light of this, OLC's position that the ***CVRA***'s venue provision's "no-prosecution-underway" reference covers proceedings, such as an initial appearance, does not work.

The only sensible way to construe the ***CVRA***'s venue provision is to read it as conveniently dividing criminal cases into two phases: a prosecution phase and an earlier investigative phase when "no prosecution is under way." [180] Senator Kyl, for

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[172] ***U.S. Const. amend. VI.***

[173] *United States v. Gouveia, 467 U.S. 180, 190 (1984)* (quoting *United States v. MacDonald, 456 U.S. 1, 6-7 (1982))* (internal quotation marks omitted).

[174] See, e.g., *Texas v. Cobb, 532 U.S. 162, 172-73 (2001).*

[175] *Brewer v. Williams, 430 U.S. 387, 398 (1977)* (quoting *Kirby v. Illinois, 406 U.S. 682, 689 (1972)).*

[176] See, e.g., *United States v. Alvarado, 440 F.3d 191, 196 (4th Cir. 2006).*

[177] OLC ***CVRA*** Rights Memo, supra note 2, at 14 n.15 (citing *Hanrahan v. United States, 348 F.2d 363, 366 n.6 (D.C. Cir. 1965));* see Wayne R. LaFave et al., Criminal Procedure § 6.4(e), at 670 (3d ed. 2007) ("There is an apparent split of authority on the question of whether the filing of a complaint is alone enough to give rise to a ***Sixth Amendment*** right to counsel, though the difference probably is explainable by the fact that this document is used for multiple purposes."); see also *Felder v. McCotter, 765 F.2d 1245, 1248 (5th Cir. 1985)* (citing Texas law).

[178] *Alvarado, 440 F.3d at 200* (citations omitted) (internal quotation marks omitted).

[179] Id. (quoting *United States v. Gouveia, 467 U.S. 180, 187 (1984)).*

[180] *18 U.S.C. § 3771*(d)(3) (2012).

instance, has noted that if there are any doubts about how to construe the ***CVRA***, this venue provision "sweeps them away." [181] Once again, the language that Congress used leads inexorably to the conclusion that the ***CVRA*** extends rights to victims before the filing of criminal charges.

IV. When Pre-charging Rights Attach Under the ***CVRA***

The zeal with which OLC argues against applying ***CVRA*** rights before charging raises the question of why it protests so much. Although OLC never articulated this concern, perhaps OLC worried that pre-charging rights would be difficult to administer. Such concerns should evaporate with a workable construction of when pre-charging rights attach. In this Part, we propose such a construction, suggesting that ***CVRA*** rights should attach when substantial evidence exists that a specific person has been directly and proximately harmed as the result of a federal crime. This approach appears to already be the method that the Department is taking, as **[*91]** it has extended many rights to victims before the formal filing of criminal charges as a matter of internal policy. [182] This approach appears to be workable, as a number of states extend rights to victims during the investigative process. [183]

A. A TEST FOR DETERMINING WHEN RIGHTS ATTACH

As explained in the earlier Parts of this Article, the ***CVRA*** clearly envisions that crime victims would have rights in the criminal justice process before the return of indictments or the filing of criminal complaints. The question then as to how much earlier in the process crime victims have rights naturally arises. Does the ***CVRA*** apply one second after a federal crime has been committed? Or does it apply at some later point during an investigation?

This issue was nicely framed by the U.S. District Court for the Eastern District of New York in a securities fraud case. In the first indictment underlying the case, the charged crime did not include various victims. A later superseding indictment broadened the charges to include those missing individuals. When they brought a suit under the ***CVRA***, the court noted that "quite understandably, movants perceive their victimization as having begun long before the government got around to filing the superseding indictment." [184] The court, however, explained that there must be "logical limits" to crime victims' rights before the filing of charges. [185] The court noted:

For example, the realm of cases in which the ***CVRA*** might apply despite no prosecution being "underway,' cannot be read to include the victims of uncharged crimes that the government has not even contemplated. It is impossible to expect the government, much less a court, to notify crime victims of their rights if the government has not verified to at least an elementary degree that a crime has actually taken place, given that a corresponding investigation is at a nascent or theoretical stage. [186]

The logical limits that the ***CVRA*** envisions could come from how the Justice Department interacts with criminals during the investigation of a crime. Crime victims' rights advocates are fond of saying that victims "only want to be treated like criminals" - that is, they simply want to have the same kinds of rights as criminals receive, such as the right to be notified **[*92]** of court hearings and to attend those hearings. [187] So it is instructive to notice that the Justice Department policy is to extend certain rights to suspected criminals during certain points in the investigative process. That policy might provide guidance on when crime victims' rights would attach.

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[181] Kyl et al., supra note 19, at 594.

[182] See, e.g., Attorney General Guidelines, supra note 52, at 41-42 (discussing the right to confer regarding plea bargains).

[183] See infra Part III.D.

[184] *United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).*

[185] Id.

[186] Id.

[187] See, e.g., Cassell, supra note 15, at 1376-85 (describing the rationale underpinning state victims' rights statutes).

Of particular interest here is the Department's policy for grand jury subpoenas issued to a "target" of a criminal investigation. When such a target is subpoenaed to testify before a grand jury, the Department of Justice will advise that target of his rights, such as the right to refuse to answer any question that might be incriminating. [188] The Department of Justice defines a "target" of a criminal investigation as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." [189]

If the Department's investigation has coalesced sufficiently so that it can provide notice of rights to putative defendants, it should likewise be in a position to provide notice of rights to that defendant's victims. Combining the Department's definition of "target" with the ***CVRA***'s coverage and definition-of-victim provisions produces a formulation whereby ***CVRA*** rights attach in (at least) the following circumstances:

CVRA rights attach when an officer or employee of the Department of Justice or any other department or agency of the United States engaged in the detection, investigation, or prosecution of crime has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia, and in the judgment of the officer or employee, that person is a putative victim of that offense.

This formulation borrows from the ***CVRA***'s coverage provision [190] to define the relevant universe of substantial evidence as that in the possession of the Justice Department or other federal agencies. For instance, if state law enforcement officers are investigating a bank robbery, the fact that the robbery might also be prosecuted federally [191] does not make the teller at the bank a federal "victim" of the crime until evidence regarding the crime comes into the possession of a federal agency. The formulation also tracks the ***CVRA***'s definition of "victim" in limiting the universe of potential **[*93]** victims to those who have been "directly and proximately harmed." [192] Finally, the formulation requires some federal officer or employee to evaluate the evidence and reach the conclusion that a federal offense has been committed that harmed the person in question. This determination responds to the observation by the District Court for the Eastern District of New York that the ***CVRA*** "cannot be read to include the victims of uncharged crimes that the government has not even contemplated." [193] At the same time, such a formulation obviously does not require the filing of formal criminal charges, or even the preparation of formal criminal charges. Instead, all that is required is for the Department to recognize that a person is a putative victim of a federal offense, just as all that is required for the mailing of a target letter to a subpoenaed suspected criminal, is recognition that he is a putative defendant in a federal case.

B. APPLYING THE TEST TO THE EPSTEIN CASE

To illustrate how the test would operate, it is useful to examine the facts of the Epstein case. Applying the proposed test to that case produces straightforward answers, which suggests that the test would be workable in practice.

From 2001 to 2007, Jeffrey Epstein sexually abused more than thirty minor girls in his mansion, including Jane Doe Number One and Jane Doe Number Two. [194] Initially, of course, his acts of abuse were secret, unknown to law enforcement. During that period of time, the victims would not have had rights under the ***CVRA***.

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[188] Criminal Resource Manual, supra note 87, § 9-11.151.

[189] Id.

[190] *18 U.S.C. § 3771*(e) (2012).

[191] Id. § 2113.

[192] See id. § 3771(e).

[193] *United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).*

[194] As above, see supra notes 34-41 and accompanying text, this part of the Article draws on the factual allegations made by the victims in this case - allegations that Epstein has not intervened to dispute. See Jane Doe Motion, supra note 40, at 3-23.

HOUSE_OVERSIGHT_017626

In 2006, Epstein's acts of abuse came to the attention of the Palm Beach Police Department, which began investigating the case. [195] At this point, once again, the victims would not have had rights under the proposed ***CVRA*** test. The ***CVRA*** extends rights in the federal criminal justice process. A state investigation does not trigger the ***CVRA*** (although it may trigger certain state law protections, as discussed below). [196]

At some point in 2006, the Palm Beach Police Department asked the FBI to investigate Epstein on federal sex offenses, such as using a means of **[*94]** interstate communication in connection with sex offenses and traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with minors. [197] The local police provided the FBI with information, which the FBI then investigated. Following an investigation, the FBI determined that the allegations of abuse against Epstein were credible, and it presented the case to the U.S. Attorney's Office for the Southern District of Florida. In 2007, the Office contacted counsel for Jeffrey Epstein and began negotiating a resolution of the case against him. [198]

Under our proposed test, the victims would not have had ***CVRA*** rights the first moment that the FBI became aware of Epstein's possible commission of sex offenses. But after the FBI developed substantial evidence of those sex offenses, identified victims of those offenses, and presented the case to the appropriate U.S. Attorney's Office for prosecution, ***CVRA*** rights would have attached. Accordingly, the FBI would have been required to notify the identified victims of their rights under the ***CVRA*** (as well as under the VRRA). From that point forward in the case, the victims would have had ***CVRA*** rights, such as the right to fair treatment and the right to confer with prosecutors. In this case, the victims would have had the right to confer with prosecutors about the nonprosecution agreement that they ultimately reached with Epstein. [199]

C. CURRENT DEPARTMENT POLICY ON PRE-CHARGING RIGHTS

One objection that might be made to the formulation offered above is that it might unduly burden federal law enforcement officers and prosecutors, who would need to make judgment calls about when an investigation has coalesced to the point where "victims" are in existence, "substantial evidence" has been collected, and notice of rights has to be provided. Any such objection would be ill-founded, though, as it does not appear that implementing such an approach would be difficult. [200] Presumably the Justice Department has already been providing such rights in at least Texas, Louisiana, and Mississippi to comply with the Fifth **[*95]** Circuit's 2008 ruling in In Re Dean, which held that the ***CVRA*** extends rights to victims before defendants are charged. [201] We have not seen any reports that providing the rights has been difficult.

Perhaps the reason for the lack of any reported difficulty is that the Department's current policy on crime victims' rights already requires notices to victims during investigations. The Justice Department has promulgated the Attorney General Guidelines for Victim and Witness Assistance, the latest edition of which is from May 2012. The Guidelines discuss crime victims' rights under both the ***CVRA*** and the earlier VRRA. Because of the OLC memorandum discussed above, the Guidelines limit ***CVRA***

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[195] See Probable Cause Affidavit, Palm Beach Police Department: Police Case No. 05-368(1) (May 1, 2006), available at *http://goo.gl/fAPFw5*; see also Statement of Undisputed Facts, Epstein v. Rothstein, No. 50 2009 CA 040800XXXXMBAG (Fla. Cir. Ct. Sept. 22, 2010), available at *http://goo.gl/DzMbe8*.

[196] See supra notes 178-95 and accompanying text as well as infra Part IV.D.

[197] See *18 U.S.C.§§2422*(b), 2423(b), (e) (2012).

[198] A more substantial summary of the case is available in case filings. See Jane Doe Motion, supra note 40.

[199] See supra Part II.

[200] This Article does not discuss mass victim cases in which notice needs to be provided to hundreds of victims. But in such situations, the ***CVRA*** already provides for "reasonable" alternative procedures. *18 U.S.C. § 3771*(d)(2) (2012). The Department of Justice, for example, has used websites to provide notice in terrorism cases to large numbers of victims. See, e.g., United States v. Ingrassia, No. CR-04-0455ADSJO, 2005 WL 2875220, at 4 (E.D.N.Y. Sept. 7, 2005); Criminal Division's Victim Notification Program, U.S. Dep't of Justice, *http://goo.gl/6H6IEk* (last visited Dec. 4, 2013).

[201] *527 F.3d 391 (5th Cir. 2008).*

rights until after the time "when criminal proceedings are initiated by complaint, information, or indictment." [202] The Department, however, provides hortatory guidance that Justice Department employees shall make "best efforts" to notify crime victims about their ***CVRA*** rights "as early in the criminal justice process as is feasible and appropriate." [203]

Of greater interest, however, is the Department's mandatory policy regarding notification regarding crime victim services under the VRRA. The Guidelines explain how "Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken without interfering in the investigation." [204] The Guidelines then direct the appropriate "responsible official" to provide crime victims with "information about services available to them." [205] This information must be provided at "the earliest opportunity after detection of a crime at which it may be done without interfering with an investigation." [206]

The Department appears to have little difficulty implementing this requirement. Evidence of this fact comes from the Justice Department itself, which responded to the letter from Senator Kyl discussed earlier questioning why the Department was not applying the ***CVRA*** before charges were filed. [207] In its response, the Department noted that OLC had issued an opinion that the ***CVRA*** did not extend rights before the formal filing of charges. [208] "Even so," the Department explained, "the new AG Guidelines go further and provide that Department prosecutors should make **[*96]** reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations, even prior to the filing of a charging instrument with the court." [209]

The Department also noted that it provided extensive pre-charging notifications to victims under the VRRA:

Pursuant to the Victims' Rights and Restitution Act of 1990 (VRRA), the Department identifies victims and provides to them service referrals, reasonable protection, notice concerning the status of the investigation, and information about the criminal justice process prior to the filing of any charges. The Department's investigative agencies provide such services to thousands of victims every year, whether or not the investigation results in a federal prosecution. [210]

Quantifying the scope of this undertaking with regard to one federal investigative agency, the Department explained:

The [FBI] alone reports that it provided more than 190,000 services to victims during the past fiscal year [FY 2011], including case status updates, assistance with compensation applications and referrals, and counseling referrals. From sexual assaults in Indian Country to child pornography and human trafficking to mass violence and overseas terrorism, FBI victim specialists provide much-needed immediate and ongoing support and information to victims. The FBI addresses victim safety issues when needed, providing on-scene response and crisis intervention services in thousands of investigations. With regard to sexual assault victims, FBI personnel arrange for and often accompany victims to forensic sexual assault medical examinations and provide assistance with HIV/STD testing. [211]

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[202] Attorney General Guidelines, supra note 52, at 8.

[203] Id. at 35.

[204] Id. at 26 (citing *42 U.S.C. § 10607*(b) (2006)).

[205] Id. at 29 (citing *42 U.S.C. § 10607*(b)(2)). Elsewhere, the Guidelines define the official who is responsible as the appropriate federal law enforcement officer during the investigation of the crime or the U.S. Attorney once charges have been filed. Id. at 25-26.

[206] Id. at 29.

[207] See supra notes 130-33 and accompanying text.

[208] Letter from Ronald Weich, supra note 135, at 2.

[209] Id.

[210] Id. at 2-3.

[211] Id. at 3.

In view of the Department's existing notifications and provision of services before charges are filed under the VRRA, it is hard to conceive how any viable claim could be made that it would be difficult to provide similar rights under the ***CVRA***. The four rights that would be potentially in play before charging would be the right to reasonable protection, the right to fair treatment, and the right to confer with prosecutors, along with the predicate right to notice of these rights. [212] The VRRA already requires the Department to provide reasonable protection, so this would not be an expanded obligation. [213] Similarly, the Guidelines already require prosecutors to confer with victims about plea agreements (the most common situation where victims want to confer), so it is hard to imagine how extending this right would create any undue burden. [214] Additionally, the right to "fair treatment" could only be a problem if the Department **[*97]** wanted to treat victims unfairly. Given its repeated and professed commitment to crime victims, here too this obligation should not be burdensome. And finally, with regard to providing notice of ***CVRA*** rights to victims, the fact that the Department currently provides notice of VRRA rights indicates that it should not be difficult to provide notice of ***CVRA*** rights as well.

Indeed, it is possible that the Department's notification letters under the VRRA already include this information. Interestingly, in the Epstein case, the FBI notified Jane Doe Number One and Jane Doe Number Two that they had rights in the criminal justice process. As early as June 7, 2007 - more than three months before it concluded a nonprosecution agreement with Epstein - the U.S. Attorney's Office sent a notice to Jane Doe Number One stating "your case is under investigation." [215] The notice also informed Jane Doe Number One that "as a victim and/or witness of a federal offense, you have a number of rights." [216] Among the rights that the U.S. Attorney's Office told Jane Doe that she possessed was "the reasonable right to confer with the attorney for the United States in the case." [217] Of course, she would not have had those rights if she was not covered by the ***CVRA***. The FBI therefore apparently assumed that the ***CVRA*** already applied in the Epstein case. It was only later, when the matter went into litigation, that the Department of Justice reversed course. This change in course underscores the problems arising out of the OLC memorandum and the Department's current interpretation of the ***CVRA***.

D. STATE LAW EXTENSION OF PRE-CHARGING RIGHTS

The focus of this Article so far has been crime victims' rights in the federal system. But in concluding, it is instructive to note how a number of states offer parallel rights for crime victims, including the right to confer with prosecutors. In fact, several states have extended such rights prior to formally filing of charges against defendants - without reported difficulty, so far as we are aware. This confirms our inference that extending ***CVRA*** rights to crime victims before the formal filing of criminal charges is both feasible and desirable.

A general overview of state laws illustrates the broad protections afforded to victims in state criminal justice systems. Nearly two-thirds of states have adopted constitutional provisions to protect victims throughout **[*98]** the criminal justice process. [218] Moreover, every state has adopted a statute that either enforces its constitutional ***amendment*** or creates independent statutory rights for crime victims. [219] As a result, state legislatures and state employees have attempted to give victims a voice in the criminal justice process across the country.

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[212] *18 U.S.C. § 3771*(a)(1), (5), (8), (c)(1) (2012).

[213] See *42 U.S.C. § 10607*(c)(2) (2006).

[214] See Attorney General Guidelines, supra note 52, at 41-42.

[215] Letter from A. Marie Villafana, Assistant U.S. Att'y, to Jane Doe #1 (June 7, 2007), reprinted in Jane Doe Motion, supra note 40, at ex. C.

[216] Id.

[217] Id.

[218] See Victims' Rights Laws by State, Nat'l Crime Victim L. Inst. (Oct. 17, 2013), *http://goo.gl/pdDx1w* (listing and linking to state laws and constitutional ***amendments***).

[219] See LaFave et al., supra note 168, § 21.3(f), at 1041-42.

HOUSE_OVERSIGHT_017629

Notably, while the strength of these rights varies from state to state, [220] nearly forty states require the prosecuting attorney to notify or confer with the victim regarding plea negotiations. [221] Several jurisdictions involve the victim in the charging decision. [222] In some states, law enforcement and prosecutors must involve the victim at any "critical" [223] or "crucial" [224] stage of the criminal proceeding; and in a minority of jurisdictions, the judge must ascertain whether the prosecutor has afforded the victim statutory protections prior to accepting a plea agreement. [225]

The general contours of state provisions suggest that several state governments have recognized the value in informing victims of their rights and involving them in the criminal process prior to the formal filing of charges. [226] Indeed, a brief look at the statutory protections illustrates the extent to which states have attempted to afford protections to victims long before the formal filing of charges.

[*99] For example, Arizona has adopted a constitutional ***amendment*** and statutes that expansively protect victims. Under Arizona law, the definition of victim hinges on whether a criminal offense has been committed, and the term "criminal offense" is defined as "conduct that gives a peace officer or prosecutor probable cause to believe" a crime has occurred. [227] In short, a victim's status does not hinge on the formal filing of charges but rather on the criminal conduct itself. [228] Arizona law enforcement personnel must give information to victims describing their rights as soon as possible, even if formal charges have not yet been filed, and a victim may request that the prosecutor discuss the disposition of the case, including "a decision not to proceed with a criminal prosecution, dismissal, plea, or sentence negotiations and pretrial diversion programs." [229] A victim may even pursue some rights if counts are dismissed. [230] Arizona courts have also permitted victims to invoke their rights in the context of civil forfeiture proceedings. [231]

Hawaii's victims' rights statute illustrates how a state has defined the term "case" more expansively than the limited definition advocated by the Department in order to facilitate victim participation. By statute in Hawaii, victims must, upon request, be informed of "major developments" in any felony case. [232] Along a similar vein, the prosecuting attorney must consult or

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[220] See generally Dean G. Kilpatrick et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, The Rights of Crime Victims - Does Legal Protection Make a Difference? (1998), available at *http://goo.gl/EzH61S*.

[221] See Peggy M. Tobolowsky, Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime, 25 New Eng. J. on Crim. & Civ. Confinement 21, 64 & n.168 (1999) (citing to victims' rights statutes in Connecticut, Illinois, and Michigan, among others). Unfortunately, as some commentators have noted, the notice and conferral provisions in some states are ambiguous, and the absence of case law precludes a definitive understanding of the reach of the right in some jurisdictions. See LaFave et al., supra note 168, § 21.3(f), at 1041-42; see also, e.g., *Kan. Stat. Ann. § 74-7333(a)(5)* (2002) ("The views and concerns of victims should be ascertained and the appropriate assistance provided throughout the criminal process."). In some jurisdictions, the ambiguous use of an illustrative list could be read as suggesting that a particular right, such as conferral, hinges on formal charges. See, e.g., *Ky. Rev. Stat. Ann. § 421.500(6)* (LexisNexis Supp. 2012) (requiring consultation on "disposition of the case including dismissal, release of defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program," but failing to define "disposition" or "case").

[222] See Tobolowsky, supra note 221, at 59-60.

[223] E.g., *La. Rev. Stat. Ann.§§46:1842(2)*, *46:1844(K)* (2010).

[224] E.g., Fla. Const. art. I, § 16(b) (refraining from identifying the term).

[225] See LaFave et al., supra note 168, § 21.3(f), at 1041.

[226] See *Victims' Rights Laws by State, supra* note 218.

[227] *Ariz. Rev. Stat. Ann. § 13-4401(6)* (2010) (emphasis added); see *State ex rel. Thomas v. Klein, 150 P.3d 778, 780-81 (Ariz. Ct. App. 2007)* (noting the original version defined a criminal offense as a violation of a statute).

advise the victim about any plea negotiations. [233] Interestingly, however, the Hawaii legislature defined "major developments" as "arrest or release of the suspect by the police, case deferral by the police, referral to the prosecutor by the police, rejection of the case by the prosecutor, preliminary hearing date, grand jury date, trial and sentencing dates, and the disposition of the case." [234] The usage of the term "case" and the plain language of the provisions demonstrate that victims in the State of Hawaii are entitled to a notification right and a possible consultation right long before formal charges are filed.

[*100] Other states also expressly extend rights before the filing of charges. Colorado guarantees rights at "all critical stages of the criminal justice process[,]" which includes both the filing of charges and the decision to not file charges. [235] In Missouri, victims have the right:

on charged cases or submitted cases where no charge decision has yet been made, to be informed by the prosecuting attorney of the status of the case and of the availability [of different forms of compensation and assistance] and of any final decision by the prosecuting attorney not to file charges. [236]

In New Jersey, officials typically send a letter informing the victim "that the case has been referred to the prosecutors' office and explains and offers the services available from the country office of victim-witness advocacy." [237] Subsequent letters to the victim ensure that the victim has notice of a series of decisions long before indictment, [238] and the office actively solicits information in order to "help the prosecutor's office decide whether or not to prosecute a case." [239] Along a similar vein, the Massachusetts legislature included a provision that makes it clear that nothing should prevent a prosecutor from providing victim services to persons injured by the commission of a crime, even though a complaint or indictment has not yet been issued. [240]

In addition to extending rights before the filing of charges, several states require consultation before the prosecutor reaches a plea agreement with the defendant. For example, Idaho's statute provides that a victim must be given an opportunity "to communicate with the prosecution in criminal or juvenile offenses, and be advised of any proposed plea agreement by the prosecuting attorney prior to entering into a plea agreement in criminal or juvenile offenses involving crimes of violence, sex

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[228] Under Arizona law, the "rights and duties that are established by this chapter arise on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal offence against a victim." *Ariz. Rev. Stat. Ann. § 13-4402(A)* (2010) (emphasis added).

[229] *Ariz. Rev. Stat. Ann. § 13-4419(A)* (2010).

[230] See *Ariz. Rev. Stat. Ann. § 13-4402.01(A)*.

[231] It appears, however, that the criminal proceeding may have been parallel to the civil forfeiture proceeding. See *State v. Lee, 245 P.3d 919, 923-24 (Ariz. Ct. App. 2011).*

[232] *Haw. Rev. Stat. Ann. § 801D-4(a)(1)* (LexisNexis 2007).

[233] See id.

[234] Id. § 801D-2.

[235] Colo. Const. art. II, § 16a; ***Colo. Rev. Stat. § 24-4.1-302(1)*** (2013). But see ***Colo. Rev. Stat. § 24-4.1-302.5(1)(f)*** (2012) (limiting conferral right, in particular, to later stages of a criminal proceeding). Despite these limitations on the conferral right, victims retain the ability to be heard at any hearing involving a plea. See id. § 24-4.1-302.5.

[236] *Mo. Ann. Stat. § 595.209(10)* (West 2011).

[237] Office of Victim-Witness Advocacy, N.J. Dep't of Law & Pub. Safety, A Crime Victim's Guide to the Criminal Justice System 4 (2d ed. 1997); see also N.J. Const. art. I, § 22. Compare *18 U.S.C. § 3771* (2012), with *N.J. Stat. Ann. § 52:4B-36* (West 2009). In addition to the rights similar to the federal legislation, New Jersey law provides for the right "to be advised of case progress and final disposition and to confer with the prosecutor's representative so that the victim may be kept adequately informed … ." Id. § 52:4B-36(k).

HOUSE_OVERSIGHT_017631

[*101] crimes or crimes against children." [241] In Indiana, the plain language of its statute leaves open the possibility of a conferral right before formal charges to the extent that the statute includes two separate time frames: "after a crime … has been charged" or "before any disposition of a criminal case involving the victim." [242]

To be sure, not all states have afforded victims a voice throughout the entirety of the criminal justice process. [243] In some states, the statutes are ambiguous. [244] In a handful of states, there is clear language limiting rights until after the filing of charges. For example, Louisiana constrains the conferral right to criminal matters "in which formal charges have been filed by the district attorney's office." [245] Yet, unlike the federal ***CVRA***, this statute specifically excludes pre-charging situations. And, in any event, despite Louisiana's limitation on a particular right within the statute, the legislature in this state still often saw fit to provide the victim with notification rights, even in the absence of the formal filing of charges. [246]

Very few state courts have ever considered the precise issue of whether conferral rights may attach prior to the formal filing of charges. This is likely caused by the fact that, unlike the federal statute, many state statutes fail to provide the victim with a procedural mechanism for challenging the conduct of prosecutors or law enforcement agencies. [247] However, in rare cases, state courts have implicitly recognized that a meaningful interpretation of victims' rights should include some rights prior to filing.

For example, a Connecticut court concluded that a company injured by the delinquent act of a minor was entitled to information about the case **[*102]** contained in a police file in a civil proceeding, even though it appears that there was little indication that criminal charges had been filed. [248] Similarly, the South Carolina Supreme Court, while limiting the ability of the victim to challenge the conduct of a prosecutor, concluded that the same rights under the state constitution must attach prior to the formal filing of an indictment. [249] Other courts have even permitted a victim to recover compensation or reparations for unindicted or acquitted conduct. [250]

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[238] See *Office of Victim-Witness Advocacy, supra* note 237, at 4 (including pre-grand jury remand, administrative dismissal, grand jury remand, grand jury dismissal, and indictment returned).

[239] Id. at 26 (describing victim involvement at grand jury and arraignment stages of the proceeding).

[240] See *Mass. Ann. Laws ch. 258B, § 2* (LexisNexis 2004).

[241] *Idaho Code Ann. § 19-5306(1)(f)* (2004). As in the case of most of the state statutes, the Idaho statute is not without ambiguity. A different provision within the statute makes the notification right contingent "upon the filing of a criminal complaint or juvenile petition … ." Id. § 19-5306(2).

[242] *Ind. Code Ann. § 35-40-5-3(b)* (West 2012); id. § 35-40-1-1 (failing to define "case").

[243] See, e.g., Md. Const. art. 47(b) ("In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed … .").

[244] In Delaware, for example, the statute contains an additional limitation in the conferral provision that is noticeably absent from the duty imposed on law enforcement to provide information about the victim's rights to that victim. Compare *Del. Code Ann. tit. 11, § 9405* (2007), and *Del. Code Ann. tit. 11, § 9411* (2007) (imposing additional requirements after the Attorney General commences the prosecution), with *Del. Code Ann. tit. 11, § 9410* (2007). Query whether the limitations imposed in one section should be inferred in the other under the doctrine of expressio unius est exclusio alterius.

[245] La. Rev. Stat. Ann. § 1844(D)(1) (2010).

[246] See id. § 1844.

[247] See generally Douglas E. Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, *2005 BYU L. Rev. 255, 300-23* (discussing problems with remedies in victims' rights statutes).

[248] See *In re James B., Jr., 714 A.2d 735 (Conn. Super. Ct. 1998).*

In other words, while few state judiciaries have addressed the precise timing of state crime victims' rights, those that have addressed the question have typically found that the rights do extend to pre-charging situations.

Despite the relative dearth of state court cases, it is worth noting that most state statutes unequivocally provide for notification rights early in the criminal process. [251] For example, the Illinois statute imposes a limited duty on law enforcement agencies to keep victims informed of the status of an investigation until the accused is apprehended or the agency discontinues the investigation. [252] Similarly, law enforcement agencies in Iowa must keep the victim apprised of the investigation "until the alleged assailant is apprehended or the investigation is closed." [253] Michigan's statute requires law enforcement to provide information within a mere twenty-four hours of contact between the agency and the victim. [254]

In sum, while state law on crime victims' rights before charging is not fully developed, what law exists tends to support the position that crime victims deserve rights before the formal filing of charges. This law fits the long-standing trend in states toward expanding protections for crime **[*103]** victims. [255] The decision by state legislators to extend notification or conferral rights to crime victims demonstrates an express recognition that crime victims' meaningful participation in the criminal justice process may involve granting those victims rights before indictment.

Conclusion

Crime victims have important rights at stake in the criminal justice process, even before prosecutors formally file criminal charges. It is hardly surprising, therefore, to find that a federal law that Congress in fact designed to create "broad and encompassing" rights for victims protects victims during a criminal investigation. As this Article has explained, interpreting the ***CVRA*** to cover crime victims during the pre-charging phase of a case is consistent with the statute's purposes, text, legislative history, and interpretive case law. And state criminal justice systems also appear to be moving in that direction.

The Justice Department's contrary interpretation seems unlikely to prevail when challenged. The ***CVRA*** signals a paradigm shift in the way that crime victims are to be treated, at least within the federal criminal justice system. Before enactment of the law, federal investigators and prosecutors might have been able to keep victims at arm's length, refusing to confer with them about the case and otherwise ignoring or even mistreating them during the process. But those days are over. The ***CVRA*** promises victims that they now have the right to confer with prosecutors and the right to be treated fairly while their cases are investigated. It is time for the Department of Justice to recognize and embrace that new reality.

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[249] See *Ex parte Littlefield, 540 S.E.2d 81, 85 (S.C. 2000).*

[250] See Kimberly J. Winbush, Annotation, Persons or Entities Entitled to Restitution as "Victim" Under State Criminal Restitution Statute, 92 A.L.R. 5th 35, 35 (2001) (recounting cases in which unnamed victims were entitled to restitution).

[251] See, e.g., *Minn. Stat. Ann. § 611A.0315(a)* (West 2009) (requiring a prosecutor to "make every reasonable effort to notify a victim of domestic assault … or harassment that the prosecutor has decided to decline prosecution of the case" but providing the right to participate in proceedings to circumstances in which the offender has been charged).

[252] See *725 Ill. Comp. Stat. Ann. 120/4.5* (2008).

[253] *Iowa Code Ann. § 915.13(1)(f)* (West 2003).

[254] See *Mich. Comp. Laws Ann. § 780.753* (West 2007). Michigan's conferral right is particularly ambiguous, because the notification requirement imposed upon the prosecuting attorney contains a time limitation (after arraignment), but the legislature did not include an express time limitation on the conferral right. See *Mich. Comp. Laws Ann. § 780.756(3)* (West 2007) (requiring the victim have the opportunity to consult prior to "any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion"); see also *Miss. Code Ann. § 99-43-7(1)* (2007) (imposing a requirement on law enforcement officials to notify a victim within seventy-two hours).

[255] See Jeffrey A. Parness et al., Monetary Recoveries for State Crime Victims, *58 Clev. St. L. Rev. 819, 850 (2010);* Tobolowsky, supra note 221, at 59 (describing a "significant expansion of victim rights to be consulted by the prosecutor and heard by the court").

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ARTICLE: Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure

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Text

[*863]

I. Introduction

Federal courts should treat crime victims fairly in the criminal process. In a nod to that goal, the Advisory Committee on the Federal Rules of Criminal Procedure (Advisory Committee) has circulated for public comment proposed ***amendments*** to the Federal Rules of Criminal Procedure (the Rules) regarding crime victims' rights. These ***amendments*** attempt to implement the recently-enacted Crime Victims' Rights Act (***CVRA***), [1] which guarantees crime victims a series of rights, including the right to be treated fairly. Unfortunately, the proposed ***amendments*** are mere tentative, half measures that do not begin to fully protect crime victims.

This Article contends that the Advisory Committee should broaden its vision of the proper role for crime victims and recommend far more expansive victim protections. In the ***CVRA***, Congress articulated specific rights for crime victims, such as the right to be notified of court hearings, to attend those hearings, and to speak at appropriate points in the process. [2] But along with these specific rights came the sweeping requirement that crime victims "be treated with fairness and with respect for the victim's dignity and privacy." [3] This congressional command must not be ignored. In addition, entirely apart from any congressional dictate, crime victims deserve fair treatment in the federal system. Acting for the federal judiciary, the Advisory Committee should make certain that the Rules fully reflect victims' interests rather than allow the initiative for protecting victims to pass to other branches of government.

This Article proceeds in five parts. Following this Introduction, Part II reviews events leading to the recently circulated ***amendments***. The ***amendments*** were prompted by the ***CVRA*** - an act passed by Congress in 2004 to protect victims' rights through the federal criminal process. To comply with the ***CVRA***, the federal criminal rules had to be amended in many places,

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[1] Pub. L. No. 108-405, § 102(a), ***118 Stat. 2260, 2261-62*** (codified as amended at *18 U.S.C. § 3771* (Supp. 2006)).

[2] *18 U.S.C. § 3771* (a)(2)-(4).

[3] Id. § 3771(a)(8).

as I argued at length in an earlier article. [4] After receiving my suggested changes, the Advisory Committee agreed with some, but declined to adopt many of the others. At issue for the Advisory Committee was whether to proceed narrowly by changing only a few rules to track specific congressional directives or to proceed more broadly by reworking the entire body of federal criminal rules to ensure that they are all fair to crime victims. The Committee opted for the narrower approach.

Part III of this Article disputes the Advisory Committee's limited vision. Congress has required that the courts must treat crime victims "with fairness" throughout the process. [5] The only way to fully implement that command is a **[*864]** thorough reworking of the federal criminal rules to integrate victims into the day-to-day workings of the process. The Committee's parsimonious ***amendments*** simply ignore that congressional directive and mean that, in practice, many of the federal criminal rules will continue to overlook the legitimate interests of crime victims.

Part IV of this Article contains a rule-by-rule analysis of changes that should be made to the federal rules. The following changes are of particular importance:

1. Ensuring that crime victims' attorneys can appear in court (Rule 1);

2. Providing for victim participation in the plea bargain process (Rule 11);

3. Protecting victims' addresses and telephone numbers from improper disclosure (Rule 12);

4. Guaranteeing victims the right to attend criminal depositions (Rule 15);

5. Protecting victims from having personal and confidential information improperly subpoenaed (Rule 17);

6. Considering victims' interests when cases are transferred or when a bench trial is ordered (Rules 21 and 23);

7. Integrating victims into the sentencing process (Rule 32);

8. Articulating victims' right to discretionary appointment of counsel (Rule 44.1);

9. Giving victims the right to be heard at bail decisions (Rule 46);

10. Requiring victims' views be considered before a case is dismissed (Rule 48);

11. Protecting victims' right to a speedy trial (Rule 50);

12. Giving victims notice of court proceedings and of their rights in those proceedings (Rule 60(a)(1));

13. Guaranteeing victims the right to attend court proceedings (Rule 60(a)(2));

14. Guaranteeing victims the right to be heard on bail, plea, sentencing, and other issues important to victims (Rule 60(a)(3)).

Finally, Part V briefly concludes by explaining that the likely consequence of the Advisory Committee failing to fully implement Congress's vision will be that Congress itself will step in to do the job. It would be unfortunate if the Judiciary were to abdicate its responsibilities to protect crime victims and leave the task to another branch of government.

This Article also contains a short Afterword, which recounts developments subsequent to the drafting of this Article in January 2007.

[*865]

II. Victims' Rights, the ***CVRA***, and ***Amendments*** to the Rules

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[4] See Paul G. Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed ***Amendments*** in Light of the Crime Victims' Rights Act, *2005 BYU L. Rev. 835, 852-924* [hereinafter Cassell, Proposed ***Amendments***].

[5] *18 U.S.C. § 3771*(a)(8).

A. The Crime Victims' Rights Movement

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victims' absence from criminal processes conflicted with "a public sense of justice keen enough that … it has found voice in a nationwide "victims' rights' movement." [6] Victims advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims. [7] These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

The victims movement received considerable impetus in 1982 with the publication of the report of the President's Task Force on Victims of Crime ("Task Force"). The Task Force concluded that "the criminal justice system has lost an essential balance… . The system has deprived the innocent, the honest, and the helpless of its protection… . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be reddressed." [8] The Task Force advocated multiple reforms. It recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution. [9] It also urged that courts receive victim-impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would **[*866]** be called as witnesses. [10] In its most sweeping recommendation, the Task Force proposed a federal constitutional ***amendment*** to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings." [11]

In the wake of the recommendation for a constitutional ***amendment***, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go first to the states to enact state victims' rights ***amendments***. They have had considerable success with this "states-first" strategy. [12] To date, about thirty states have adopted ***amendments*** to their own state constitutions, [13] which protect a wide range of victims' rights.

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[6] *Payne v. Tennessee, 501 U.S. 808, 834 (1991)* (Scalia, J., concurring) (internal quotations omitted). See generally Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, Victims in Criminal Procedure 638-39 (2d ed. 2005) (discussing the need for victims' participation in the criminal justice system); see also Shirley S. Abrahamson, Redefining Roles: The Victims' Rights Movement, 1985 Utah L. Rev. 517; Douglas Evan Beloof, The Third Model of Criminal Process: The Victim Participation Model, *1999 Utah L. Rev. 289;* Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights ***Amendment***, *1999 Utah L. Rev. 479* [hereinafter Cassell, Barbarians at the Gates]; Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights ***Amendment***, *1994 Utah L. Rev. 1373* [hereinafter Cassell, Balancing the Scales]; Abraham S. Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 514 (1982); William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, *32 Stan. J. Int'l L. 37 (1996);* Steven J. Twist, The Crime Victims' Rights ***Amendment*** and Two Good and Perfect Things, *1999 Utah L. Rev. 369.*

[7] See generally Beloof, Cassell & Twist, supra note 6, at 29-38; Douglas Evan Beloof, The Third Wave of Victims' Rights: Standing, Remedy and Review, *2005 BYU L. Rev. 255;* Cassell, Balancing the Scales, supra note 6, at 1380-82 (arguing for increased rights of crime victims in criminal justice systems).

[8] President's Task Force on Victims of Crime, Final Report 114 (1982).

[9] Id. at 63.

[10] Id. at 72-73.

[11] Id. at 114 (emphasis omitted).

[12] See S. Rep. No. 108-191, at 3 (2003).

[13] See Ala. Const. amend. 557; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, §§12, 28; Colo. Const. art. II, § 16a ; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1, § 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.J. Const. art. I, § 22; N.M. Const. art. 2, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. 1, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; Tenn. Const. art. 1, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. 2, § 33; Wis. Const. art. I, § 9m.

The Crime Victims' Rights Movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and provided expanded restitution. [14] Since then, Congress has passed several acts that further protected victims' rights, including the Victims of Crime Act of 1984, [15] the Victims' Rights and Restitution Act of 1990, [16] the Violent Crime Control and Law Enforcement Act of 1994, [17] the Antiterrorism and Effective Death Penalty Act of 1996, [18] and the Victim Rights Clarification Act of 1997. [19] Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses. [20]

Among these, the Victims' Rights and Restitution Act of 1990 is worth briefly highlighting. This act purported to create a comprehensive list of victim's rights in the federal criminal justice process. The act commanded that "[a] crime victim has the following rights" [21] and then listed various rights in the process. Among the **[*867]** rights were the right to "be treated with fairness and with respect for the victims' dignity and privacy," [22] to "be notified of court proceedings," [23] to "confer with [the] attorney for the Government in the case," [24] and to attend court proceedings, even if called as a witness, unless the victim's testimony "would be materially affected" by hearing other testimony at trial. [25] The statute also directed the Justice Department to make its "best efforts" to ensure that victims received their rights. [26] Yet this act never successfully integrated victims into the federal criminal justice process and was generally regarded as something of a dead letter. Because Congress passed the ***CVRA*** in 2004 to remedy the problems with this law, it is worth briefly reviewing why it was largely unsuccessful.

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code - the title dealing with "Public Health and Welfare." As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in a single West publication - the Federal Criminal Code and Rules. This single publication is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because West Publishing never included the Victims' Rights Act in this book, the statute was essentially unknown even to the most experienced judges and attorneys. The prime illustration of the ineffectiveness of the Victims' Rights Act comes from the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules. [27]

Because of such problems with the statutory protection of victims' rights, victims advocates decided in 1995 the time was right to press for a federal constitutional ***amendment***. They argued that the statutory protections could not sufficiently guarantee

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[14] Pub. L. No. 97-291, *96 Stat. 1248 (1982).*

[15] Pub. L. No. 98-473, *98 Stat. 2170 (1984).*

[16] Pub. L. No. 101-647, ***104 Stat. 4820 (1990).***

[17] Pub. L. No. 103-322, ***108 Stat. 1796 (1994).***

[18] Pub. L. No. 104-132, ***110 Stat. 1214 (1996).***

[19] Pub. L. No. 105-6, ***111 Stat. 12 (1997).***

[20] See, e.g., *18 U.S.C. § 3509* (2006) (protecting rights of child victim-witnesses).

[21] Pub. L. No. 101-647, § 502(b) (1996).

[22] Id. § 502(b)(1).

[23] Id. § 502(b)(3).

[24] Id. § 502(b)(5).

[25] Id. § 502(b)(4).

[26] Id. § 502(a).

[27] *United States v. McVeigh, 157 F.3d 809, 814-815 (10th Cir. 1998).* See generally Cassell, Barbarians at the Gates, supra note 6, at 515-22 (discussing this case in greater detail).

victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia." [28] As the Justice Department reported:

Efforts to secure victims' rights through means other than a constitutional ***amendment*** have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and **[*868]** constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. [29]

To place victims' rights in the constitution, victims advocates (led most prominently by the National Victims Constitutional ***Amendment*** Network [30]) approached the President and Congress about a federal ***amendment***. [31] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights ***amendment*** with the backing of President Clinton. [32] The intent of the ***amendment*** was to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation." [33] A companion resolution was introduced in the House of Representatives. [34] The proposed ***amendment*** embodied seven core principles: (1) the right to notice of proceedings, (2) the right to be present, (3) the right to be heard, (4) the right to notice of the defendant's release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing. [35]

The ***amendment*** failed to pass in the 104th Congress. On January 21, 1997, the opening day of the first session of the 105th Congress, Senators Kyl and Feinstein reintroduced the ***amendment***. [36] A series of hearings were held that year in both the House and the Senate. [37] Responding to some of the concerns raised in these hearings, the ***amendment*** was reintroduced the following year. [38] The Senate Judiciary Committee held hearings [39] and passed the proposed ***amendment***. [40] However, the full Senate did not consider the ***amendment***. In 1999, Senators Kyl **[*869]** and Feinstein again proposed the ***amendment***. [41] On September 30, 1999, the Judiciary Committee again voted to send the ***amendment*** to the full Senate. [42] But on April 27,

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[28] Laurence H. Tribe & Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B5.

[29] Victims' Rights ***Amendment***: Hearing on S.J. Res. 6 Before the S. Judiciary Comm., 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

[30] See *www.nvcap.org* (last visted Dec. 30, 2007).

[31] For a comprehensive history of victims' efforts to pass a constitutional ***amendment***, see Jon Kyl, Steven J. Twist & Stephen Higgins, On the Wings of Their Angels, the Scott Campbell, Stephanie Roper, Wendy Preseon, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, *9 Lewis & Clark L. Rev. 581, 583-91 (2005).*

[32] S.J. Res. 52, 104th Cong. (1996).

[33] S. Rep. No. 108-191, at 1-2 (2003); see also S. Rep. No. 106-254 (2000) (listing recommendations for the federal victims' rights ***amendment***).

[34] H.R.J. Res. 174, 104th Cong. (1996).

[35] S.J. Res. 65, 104th Cong. (1996).

[36] S.J. Res. 6, 105th Cong. (1997).

[37] See, e.g., Victims' Rights ***Amendment***: Hearing on S.J. Res. 6 Before the S. Judiciary Comm., 105th Cong. (1997).

[38] S.J. Res. 44, 105th Cong. (1998).

[39] Crime Victim's Rights Constitutional ***Amendment***: Hearings on S.J. Res. 44 Before the S. Judiciary Comm., 105th Cong. (1998).

[40] See 144 Cong. Rec. S11,010 (daily ed. Sept. 28, 1998).

[41] S.J. Res. 3, 106th Cong. (1999).

2000, after three days of floor debate, the ***amendment*** was shelved when it became clear that its opponents had the votes to sustain a filibuster. [43] At the same time, hearings were held in the House on the companion measure there. [44]

Discussions about the ***amendment*** began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the ***amendment***. [45] The following day, President Bush announced his support. [46] On May 1, 2002, a companion measure was proposed in the House. [47] On January 7, 2003, Senators Kyl and Feinstein proposed the ***amendment*** as Senate Joint Resolution 1. The Senate Judiciary Committee held hearings in April of that year, [48] followed by a written report supporting the ***amendment***. [49] On April 20, 2004, a motion to proceed to consider the ***amendment*** was filed in the Senate. Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure. After it had become clear that the necessary super-majority votes were not available to amend the Constitution, victims advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act

The Crime Victims' Rights Act ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than to pursue the dream of a federal constitutional ***amendment***. In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push again for a federal constitutional ***amendment***. Concluding that the ***amendment*** lacked the required supermajority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. [50] In exchange for backing off from the constitutional ***amendment*** in the short term, victims advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights. [51] This "new and bolder" approach not only created a bill of rights for victims, but also provided funding for victims' **[*870]** legal services and created remedies when victims' rights were violated. [52] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal ***amendment***. [53]

The legislation that ultimately passed - the Crime Victims' Rights Act - gives victims "the right to participate in the system." [54] It lists various rights for crime victims in the process of prosecuting the accused, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process, and the right to be treated with fairness. [55] Rather than relying merely on the "best efforts" of prosecutors to vindicate the rights, the ***CVRA*** also contains

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[42] 146 Cong. Rec. S2986 (daily ed. Apr. 27, 2000) (statement of Sen. Kyl).

[43] Id. at S2966 (statement of Sen. Kyl).

[44] H.R.J. Res. 64, 106th Cong. (2000).

[45] S.J. Res. 35, 107th Cong. (2002).

[46] 149 Cong. Rec. 582 (daily ed. Jan. 7. 2003) (statement of Sen. Kyl).

[47] H.R.J. Res. 91, 107th Cong., (2002).

[48] A Proposed Constitutional ***Amendment*** to Protect Crime Victims, S.J. Res. 1: Hearings Before the S. Comm. on the Judiciary, 108th Cong. (2003).

[49] S. Rep. No. 108-191 (2003).

[50] Kyl et al., supra note 31, at 591-92.

[51] 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[52] Id. at S4263 (statement of Sen. Feinstein).

[53] Id. at S4260 (statement of Sen. Kyl); see also Prepared Remarks of Attorney General Alberto R. Gonzales, Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating a federal victims' rights ***amendment*** remains a priority for President Bush).

[54] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). For a description of victim participation, see Beloof, supra note 6.

[55] *18 U.S.C. § 3771*(a) (2006).

specific enforcement mechanisms. [56] Most important, the ***CVRA*** directly confers standing onto victims to assert their rights, a flaw in the earlier enactment. [57] The act provides that rights can be "asserted" by "the crime victim or the crime victim's lawful representative, and the attorney for the Government." [58] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis. [59] The courts are also required to "ensure that the crime victim is afforded" the rights given by the new law. [60] These changes were intended to make victims "an independent participant in the proceedings." [61]

C. My Proposed ***Amendments*** to the Federal Rules of Criminal Procedure

In the wake of the ***CVRA***, the Federal Rules of Criminal Procedure needed to be significantly amended to comply with the statute's mandates. With this goal in mind, I prepared a comprehensive set of proposed ***amendments*** to the Rules and submitted them to the Advisory Committee on the Federal Rules of Criminal Procedure. [62]

My proposals began from the premise that "victims now must be folded into the process through which federal courts conduct criminal cases, including bail, plea, trial, and sentencing hearings." [63] Because the federal rules are the "playbook" **[*871]** of the federal courts, it seemed advisable to reflect the new role of victims throughout the Rules. Moreover, Congress intended the ***CVRA*** to be "a formula for success" and a "model for our States." [64] The only way the federal rules could serve as a model, I argued, was by fully implementing victims' rights. I then proposed twenty-eight specific changes to the Federal Rules of Criminal Procedure to integrate crime victims into the federal process. [65] Each of these proposals included both specific text for an ***amendment*** and a legal justification for the change.

D. The Criminal Rules Committee Proposals

The Advisory Committee took up my proposed rule changes in the summer of 2005. The distinguished chair of the committee, Judge Susan Bucklew, appointed a subcommittee, chaired by Judge James Jones, to consider changes to the federal rules to implement the ***CVRA***. The Subcommittee, including its reporter, Professor Sara Sun Beale, prepared a report to the full committee recommending only a few changes to the Rules. [66] The Subcommittee "felt that it would not be appropriate to create new victim rights not based upon the statute." [67] Accordingly, the Subcommittee recommended just a few changes to the Rules, essentially parroting a few parts of the ***CVRA***'s language.

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[56] Id.

[57] Cf. Beloof, supra note 7, at 283 (identifying this as a pervasive flaw in victims' rights enactments).

[58] *18 U.S.C. § 3771*(d)(1).

[59] Id. § 3771(d)(3).

[60] Id. § 3771(b)(1).

[61] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[62] See Cassell, Proposed ***Amendments***, supra note 4.

[63] Id. at 852.

[64] Id. at 854-55 (quoting 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

[65] Id. at 856-923.

[66] Memorandum from Professor Sara Sun Beale, Reporter, to the Members of the Crim. Rules Advisory Comm. (Sept. 19, 2005) [hereinafter ***CVRA*** Subcommittee Memo]. This document does not appear on the helpful website regarding federal rulemaking - *www.uscourts.gov/rules*. To make the document more widely available, I have posted the report on my website -*http://www.law.utah.edu/paul-cassell*.

[67] ***CVRA*** Subcommittee Memo, supra note 66, at 2.

The full Advisory Committee took up the Subcommittee's proposals at its meeting on October 24-25, 2005. [68] It largely agreed with the Subcommittee's proposals, approving a limited set of changes to the Rules to implement the ***CVRA***. The Advisory Committee sent a report of its proposed changes to the Standing Committee on Rules of Practice and Procedure in December, 2005. [69] The Advisory Committee described its changes as seeking "to incorporate, but not go beyond, the rights created by the statute." [70] The rules were then circulated for nationwide public comment. [71] The Advisory Committee held a public hearing on **[*872]** the rule change in Washington, D.C. on January 26, 2007. I testified at the hearing, presenting this Article as my testimony. [72]

III. The ***CVRA***'s Right to Fairness Requires Comprehensive Changes to Protect Victims

The ***CVRA*** requires fundamental changes in the Federal Rules of Criminal Procedure. The ***CVRA*** makes crime victims participants in the criminal justice process and commands in sweeping terms that the courts must treat victims "with fairness and with respect for the victim's dignity and privacy." [73] To faithfully implement that directive, it is necessary to assess each of the existing rules against a fairness standard and then make changes and additions where the Rules do not guarantee fair treatment to victims.

The Advisory Committee has made some useful progress in that direction. It should be commended for the careful drafting of its proposed changes and the thoroughness with which it explored the topic. Moreover, it is the nature of articles such as this one to highlight points of disagreement rather than points of agreement. The Advisory Committee has seen fit to adopt several of the proposals that I recommended, [74] a fact that should not be overlooked.

Unfortunately, the Advisory Committee acted timidly. Instead of reviewing all the Rules to determine whether they treated victims fairly, the Advisory Committee decided it would not venture beyond parroting specifically described rights in the ***CVRA***. The committee's reporter, well-regarded Duke law professor Sara Sun Beale, articulated the Advisory Committee's drafting technique as simply incorporating rights created by Congress:

The most basic decision was how far beyond the statutory provisions the rules should go at this time. Although the ***CVRA*** enumerates a number of specific rights, it also contains general language stating that victims have a "right to be treated with fairness." Judge Cassell advocates using this general right to fairness as a springboard for a variety of victim rights not otherwise provided for in the ***CVRA***.

[We] concluded that the rules should incorporate, but not go beyond, the specific statutory provisions. The ***CVRA*** reflects a careful Congressional balance between the rights of the defendant, the discretion afforded to prosecution, and the new rights afforded to victims. In light of this careful statutory balance, [we] felt that it would not be appropriate to create new victim rights not based upon the statute. Rather, [we] **[*873]** sought to incorporate the rights Congress did afford into the rules. In so doing, [we] attempted, to the degree possible, to use the statutory language. [We] anticipate[] that the courts will develop the

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[68] Judicial Conference of the United States, Minutes of the Advisory Committee on the Rules of Criminal Procedure (Oct. 24-25, 2005), available at *http://www.uscourts.gov/rules/Minutes/CR10-2005-min.pdf* [hereinafter Advisory Committee Minutes].

[69] Judicial Conference of the United States, Report of the Advisory Committee on Criminal Rules (Dec. 8, 2005), available at *http://www.uscourts.gov/rules/Reports/CR12-2005.pdf* [hereinafter Advisory Committee Report].

[70] Id. at 2.

[71] Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed ***Amendments*** to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure (Aug. 2006), *www.uscourts.gov/* rules/newrules1.html [hereinafter Proposed ***Amendments***] (last visted Dec. 30, 2007).

[72] All testimony and other comments about the proposed changes can be found at *www.uscourts.gov/rules/Proposed0206-1.htm*.

[73] *18 U.S.C. § 3771*(a)(8) (2006) (emphasis added).

[74] See, e.g., infra notes 96-97 and accompanying text (discussing ***amendment*** to Rule 18).

meaning of the statutory terms on a case-by-case basis, and [we] did not attempt to use the rules to anticipate and resolve the interpretative questions that will arise. [75]

Before debating the merits of the Advisory Committee's position, it is useful to step back and look at the forest rather than the trees. Regardless of how the ***CVRA***'s language on fairness is interpreted, should we really debate treating crime victims fairly? Presumably the general public expects the nation's criminal rules to be fair to all concerned - the government, defendants, and victims. Reflecting that view, for the last twenty years Congress has passed a series of laws extending rights to crime victims. [76] Even without a single word in the ***CVRA*** mentioning fairness, the Advisory Committee should carefully review the existing rules to ensure fairness for victims.

In any event, Congress has spoken. The Advisory Committee's general approach does not faithfully implement the congressional command of fair treatment, as the following sections demonstrate.

A. The ***CVRA***'s Text and Legislative History Create a Substantive Right to Fairness

Turning to the Advisory Committee's specific justifications for not implementing the right to fairness, perhaps its most striking claim is that the right is merely some sort of a "springboard" for other specific rights. The Advisory Committee declines to implement this right because this would "go beyond … the specific statutory provisions" in the ***CVRA***. [77] But the right to fairness is itself one of the specific provisions in the ***CVRA***. The ***CVRA*** grants victims the following rights:

1. The right to be reasonably protected from the accused

2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused

3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding

[*874] 4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding

5. The reasonable right to confer with the attorney for the Government in the case

6. The right to full and timely restitution as provided in law

7. The right to proceedings free from unreasonable delay

8. The right to be treated with fairness and with respect for the victim's dignity and privacy [78]

As in the various state victims' bills of rights, [79] the fairness right is not mere hortatory language. The ***CVRA*** introduced these rights in the statute with the introductory clause: "A crime victim has the following rights … ." [80] Thus, the right to fairness is

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[75] ***CVRA*** Subcommittee Memo, supra note 66, at 1-2. The Advisory Committee largely adopted the recommendation of the subcommittee. To simplify this Article, I will generally ascribe the views of the subcommittee to the Advisory Committee.

[76] See supra notes 14-20 and accompanying text.

[77] ***CVRA*** Subcommittee Memo, supra note 66, at 1.

[78] *18 U.S.C. § 3771*(a) (2006) (emphasis added).

[79] See, e.g., Alaska Const. art. I, § 24 (victim's right "to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Ariz. Const. art. II, § 2.1(A)(1) (victim's right "to be treated with fairness, respect, and dignity"); Idaho Const. art. I, § 22(1) (victim's right "to be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); Ill. Const. art. I, § 8.1(a)(1) (victim's right "to be treated with fairness and respect for their dignity"); Mich. Const. art. I, § 24(1) (victim's right "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.J. Const. art. I, § 22 (victim's right to "be

to be given real world application. To be sure, it is a broad right - akin to the defendant's broad right to "due process of law." [81] But to implement that right in the criminal rules is not "creating new victims rights not based upon the statute," as the Advisory Committee puts it, but simply implementing a clearly articulated congressional command.

It is a "cardinal principle of statutory construction" that effect must be given to every word in a statute. [82] Under the Advisory Committee's approach, the congressional directive that crime victims be treated fairly will have no effect on **[*875]** any of the Rules. The fairness directive will, in other words, be rendered mere surplusage - something that the Supreme Court has repeatedly cautioned against. [83]

The Advisory Committee also admits that it is interpreting the ***CVRA*** narrowly, contrary to the standard rule that remedial legislation is to be construed broadly. [84]

In addition, the Advisory Committee's approach flouts the declared intentions of the Act's drafters. There is no need to guess about Congress's intent on the right of fairness. Senator Kyl, who cosponsored the ***CVRA*** with Senator Feinstein, explained quite directly that Congress meant for the right to have substantive content:

The broad rights articulated in this section [section 8, mandating victims be treated with fairness along with dignity and respect] are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. [85]

Nor is there any doubt that Congress intended this command to reach the judiciary, including judicial branch components like the Advisory Committee. Again, Senator Kyl specifically addressed this point:

Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision [section 8] is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process. [86]

The Advisory Committee's decision not to treat fairness as an enforceable right is so at odds with the ***CVRA***'s legislative history that one becomes curious as to why the Advisory Committee determined not to follow it. The Advisory Committee also diverged from the legislative history in several other areas. [87] In reviewing the Advisory Committee's records, however, notably absent is any mention of legislative intent. The Advisory Committee does not cite the statute's **[*876]** legislative

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treated with fairness, compassion and respect by the criminal justice system"); N.M. Const. art. II, § 24(A)(1) (the "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, § 10a (victims "shall be accorded fairness, dignity, and respect in the criminal justice process"); Tex. Const. art. I, § 30(a)(1) ("right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); Utah Const. art. I, § 28(1)(a) (victim's right to be "treated with fairness, respect, and dignity"); Wisc. Const. art. I, § 9m (victim's right to be treated with "fairness, dignity and respect for their privacy"). See generally Cassell, Balancing the Scales, supra note 6, at 1387-88 (discussing victim's right to fairness in Utah).

[80] *18 U.S.C. § 3771*(a) (emphasis added).

[81] ***U.S. Const. amend. V***; see also ***U.S. Const. amend. XIV*** (due process right in state proceedings).

[82] See, e.g., *Duncan v. Walker, 533 U.S. 167, 174 (2001)* (quoting *United States v. Menasche, 348 U.S. 528, 538-39 (1955)).*

[83] See, e.g., *Babbit v. Sweet Home Chapter of Comtys. for a Great Or., 515 U.S. 687, 698 (1995).*

[84] See, e.g., *Hughes v. Box, 814 F.2d 498, 501 (8th Cir. 1987); Gardner & N. Roofing & Siding Corp. v. Bd. of Governors of Fed. Reserve Sys., 464 F.2d 838, 841 (D.C. Cir. 1972).*

[85] 150 Cong. Rec. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); see also 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[86] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added); see also 150 Cong. Rec. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[87] See, e.g., infra notes 437-443 (noting rejection of Senators Feinstein's and Kyl's views on the right to be heard on issues affecting victims' rights); infra note 488-493 (noting rejection of Senator Kyl's views on the right to be heard on speedy trial issues).

history even once in a twenty-page subcommittee report, in four pages of minutes of its discussions, or in twenty-six pages of proposed ***amendments*** and accompanying Advisory Committee Notes. [88] Perhaps the Advisory Committee took a different approach than the ***CVRA***'s drafters because it did not consider their stated intentions.

If, on the other hand, the Advisory Committee was aware of the drafters' intentions and declined to follow them, it is staking out a rather unusual path. It is standard practice for the Advisory Committee, no less than courts, to look to legislative history in crafting the Rules. [89] With respect to the ***CVRA*** in particular, many courts have found the ***CVRA***'s legislative history highly instructive. They have good reason for relying on the history. Unlike some contentious pieces of legislation where legislators possessed divergent views, the ***CVRA*** enjoyed a "broad, bi-partisan consensus." [90] It passed by a vote of 393 to 14 in the House [91] and by a voice vote in the Senate. [92] Moreover, the ***CVRA***'s cosponsors were bipartisan, and the views they gave on the legislation were not contradicted by anyone else. Thus, as the Ninth Circuit has explained in construing the ***CVRA*** to track Senator Kyl's and Feinstein's views:

Floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views. Silence, the maxim goes, connotes assent, and so we can draw from the fact that no one registered disagreement with Senators Kyl and Feinstein on this point the reasonable inference that the views they expressed reflected a consensus, at least in the Senate. [93]

In light of all this, it is beyond doubt that crime victims have a substantive right to be treated with fairness (as well as with respect for their dignity and **[*877]** privacy) in the federal criminal justice process. Once that right is in mind, the Advisory Committee has clear duties under the Rules Enabling Act. That Act provides that the Rules "shall not abridge, enlarge or modify any substantive right." [94] Therefore, if any existing rule of criminal procedure "abridges" or even "modifies" a victim's rights to fairness, it is invalid and must be changed. Accordingly, the Advisory Committee must review all the Federal Rules of Criminal Procedure to ensure that they protect victims' right to fairness.

B. The Advisory Committee Treats the Right to Fairness Inconsistently

The Advisory Committee claimed that to implement the right to fairness would use the right as "a springboard for a variety of victim rights not otherwise provided for in the ***CVRA***." [95] If so, the Advisory Committee was unable to consistently follow its own view. The Advisory Committee agreed with my proposed change to Rule 18; that change required that when a court determines where within a judicial district to hold a trial, it should consider not only the convenience of the defendant and the

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[88] See *Advisory Committee Report, supra* note 69, at 1-20; Advisory Committee Minutes, supra note 68, at 13-16; Proposed ***Amendments***, supra note 71, at 349-75.

[89] See, e.g., *Fed. R. Crim. P. 15*, Advisory Committee Note to 1974 ***Amendment*** (quoting directly from the Congressional Record statements from drafter of relevant legislation).

[90] See *United States v. Cienfuegos, 462 F.3d 1160, 1165 (9th Cir. 2006);* see also 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2005) (statement of Sen. Kyl) ("After extensive consultation with my colleagues, broad bipartisan consensus was reached and the language in [the ***CVRA***] was agreed to.").

[91] 150 Cong. Rec. H8208-09 (daily ed. Oct. 6, 2004).

[92] 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004).

[93] *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1015-16 (9th Cir. 2006)* (internal quotations and citations omitted); accord *United States v. Sharp, 463 F.Supp.2d 556, 561 n.12 (E.D. Va. 2006);* see also *In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006)* (looking to legislative history to interpret ***CVRA***); *United States v. Cienfuegos, 462 F.3d 1160, 1165 (9th Cir. 2006)* (same); *United States v. Degenhardt, 405 F. Supp. 2d 1341, 1344 (D. Utah 2006)* (same); *United States v. Ingrassia, 2005 WL 2875220 (E.D.N.Y. 2005)* (same).

[94] *28 U.S.C. § 2072*(b) (2006).

[95] ***CVRA*** Subcommittee Memo, supra note 66, at 1.

witnesses, but also the victim as well. [96] Notably, the Advisory Committee's rationale for this change was to "implement[] the victim's "right to be treated with fairness' under the Crime Victims' Rights Act." [97] But if a change to the relatively obscure Rule 18 is appropriate in light of the victim's right to fairness, why aren't changes to many other, more significant rules also appropriate?

Further highlighting the inconsistent treatment of the right to fairness is the way the Advisory Committee handled parallel provisions in the ***CVRA***. In a single clause, the ***CVRA*** gives victims the right to be treated not only with fairness, but also with dignity and respect: section (a)(8) of the ***CVRA*** provides that victims shall enjoy "the right to be treated with fairness and with respect for the victim's dignity and privacy." [98] The Advisory Committee used victims' rights to dignity and respect as a "springboard" in several places. For example, the Advisory Committee proposed an ***amendment*** to prevent inappropriate subpoenas for personal or confidential information about a victim, explaining that "this ***amendment*** implements the Crime Victims Rights Act, codified at *18 U.S.C. § 3771*(a)(8), which states that victims have a right to respect for their "dignity and privacy.'" [99] Similarly, the Advisory Committee proposed an ***amendment*** to prevent the inappropriate release of a victim's address and telephone number as part of alibi defense disclosures, explaining that "this ***amendment*** implements the victims' rights under the Crime Victims Rights Act … to be treated with respect for the **[*878]** victim's dignity and privacy." [100] Why the Advisory Committee believed it appropriate to try to implement the "dignity and privacy" provisions of the ***CVRA*** but not the immediately adjacent "fairness" provision is unclear.

C. The Advisory Committee Should Not Leave the ***CVRA***'s Interpretation to the Litigation Process.

The Advisory Committee also justified its decision not to review the Rules for fairness on the ground that it would "not attempt to use the rules to anticipate and resolve the interpretative questions that will arise" under the ***CVRA***. [101] Yet a basic purpose - perhaps the basic purpose - behind the procedural rules is to lay out answers to questions that might otherwise have to be litigated. To that end, Rule 2 of the criminal rules provides that "these rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." [102] It is at odds with securing simplicity in procedure to simply regurgitate the language of the ***CVRA*** in the criminal rules, leaving every interpretative question to the vagaries of litigation.

Historical examples are legion of the Advisory Committee amending the Federal Rules of Criminal Procedure precisely to resolve questions that were being (or might have been) litigated. To provide a few straightforward examples, in 1979 the Advisory Committee amended and clarified the standards for presentence withdrawal of a guilty plea. The Advisory Committee noted that courts had "critically stated that the Rule offers little guidance as to the applicable standard for a presentence withdrawal of plea and that as a result the contours of [the presentence] standard [in the rule] are not easily defined." [103] The ***amendment*** clarified language "which has been a cause of unnecessary confusion." [104]

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[96] See *Advisory Committee Report, supra* note 69, at 8 (adopting proposal from Cassell, Proposed ***Amendments***, supra, note 4, at 878-79).

[97] Id. at 4; accord ***CVRA*** Subcommittee Memo, supra note 66, at 8.

[98] *18 U.S.C. § 3771*(a)(8).

[99] *Advisory Committee Report, supra* note 69, at 3 (note to Proposed Rule 17(c)(3)).

[100] Id. at 351.

[101] ***CVRA*** Subcommittee Memo, supra note 66, at 2.

[102] *Fed. R. Crim. P. 2*.

[103] *Fed. R. Crim. P. 32* advisory committee's note (1979 Amend. to Rule 32(d)) (internal quotation marks omitted).

[104] Id.

In 1983, the Advisory Committee changed Rule 11(a)(2) to eliminate a split of authority on conditional guilty pleas. One of the reasons for the change was to "produce much needed uniformity in the federal system on this matter." [105]

In 1994, the Advisory Committee amended rule 32(b)(2) to give defense counsel an opportunity to be present when probation officers interviewed their clients while preparing a presentence report. [106] The Advisory Committee Notes explained that while there was no constitutional right to counsel at this point in the process, caselaw in two circuits suggested that requests of counsel to be present should be honored as a matter of prudence. [107] What is particularly interesting about **[*879]** this example is that the Advisory Committee stepped in to protect the legitimate interests of defendants even in the absence of a constitutional or statutory command to do so. Of course, the ***CVRA*** creates a statutory command to the Advisory Committee to protect victims' interests.

In 2002, the Advisory Committee amended Rule 51 to provide that court rulings admitting or excluding evidence were governed by the Federal Rules of Evidence. The reason was to avoid "the possibility that an argument might have been made" that an earlier congressional action conflicted with the rules of evidence. [108] In other words, the Advisory Committee simply anticipated and resolved an interpretive question that might otherwise have arisen.

In 2005, the Advisory Committee amended Rule 12.2 to provide sanctions for a party's failure to disclose certain alibi information. [109] The reason for the change was to "fill[] a gap" in the Rules. [110]

In these instances, the Advisory Committee stepped in to avoid unnecessary litigation and to clarify the application of the Rules. Not only is this the Advisory Committee's standard approach, but there are particularly strong reasons for not leaving clarification of crime victims' rules to case-by-case litigation. The most significant problem is that such litigation will occur only in fits and starts. Unlike the government and criminal defendants who always have legal representation, crime victims have no right to appointed counsel and are often indigent or otherwise unable to afford to hire an attorney. [111] As a result, in many cases it is an empty gesture to promise victims that they can litigate application of the Rules. As a practical matter, they will often be unable to do so. [112] Indeed, the Advisory Committee seemingly compounds this problem by declining to put into the Rules any restatement of courts' discretionary authority to appoint counsel for crime victims. [113]

Even in cases where victims can afford counsel to defend their legal rights, the kind of litigation that the Advisory Committee envisions will be unenlightening and formalistic. For instance, while I have proposed including a specific provision in the Rule 11 guilty plea colloquy requiring that the court address a victim before accepting a plea, [114] the Advisory Committee has not recommended any change. This failure could well spawn litigation about the victims' role in the plea process that will require courts to consider why Rule 11 fails to mention crime victims and how this failure interplays with the ***CVRA***'s commands on

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[105] *Fed. R. Crim. P. 11* advisory committee's note (1983 Amend.).

[106] *Fed. R. Crim. P. 32* advisory committee's note (1994 Amend.).

[107] Id.

[108] *Fed. R. Crim. P. 51* advisory committee's note (2002 Amend.).

[109] *Fed. R. Crim. P. 12.2* advisory committee's note (2005 Amend.).

[110] Id.

[111] See Beloof, Cassell & Twist, supra note 6, at 381.

[112] In theory, the government is given authority to assert rights for crime victims, see *18 U.S.C. § 3771*(d)(1) (2006), but in practice the reported cases under the ***CVRA*** thus far show few examples where the government has been willing to do so. See, e.g., *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1018 (9th Cir. 2006)* (victims' assertion of right affirmed; government does not take a position on the claim).

[113] See infra notes 449-463 and accompanying text (discussing proposed rule 44.1).

[114] See infra notes 145-152 and accompanying text.

victims' rights in the **[*880]** plea process. Because the ***CVRA*** guarantees victims a right in the plea process, its dictates will ultimately govern. But only the Advisory Committee can pretermit such needless litigation about how to interpret its rules. In short, it would be much simpler for all concerned if Rule 11 - and, indeed, all the other rules - were redrafted to simply fold victims in at the appropriate point in the process.

Finally, one of the overriding goals of the ***CVRA*** is to dramatically reform the entire approach of the federal criminal justice system. As Senator Feinstein explained "this legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." [115] And Senator Kyl added, "[a] central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims … ." [116] Given Congress's clear intent to change a hostile legal culture, it makes no sense to leave victims to the mercies of litigation to determine the scope of their rights.

For all these reasons, the Federal Rules of Criminal Procedure should be amended not only to implement the narrow rights articulated in the ***CVRA*** but also its more open-ended rights, particularly the victim's right to be treated with fairness.

IV. Specific Rule Changes to Comply with the ***CVRA***

Against the backdrop of the statutory command that victims should be treated with fairness, the balance of this Article will compare my specific proposals for amending the Rules with those of the Advisory Committee - attempting to show the strong points of my ideas. For convenience, the Article proceeds sequentially through the Rules from beginning to end, relying in the case of proposed ***amendments*** on the Advisory Committee's numbering.

Rule 1 - Definition of "Victim" and "Victim's Representative" The Proposals:

I proposed amending Rule 1 to include a definition of victim and the victim's representatives as follows:

"Victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may **[*881]** assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative. [117]

The Advisory Committee instead proposed to cross-reference the statutory definition of "crime victim" as follows:

"Victim" means a "crime victim" as defined in *18 U.S.C. § 3771*(e). A person accused of an offense is not a victim of that offense. [118]

Discussion:

The rules should be amended to make clear that both a victim and the victim's representative can assert the victim's rights. As an effort in that direction, I proposed amending Rule 1 to include a definition of "victim" as well as a definition of "victim's lawful representative." [119] My definitions were lifted from the ***CVRA***. [120] In response, the Advisory Committee agreed to include a definition of "victim" but left to an Advisory Committee Note the reference to the victim's representative. [121]

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[115] 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[116] 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[117] Cassell, Proposed ***Amendments***, supra note 4, at 856-57.

[118] Proposed ***Amendments***, supra note 71, R. 1(b)(11), at 1.

[119] Cassell, Proposed ***Amendments***, supra note 4, at 852, 856-57.

[120] See *18 U.S.C. § 3771*(e) (2006); see also *United States v. Sharp, 463 F. Supp. 2d 556, 558 (E.D. Va. 2006)* (person harmed by former domestic partner of marijuana user was not "victim" entitled to provide victim impact statement pursuant to ***CVRA***).

The differences between the two approaches might seem modest until one recognizes that another provision in the Advisory Committee's proposals appears to intentionally omit any reference to a victim representative. Proposed Rule 60, the Advisory Committee's "global" provision dealing with victims' rights, explains who may enforce victims' rights. [122] In clear contrast to the ***CVRA***'s governing provision, this proposed rule omits any reference to a crime victim's representative. Proposed Rule 60 provides only that "the rights of a victim under these rules may be asserted by the victim and the attorney for the government." [123] In contrast, the ***CVRA*** enforcement provision states: "The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a)." [124] Nothing in the Advisory Committee Notes indicates that a crime victim's representative is among those authorized to assert the rights. The Advisory Committee also struck existing **[*882]** language in the Rules about a victim's representative exercising the victim's right to speak at sentencing. [125]

The repeated omission of any reference to a victim's representative is unsettling given the Advisory Committee's promise to simply track the ***CVRA***'s language. [126] Its failure to track the language here leaves the impression that the Advisory Committee is uncomfortable with a victim's representative asserting rights. Perhaps the Committee could make a policy argument against such representation, but Congress has said victims have the right to have representatives speak for them. The Federal Rules should follow the ***CVRA*** and state clearly that a victim's representative can assert a victim's rights.

The need for clarity on this point is heightened by pre-***CVRA*** caselaw questioning any right by a victim's representative to assert victims' rights. Most notably, in one of the Oklahoma City bombing prosecutions, the Tenth Circuit rebuked a trial judge for permitting an attorney for the bombing victims to participate in oral argument at a sentencing hearing. [127] The Circuit stated that "in the absence of any authority permitting the participation of victims' counsel, we harbor concerns about the propriety of the district court's rulings." [128] This statement can no longer be regarded as good law in light of the ***CVRA***'s commands. [129]

Another reason for clarity is to make sure that corporate and organizational victims are able to be heard in the process. The ***CVRA***'s definition of victim - "a person directly and proximately harmed as a result of the commission of a Federal offense" [130] - is essentially lifted from federal restitution statutes. [131] Federal courts have consistently held that a "person" entitled to restitution includes corporate entities. [132] Of course, such legal entities cannot appear personally but only through **[*883]** a

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[121] For subsequent developments on this issue, see infra notes 578-579 and accompanying text.

[122] Proposed ***Amendments***, supra note 71, R. 60, at 16-18.

[123] *Advisory Committee Report, supra* note 69, at 16.

[124] *18 U.S.C. § 3771*(d)(1) (2006) (emphasis added).

[125] See Proposed ***Amendments***, supra note 71, R. 32(i)(4)(B)(i)-(ii), at 13-14 (deleting language confirming permission for parent or legal guardian to exercise right to speak at sentencing for minor and incapacitated victims).

[126] See, e.g., *Advisory Committee Report, supra* note 69, at 1 ("The Subcommittee concluded that the Rules should incorporate, but not go beyond, the specific statutory provisions [in the ***CVRA***].").

[127] *United States v. Fortier, 242 F.3d 1224, 1230 (10th Cir. 2001).* In the interest of full disclosure, I was the attorney in question.

[128] Id.

[129] See *United States v. Degenhardt, 405 F. Supp. 2d 1341, 1343 n.7 (D. Utah 2005)* (noting that Fortier has now been overruled by statute).

[130] *18 U.S.C. § 3771*(e) (2006) (emphasis added).

[131] See *18 U.S.C. § 3663*(a)(2); id. § 3663A(a)(2).

[132] See, e.g., *United States v. Martin, 128 F.3d 1188, 1191 (7th Cir. 1997)* (collecting cases); *United States v. Hand, 863 F.2d 1100, 1104 (3d Cir. 1988)* (it makes no sense to say that "if General Motors or Chase Manhattan Bank had funds stolen, in violation of federal criminal law, a

representative. To eliminate any doubt about the ability of corporate entities to assert their interests, the Rules should be amended to clearly state that a victim's representative can enforce victims' rights. [133]

Rule 2 - Fairness to Victims The Proposals:

I proposed amending Rule 2 to require fairness to victims in construing the Rules as follows:

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay. [134]

The Advisory Committee did not propose amending Rule 2. [135]

Discussion:

To assure that crime victims are treated fairly throughout the process, it makes sense to add language incorporating crime victims in Rule 2 - the one rule that specifically mentions fairness. As discussed in the previous Part of this Article, the Advisory Committee does not agree that the Rules should be amended to protect a victim's right to fairness and for this reason, presumably, declined to amend Rule 2. The qualifier "presumably" is needed here because the ***CVRA*** Subcommittee did not give an explanation for declining to follow my recommendation here. [136]

The fairness issues appears to be the fundamental difference between my approach and the Advisory Committee's approach - the Rules are either going to treat crime victims fairly or not. As discussed in the previous Part of this Article, they should.

But even those who share my view on fairness might nonetheless argue that Rule 2 need not be amended because it is an interpretive rule with no substantive effect. After all, it could be argued, the rule simply calls for a "just determination" of criminal cases, arguably a symbolic command. And, in any event, that command might be flexible enough to encompass crime victims.

[*884] The debate about how Rule 2 ought to read is, however, about more than symbols. In 1946, the initial chairman of the Advisory Committee called Rule 2 "the most important rule of the whole set." [137] Rule 2 has been cited by a number of courts, [138] including the Supreme Court. [139] Rule 2 has consequences. Not only does it "set[] forth a principle of interpretation" for

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judge could not require the wrongdoers to pay restitution … ."); *United States v. Kirkland, 853 F.2d 1243, 1246 (5th Cir. 1988)* ("Non-human entities … can be "victims' entitled to restitution … ."); see also *United States v. Lincoln, 277 F.3d 1112, 1113-14 (9th Cir. 2002)* (discussing *18 U.S.C. § 3664,* which specifically recognizes the United States as a possible victim for restitution purposes).

[133] The National Association of Criminal Defense Lawyers has proposed adding a "factfinding" hearing for determining who qualifies as a victim under the ***CVRA***. This novel and cumbersome proposal is discussed below. See infra notes 546-547 and accompanying text (discussing Proposed Rule 60(b)).

[134] Cassell, Proposed ***Amendments***, supra note 4, at 858.

[135] Proposed ***Amendments***, supra note 71.

[136] See *CVRA Subcommittee Report, supra* note 66, at 17-20 (listing Cassell proposals not adopted; Rule 2 proposal not listed).

[137] Vanderbilt, N.Y.U Institute of Federal Rules of Civil Procedure, at 120 (1946), quoted in 1 Charles Alan Wright, Federal Practice and Procedure: Criminal § 32, at 30 n.1 (3d ed. 1999).

[138] See, e.g., *United States v. Gupta, 363 F.3d 1169,1174 (11th Cir. 2004); United States v. Navarro, 169 F.3d 228, 237 (5th Cir. 1999);* ***United States v. Price, 13 F.3d 711, 723 (3d Cir. 1994);*** *United States v. Giovannetti, 928 F.2d 225, 226 (7th Cir. 1991); United States v. Campbell, 845 F.2d 1374, 1378 (6th Cir. 1988); United States v. Green, 847 F.2d 622, 625 (10th Cir. 1988); United States v. Hillard, 701 F.2d 1052, 1061 (2d Cir. 1983),* cert. denied ***461 U.S. 958 (1983);*** *United States v. Broadus, 664 F. Supp. 592, 596-98 (D.D.C. Cir. 1987); United States v. Pers. Fin. Co. of N.Y., 13 F.R.D. 306, 311 (S.D.N.Y. 1952).*

[139] See *Carlisle v. United States, 517 U.S. 416, 424, 431 (1996).*

ambiguous rules, but the Court has used it as a basis for deviating from the Rules in some circumstances. [140] Indeed, in some lower court cases, Rule 2 has proven outcome determinative. For example, in United States v. Broadus, the United States District Court for the District of Columbia used Rule 2 as a basis for deviating from the time limits imposed by Rule 29(c) for the defendant to seek a new trial. [141] Relying on Rule 2, the court determined that "a seemingly plausible inference from a criminal rule cannot command blind adherence if it would deprive an accused person … of a just determination of his or her cause." [142] Using Rule 2 to protect defendants' legitimate interests seems entirely proper. But crime victims need the same textual support to secure their legitimate interests.

Not only is Rule 2 important, directly including crime victims in the language is important as well. Courts are used to resolving disputes between prosecutors and defendants, not considering the interests of crime victims. [143] That problem is, indeed, the whole reason for the passage of the ***CVRA***. As Senator Feinstein has explained, "In case after case we found victims and their families were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by … judges focused on defendant's rights, and by a court system that simply did not have a place for them." [144] For all these reasons, Rule 2 should be amended to make clear that the Rules must be construed to be fair not only to the parties, but also to victims.

[*885] Rule 11(a)(3) - Victims' Views on Nolo Contendere Pleas The Proposals:

I proposed requiring courts to consider a victim's view before accepting any nolo contendere plea as follows:

Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' and victims' views and the public interest in the effective administration of justice. [145]

The Advisory Committee proposed no change to the rule. [146]

Discussion:

It is unclear why the Advisory Committee declined to change Rule 11 to require courts to consider victims' views on nolo pleas. The ***CVRA*** Subcommittee purported to catalog and briefly discuss all of my proposals that the subcommittee declined to recommend to the full Committee. Inexplicably, my Rule 11(a)(3) proposal (along with my other Rule 11 proposals) was not mentioned [147] and, thus, there is nothing in the available records to indicate that the Advisory Committee considered it. Possibly the reason the Advisory Committee did not recommend this change was simply oversight.

Perhaps the Advisory Committee was relying on its "global" rule on victims' rights (Rule 60) which provides that "the court must permit a victim to be reasonably heard at any public proceeding in the district court concerning … [a] plea … involving the crime." [148] But that rule deals solely with the subject of being "heard." Once the court has heard the victim, the question

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[140] See *id. at 424-25* (referring to *Fallen v. United States, 378 U.S. 139 (1964)).*

[141] *664 F. Supp. at 598.*

[142] *Id. at 596-97.*

[143] See, e.g., Beloof, supra note 6, at 289 (noting "state of denial" about crime victims' rights by institutional actors); Russell P. Butler, What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings, 19 Fed. Sent'g Rep., Oct. 2006, at 21, 21 (noting that the ***CVRA*** heralds a "new era" for crime victims' rights).

[144] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[145] Cassell, Proposed ***Amendments***, supra note 4, at 866.

[146] Proposed ***Amendments***, supra note 71.

[147] ***CVRA*** Subcommittee Memo, supra note 66, at 17-20.

[148] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 16.

remains what the court should do with the victim's statement. Currently Rule 11(a)(3) specifies that the court must consider "the parties'" views on a nolo plea - but it makes no mention of the victim's views. [149] The ***CVRA*** now mandates that victims must be "reasonably heard" at any proceeding involving a "plea." [150] It is hard to see how anyone could argue that a victim is reasonably heard when, after making a **[*886]** statement about the nolo plea, the court is not required to even consider it. The rule should be amended to require courts to consider victims' statements.

Rule 11(b)(4) - Victims' Right To Be Heard on Pleas

The Proposals:

I proposed that the court should be required to address any victim present when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea, as follows:

Victims' Views. Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal. [151]

The Advisory Committee recommended no change to Rule 11. [152]

Discussion:

It is hard to understand why the Advisory Committee declined to recommend changing Rule 11 to require that victims be addressed, as it did not discuss the idea. [153] If the Advisory Committee deliberately rejected this idea, it has given no explanation and it is hard to see any justification for the Advisory Committee's position. The ***CVRA*** gives victims "the right to be reasonably heard at any public proceeding in the district court involving … [a] plea." [154] To implement the victim's right to be heard regarding a plea, my proposed rule change merely required the court to directly address any victim who is present in court and to consider any views the victim expressed. This is consistent with the ***CVRA***'s legislative history which explains that "this provision is intended to allow crime victims to directly address the court in person." [155] The language of the proposed rule is lifted from an earlier paragraph in Rule 11, which requires the court "before accepting a plea of guilty" to "address the defendant personally in open court." [156] Victims should be treated evenhandedly with defendants. It may also be important for the judge to address victims directly because many victims will lack **[*887]** the assistance of counsel. Untrained in legal proceedings, victims may be uncertain about exactly when in the process they should present their views. Having the court address the victim will eliminate that uncertainty and ensure that the victim's right to be heard is vindicated.

The Advisory Committee's "global" rule on victims' rights (Rule 60) does briefly address pleas. Tracking language in the ***CVRA***, the Advisory Committee would require the court to "permit a victim to be reasonably heard at any public proceeding …

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[149] The rule does mention that the court must consider "the public interest in the effective administration of justice" in reviewing a nolo plea. See *Fed. R. Crim. P. 11(a)(3)*. But this broad phrase does not appear to encompass the views of particular actors regarding a plea, as made clear by the fact that the rule separately lists "the parties' views" as something the court must consider.

[150] *18 U.S.C. § 3771*(a)(4) (2006).

[151] Cassell, Proposed ***Amendments***, supra note 4, at 866.

[152] Proposed ***Amendments***, supra note 71.

[153] See supra note 145-147 and accompanying text (noting the absence of any mention of my Rule 11 proposals as those the subcommittee rejected).

[154] *18 U.S.C § 3771*(a)(4).

[155] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[156] *Fed. R. Crim. P. 11(b)(2)*.

concerning … [a] plea." [157] But this brief mention in the rule is inferior to my specific proposal for several reasons. First, Rule 11 is the "script" when federal judges accept guilty pleas. Victims should be directly included here so that judges do not inadvertently overlook victims' rights. Second, stating only that victims may be "reasonably heard" regarding a plea, without explaining how that will occur, invites litigation and uncertainty. For example, is a victim reasonably heard when allowed to be heard only through written submission? [158] Is a victim treated "fairly" if the court is required to address the defendant in open court but not to address the victim? If the court does not address the victim, when should the victim try to interrupt the proceedings to be heard? Should the victim's views enter into the court's calculation about whether to accept the plea? All of these questions are answered in a simple and straightforward way by my proposal - a proposal which the Advisory Committee should adopt.

Rule 11(c)(1) - Prosecution To Consider Victims' Views on Pleas The Proposals:

I proposed that the prosecution should be required to consider victims' views in developing any proposed plea arrangement as follows:

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, **[*888]** the plea agreement may specify that an attorney for the government will … [listing various options]. [159]

The Advisory Committee did not recommend any change. [160]

Discussion:

My proposed change required prosecutors to make reasonable efforts to notify victims about pleas and to consider the victims' views regarding pleas. This requirement was taken almost verbatim from the Attorney General Guidelines for Victim and Witness Assistance, which already directs prosecutors to "make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations." [161] According to the Department of Justice, "twenty-nine states [already] require prosecutors to "consult with' or "obtain the views of' victims at the plea agreement stage." [162]

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[157] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 15-16.

[158] Compare *United States v. Degenhardt, 405 F. Supp. 2d 1341, 1345-46 (D. Utah 2005)* (finding that a victim must be heard orally at sentencing), and *United States v. Turner, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005)* (noting in dicta that § 3771(a)(4) "requires the victim to be given an opportunity actually to be "heard' rather than afforded some alternate means of communicating her views") (emphasis in original), with *United States v. Marcello, 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005)* (holding that "in detention hearings, the victim's right to be reasonably heard does not mandate oral statements, particularly when the [victim] has no personal knowledge of the guilt of the defendant(s) and offers an opinion only on a matter that is not in dispute").

[159] Cassell, Proposed ***Amendments***, supra note 4, at 868.

[160] Proposed ***Amendments***, supra note 71.

[161] U.S. Dep't of Justice, Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance 30 (2005) (defining what can be considered in determining whether notice is reasonable in a particular case) [hereinafter Dep't of Justice, Attorney General Guidelines]; see also U.S. Dep't of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 87 (1997) ("Prosecutors should make every effort … to consult with the victim on the terms of any negotiated plea … .") [hereinafter Dep't of Justice, New Directions from the Field].

[162] Dep't of Justice, New Directions from the Field, supra note 161, at 75 (quoting National Victims' Center, 1996 Victim's Rights Sourcebook: A Compilation of Victim's Rights Laws, Arlington, VA: National Victim Center, 1997 § 5).

Perhaps the Advisory Committee overlooked this proposed change. [163] Yet it is important, implementing not only a victim's right to be heard at plea proceedings but also the rights to "confer with the attorney for the government" [164] and to be "treated with fairness." [165] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case." [166] Because the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Reflecting that fact, the Rules should follow the approach of the majority of states in directing prosecutors to consult with victims about pleas.

[*889] Rule 11(c)(2) - Court to Be Advised of Victim Objections to Plea The Proposals:

I proposed that prosecutors and victims' attorneys should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement. [167]

The Advisory Committee proposed no change to this rule. [168]

Discussion:

In circumstances where an attorney, either for the government or for the victim, is aware of a victim's objection to a plea, that information should be relayed to the court. The victim's attorney will, no doubt, do this on her own initiative. The rule is intended to clarify that the prosecutor is under an equal obligation to communicate this information to the court.

While the Advisory Committee may have overlooked this proposal, [169] the change is necessary because the ***CVRA*** implicitly obligates prosecutors to communicate a victim's objection to the court. The ***CVRA*** commands that prosecutors use their "best efforts" to enforce victims' rights. [170] Victims are often untrained in the law and unexpectedly thrust into criminal proceedings; they may well believe that prosecutors automatically relay their objections to the plea to the court. The proposed rule avoids confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is aware of an objection.

This approach is consistent with the leading case of State v. Casey, [171] which considered whether a victim's request to be heard regarding a plea made to the **[*890]** prosecutor was sufficient to trigger the victim's constitutional right to be heard. [172] In

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[163] See supra note 147 and accompanying text (noting listing of Cassell proposals rejected; Rule 11 proposals not listed).

[164] *18 U.S.C. § 3771*(a)(5) (2006).

[165] Id. § 3771(a)(8).

[166] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[167] Cassell, Proposed ***Amendments***, supra note 4, at 869.

[168] Proposed ***Amendments***, supra note 71.

[169] See supra note 147 and accompanying text (noting listing of Cassell proposals rejected; Rule 11 proposals not mentioned).

[170] *18 U.S.C. § 3771*(c)(1) (2006).

[171] *2002 UT 29, 44 P.3d 756.* I served as pro bono counsel for the victim in the case.

[172] See generally Nicole G. Farrell, Recent Developments, A Victim's Right To Be Heard Under the Victims' Rights ***Amendment***, The Victims' Right Act, and the Rights of Crime Victims Act, *2003 Utah L. Rev. 716* (summarizing impacts of case on Utah law).

Casey, the victim told the prosecutor that she wished to be heard in opposition to a plea. The prosecutor refused to convey that information to the court and the trial judge accepted the plea. When the issue reached the Utah Supreme Court, the court concluded that the prosecutor had an ethical obligation as an officer of the court to convey that information to the judge:

Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities… . The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest … in a criminal prosecution is not that it shall win … but that justice shall be done. [173]

Applying the reasoning of Casey to analogous rights in the ***CVRA***, federal prosecutors must, as officers of the court, convey a victim's request to be heard regarding a plea. Indeed, the prosecutor should convey not only that request to be heard but also the fact that the victim has an objection to the plea. In deciding whether to accept a plea, the court must consider the public interest. [174] As the Courts of Appeals have explained, ""Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.'" [175] When the prosecutor is aware of an objection from a keenly interested member of the public - the victim - the court should not be left in the dark about it, as provided in my proposed rule. [176]

[*891] Rules 12.1 and 12.3 - Victim Addresses and Phone Numbers Not Disclosed for Alibi and Public-Authority Defense Purposes The Proposals:

Rule 12.1 currently requires the government to disclose the address and telephone numbers of any witness, including any victim, that it plans to use to disprove a defendant's alibi. I proposed amending Rule 12.1 to protect the victim's privacy, by excluding their addresses and telephone numbers from this requirement as follows:

(a) Government's Request for Notice and Defendant's Response.

(1) Government's Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) Defendant's Response. Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense;

(B) the name, address, and telephone number of each alibi witness and the address and telephone number of each witness (other than a victim) on whom the defendant intends to rely. [177]

(b) Disclosing Government Witnesses.

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[173] *Casey, 2002 UT 29, P 32, 44 P.3d at 764* (internal citations omitted) (quoting *State v. Emmett, 839 P.2d 781, 787 (Utah 1992)).*

[174] See, e.g., *United States v. Bean, 564 F.2d 700, 704 (5th Cir. 1977)* (stating that discretion of the court includes license to reject plea deals that are against public interest).

[175] *United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985)* (emphasis added) (quoting *United States v. Miller, 722 F.2d 562, 563 (9th Cir.1983)).*

[176] For alternative ways of drafting this rule, see Cassell, Proposed ***Amendments***, supra note 4, at 871-72 (noting that several states require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it).

[177] This ***amendment*** to rule 12.1(a)(2)(B) was not in my previous proposal. See Cassell, Proposed ***Amendments***, supra note 4 at 872-73. It is included here for the reasons discussed infra at note 213 and accompanying text.

(1) Disclosure. If the defendant serves a Rule 12.1(a)(2) notice [regarding intent to present an alibi defense], an attorney for the government must disclose in writing to the defendant or [178] the defendant's attorney:

(A) the name, address, and telephone number of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense.

[*892] (2) Time to Disclose. Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address and telephone number of each additional witness (other than a victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier. [179]

In addition, I proposed making a similar change to Rule 12.3 "regarding the address and telephone number of victims who will be used to disprove a public-authority defense." [180]

The Advisory Committee proposed more limited protection for victims' addresses and telephone numbers:

(b) Disclosing Government Witnesses.

(1) Disclosure.

(A) In general. If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) (A) the name, address, and telephone number of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(ii) (B) each governmental rebuttal witness to the defendant's alibi defense.

(B) Victim's Address and Telephone Number. If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

[*893] (ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests.

. . . .

(c) Continuing Duty to Disclose.

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[178] The excision of the phrase "the defendant or" was not in my previous proposal. See Cassell, Proposed ***Amendments***, supra note 4, at 872. It is included here for reasons discussed infra at note 190 and accompanying text.

[179] Cassell, Proposed ***Amendments***, supra note 4, at 873.

[180] Id.

(1) In General. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, of each additional witness and the address, and telephone number of each additional witness - other than a victim - if:

(A) (1) the disclosing party learns of the witness before or during trial; and

(B) (2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) Address and Telephone Number of an Additional Victim Witness. The telephone number and address of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

(d) Exceptions. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c). [181]

The Advisory Committee also proposed adding an Advisory Committee Note as follows:

Subdivisions (b) and (c). The ***amendment*** implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. See *18 U.S.C. § 3771*(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial **[*894]** disclosure and the prosecutor's continuing duty to disclose under subdivision (c). [182]

Discussion:

The Advisory Committee agrees with me that the current rule providing that a victim's address and telephone number be automatically disclosed whenever an alibi is at stake conflicts with the ***CVRA***. [183] This information can often be very sensitive for a crime victim, as it could allow the defendant to find and harm a victim. The difference between our proposals is that I would strike the requirement that a victim's address and telephone number be disclosed to the defense while the Advisory Committee would add specific language allowing a court to order production of the address and telephone number based on a defense showing of "need." [184]

The Advisory Committee's approach highlights an inconsistency in the way it handles defendants' and victims' interests. It has chosen to spell out in the Rules how a defendant can obtain access to a victim's address and telephone number. Of course, if the Constitution or a statute already requires the prosecutor to turn over that personal information, any rule is irrelevant. Presumably, the reason that the Advisory Committee added the language is because it knows that the language is not irrelevant - that is, that the Constitution and statute do not always require production of this information. [185] Obviously, nothing is wrong with the Advisory Committee drafting rules that go beyond the Constitution and statutes to protect defendants' legitimate interests. That approach is, indeed, commendable. What is wrong is for the Committee to work through its rules to make sure

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[181] Proposed ***Amendments***, supra note 71, R. 12.1, at 2-6 (footnote omitted).

[182] Proposed ***Amendments***, supra note 71, R. 12.1, at 6 (footnote omitted).

[183] Compare Cassell, Proposed ***Amendments***, supra note 4, at 872, with Proposed ***Amendments***, supra note 71, R. 12.1.

[184] Compare Cassell, Proposed ***Amendments***, supra note 4, at 872-73, with Proposed ***Amendments***, supra note 71, R. 12.1(b)(1)(B), at 3-4 (footnote omitted).

[185] See generally infra notes 297-324 and accompanying text (reviewing case law establishing that criminal defendants lack any relevant constitutional or statutory right to discovery).

defendants are treated fairly - even in the absence of an overarching statutory command to that effect - while not doing the same for crime victims, even where the ***CVRA*** directly commands that victims be treated "with fairness." [186]

In any event, the Advisory Committee's proposal is decidedly unfair. The Committee proposes a two-pronged approach:

If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

[*895] (i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests. [187]

Notice that the court can order disclosure of the victim's address upon a mere showing by the defendant of "a need," by proceeding under subparagraph (i) of the proposed rule; the requirement to protect the victim's interests is triggered only if the court chooses to proceed under paragraph (ii). And the proposed rule fails to give any guidance on when the court should proceed under paragraph (ii) as opposed to paragraph (i).

The Advisory Committee's provision for two ways in which the court can avoid the requirements of withholding a victim's name seems unnecessary. Subsection (d) of Rule 12.1 already allows a court to grant an exception to any of the requirements of the rule for "good cause." [188] This exception has been used to justify the government's nondisclosure of its witnesses in situations where their safety might be jeopardized. [189] There is, accordingly, no need to add "wiggle room" language in Rule 12.1.

More important, the Advisory Committee's approach is fundamentally flawed. It makes no sense to require that the victim's interests be considered only half the time - i.e., only where the court proceeds under paragraph (ii) but not under paragraph (i). More important, since the Advisory Committee appears to agree that disclosing a victim's address raises obvious safety concerns, allowing disclosure without any consideration of the victim's interests violates the ***CVRA***'s command that the victim must be "reasonably protected from the accused." [190] A court proceeding under paragraph (i) would be under no obligation to "protect[] the victim's interests" (as paragraph (ii) specifically provides), since it is a standard rule of construction that expressio unius est exclusio alterius (the expression of one thing implies the exclusion of the other). [191] At a bare minimum, the ***CVRA*** requires redrafting the rule so that the court always considers victims' interests before it can order production of a victim's address.

Also interesting are the choices that the Advisory Committee specifically lists for a judge. The options given are (i) "order the government to provide the information in writing" or (ii) "fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests." The listing of these two (and only these two) options seems to imply that the court does not have **[*896]** a third option - i.e., (iii) decline to order a victim's address be turned over. It is simply not the case that every time the defendant can establish a "need" for information - no matter how trivial or how remotely connected to the case - the court should either disclose a victim's address or fashion some other procedure toward the same end.

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[186] *18 U.S.C. § 3771*(a)(8) (2006).

[187] Proposed ***Amendments***, supra note 71, R. 12.1(b)(1)(B), at 3-4 (footnote omitted).

[188] *Fed. R. Crim. P. 12(d)*.

[189] See, e.g., *United States v. Causey, 834 F.2d 1277, 1282 (6th Cir. 1987)* (noting that, in light of Rule 12(d), any penalty for violating the rule is "neither mandatory nor absolute" (quoting *United States v. Carter, 756 F.2d 310, 311 (3d Cir. 1985))*).

[190] *18 U.S.C. § 3771*(a)(1) (2006).

[191] See, e.g., *Swanson v. United States, 224 F.2d 795, 798 (9th Cir. 1955)* (applying the principle of expressio unius est exclusio alterius when constructing *Fed. R. Crim. P. 46(f)(1)*).

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Even where the defendant can establish need, it may be the case that victims' safety interests will prevail. For example, in United States v. Wills, the district court allowed the government to delay the disclosure of the name of a witness because the witness feared for her safety and the defendant had a violent history. [192] On appeal to the Ninth Circuit, the defendant sought reversal of his conviction, arguing that "the district court abused its discretion in finding good cause to permit the government to withhold [the witness] from its alibi rebuttal list and witness list." [193] Before his trial, Wills had provided the government with the name of one alibi witness. In response, the government filed a sealed, ex parte application under Rule 12.1(e) seeking an exception to its obligation to disclose its alibi rebuttal witness to the defense. [194] Based on the defendant's violent history and apparent ability to "induce others to commit crimes on his behalf," the court allowed the government to delay the disclosure of the witness. [195]

The Wills court noted that two other circuits had addressed or commented on the issue. The ***Sixth*** Circuit, in United States v. Causey, held that good cause existed to justify the nondisclosure of a witness to the defense. [196] The Causey court found evidence in the record indicating that witnesses were being threatened in an attempt to prevent them from testifying. [197] "In such a situation, the physical safety and protection of potential witnesses constitutes a proper consideration of a trial court in determining whether good cause exists to justify nondisclosure of witnesses to opposing counsel and thus noncompliance with Rule 12.1." [198] Similarly, in United States v. Elizondo, the Seventh Circuit cited Causey for the proposition that the protection of potential witnesses could justify postponing disclosure. [199] Following the reasoning of the ***Sixth*** and Seventh Circuits, Wills held that the "district court did not abuse its discretion in finding that good cause existed to authorize the Government to delay disclosure of [the witness's] identity." [200]

The Advisory Committee might respond to these criticisms of its proposal by pointing to discretionary language; the proposed rule states that the court "may" order production of the evidence or the fashioning of an alternative procedure. But given the obvious safety concerns that attend disclosure of the victim's home **[*897]** address to the defense, the Advisory Committee should exercise extreme caution. More important, courts have no discretion to ignore the commands of the ***CVRA***. Courts must always protect a victim's right "to be reasonably protected from the accused." [201] The proposed rule does not faithfully implement that instruction. Indeed, the safety problems attendant to the Advisory Committee's proposal are heightened by fact that disclosure is authorized to "the defendant or the defendant's attorney." It does not take a great deal of imagination to foresee problems arising from telling criminal defendants where the victims who will testify against them live. In fairness to the Advisory Committee, it was only tracking language used elsewhere in Rule 12. [202] All of Rule 12 should be redrafted to require disclosure only to defense counsel, rather than to the defendant personally. [203]

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[192] *88 F.3d 704, 710 (9th Cir. 1996).*

[193] *Id. at 708* (internal quotation marks omitted).

[194] *Id. at 709.*

[195] *Id. at 710.*

[196] *834 F.2d 1277, 1281 (6th Cir. 1987)*

[197] *Id. at 1282.*

[198] Id.

[199] *920 F.2d 1308, 1314 (7th Cir. 1990).*

[200] *88 F.3d at 710.*

[201] *18 U.S.C. § 3771*(a)(1) (2006).

[202] See, e.g., *Fed. R. Crim. P. 12(a)(3)*.

[203] Of course, if the defendant were acting pro se, then he would be counsel in the matter. See *Faretta v. California, 422 U.S. 806 (1975).*

This may be a convenient place to highlight another defect in the Advisory Committee's proposal - crime victims have no right to be heard on whether their address should be given to the defendant. As discussed shortly, [204] I had originally proposed allowing victims to be heard "on any matter directly affecting a victim's right" - for example, whether disclosing a victim's home address violates the victim's right to reasonable protection. The Advisory Committee waters down that proposal, recommending only that the victim must "be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime." [205] Under the Advisory Committee's formulation, therefore, crime victims would seem to have no right to be heard on disclosure of their address. This is not a matter concerning "release, plea, or sentencing" and, in many cases, this issue will be decided by written pleadings rather than in a "public proceeding." Nothing better illustrates the unfairness of the Advisory Committee's proposals and their illegality under the ***CVRA*** than its refusal to guarantee that crime victims will be heard on the subject of whether their home address will be turned over to the defendants accused of victimizing them.

Compounding all these problems is one more: The Advisory Committee appears to encourage the use of crime victim depositions or other face-to-face meetings between victims and defendants. In its proposed note to the amended rule, the Advisory Committee describes as one possible procedure for dealing with a defense request for a victim's home address that "the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of victim." [206] This note raises a host of problems. Most importantly, a federal court lacks jurisdiction to require a crime victim to appear at a face-to-face, pretrial **[*898]** meeting with the defendant. The "federal courts are courts of limited jurisdiction," [207] and federal judges have no general power to compel private citizens to meet with defendants before a trial. [208] Moreover, the Advisory Committee seems to envision that such orders could issue without the victim even being heard on the subject, a deprivation of liberty without due process of law. [209]

Even if the court had authority and had considered a victim's arguments, a face-to-face meeting with the defendant raises other problems. Such a meeting is a deposition in all but name. Yet Rule 15 provides stringent limits on the circumstances in which a defendant can depose a victim. In particular, any deposition is limited to "exceptional circumstances" and a deposition for discovery purposes is not permitted. [210] The Advisory Committee Note suggesting a meeting between a victim and a defendant does an end run around these limitations. [211]

In light of all these concerns, the best approach is simply to strike the existing requirement that a victim's address and phone number be turned over as part of an alibi defense, as I proposed. It should also be noted that this proposal raises no due process concerns that might stem from a one-sided reciprocal discovery rule. My proposal applies even handedly to both prosecution and the defense. Neither side is required to disclose the address or telephone number of a victim, thus complying with the Supreme Court's instruction that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-

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[204] See infra notes 528-539 and accompanying text (discussing proposed Rule 60(a)(3)).

[205] Proposed ***Amendments***, supra note 71, R. 60, at 16.

[206] Id. at 6.

[207] *Rasul v. Bush, 542 U.S. 466, 490 (2004)* (quoting *Kokkenen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).*

[208] See, e.g., *State ex rel. Beach v. Norblad, 781 P.2d 349, 350 (Or. 1989)* (reversing trial court order requiring crime victim to allow defense counsel to examine her home for evidence; victim "is under no obligation to obey an order that the defendant trial judge lacked authority to issue"); *State v. Gabrielson, 464 N.W.2d 434, 438 (Iowa 1990)* (finding no constitutional, statutory, or other authority for trial court to order a psychiatric examination of a sexual abuse victim).

[209] See ***U.S. Const. amend. XIV***.

[210] 2 Charles Alan Wright, Federal Practice and Procedure (Criminal) § 241, at 11 (2000 & Supp. 2006); see, e.g., *In re United States, 878 F.2d 153, 157 (5th Cir. 1989).*

[211] Apparently in response to my arguments here, the Advisory Committee Note has been amended. See infra Afterword.

way street." [212] In any event, protecting victims from serious harm is certainly a strong state interest that would justify any incidental effect on defense preparations for trial.

Finally, however one ends up on the proper formulation of the address issue under Rule 12.1 (governing alibi defenses), the same formulation ought to be used in Rule 12.3 (governing public-authority defenses). Although I made this recommendation in a previous article, [213] the Advisory Committee appears to have overlooked this parallel provision in need of ***amendment***. So that it is not overlooked again, I will set out the proposal in full. Tracking my recommendations for Rule 12.1, I recommended a parallel ***amendment*** to Rule 12.3 as follows:

[*899]

Rule 12.3 Notice of a Public-Authority Defense

. . . .

(4) Disclosing Witnesses.

(A) Government's Request. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness and the address and telephone number of each witness (other than the victim) the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(B) Defendant's Response. Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address and telephone number of each witness. and the address and telephone number of each witness (other than the victim).

(C) Government's Reply. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness, and the address and telephone number of each witness (other than the victim), the government intends to rely on to oppose the defendant's public-authority defense.

(b) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness and the address and telephone number of each witness (other than the victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier. [214]

[*900] Rule 15 - Victims' Right to Attend Pre-Trial Depositions The Proposals:

I proposed amending Rule 15 to allow victims to attend any public depositions as follows:

(i) Victims Can Attend. Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial. [215]

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[212] *Wardius v. Oregon, 412 U.S. 470, 475 (1973).*

[213] Cassell, Proposed ***Amendments***, supra note 4, at 873.

[214] Apparently in response to my argument, the Advisory Committee has just proposed an ***amendment*** to Rule 12.3 paralleling its ***amendment*** to Rule 12.1. See infra notes 585-587 and accompanying text.

[215] Cassell, Proposed ***Amendments***, supra note 4, at 874.

The Advisory Committee did not propose any change to Rule 15. [216]

Discussion:

Rule 15 authorizes depositions for the purpose of preserving evidence for trial, [217] thus, such depositions are an extension of the trial. Victims, accordingly, have the right to attend such proceedings, if they are public, [218] under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change directly states that fact.

The Advisory Committee declined to adopt this recommendation, concluding that depositions "do not fall within the ***CVRA***, which refers only to the victim's right not to be excluded from "public court proceedings.'" [219] But here, again, the Committee has taken too narrow a view of the ***CVRA***. It is simply unfair to victims to exclude them from a deposition in a criminal case - and, thus, a violation of the ***CVRA***'s command that victims be treated with fairness.

The simplest proof of this conclusion is to consider the rights of criminal defendants at depositions. Rule 15 directly guarantees criminal defendants a right to attend a deposition. [220] Originally the rule was silent on a defendant's presence, but in the 1975 enactment of the rule, [221] a defendant was guaranteed the right to attend. [222] Presumably, a major reason the Advisory Committee added this language **[*901]** was to ensure fairness to defendants. [223] Indeed, after an indictment, "Rule 15 depositions might constitute a "critical stage' in a prosecution - requiring the presence of counsel - because of the potential consequences of such depositions at trial." [224] Just as the Advisory Committee acted in 1975 to ensure defendants were treated fairly at criminal depositions, it should now do the same for victims.

Victims also deserve the right to attend pretrial depositions because they are now participants in the criminal justice process. As the Fifth Circuit explained in reversing a trial court which had allowed an ex parte deposition, "depositions are never ordered where one party to the suit can be present, ask the questions, and hear the answers, and the opposing party in the case is not only prevented from being present and asking questions, but is also denied even the opportunity to know what the questions and answers are." [225] The Fifth Circuit further noted that "such a procedure is not only wholly unauthorized, it is contrary to the most basic presuppositions of our adversary system of litigation." [226] Because a crime victim is now "an independent

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[216] Proposed ***Amendments***, supra note 71.

[217] See, e.g., *United States v. Edwards, 69 F.3d 419, 437 (10th Cir. 1994).*

[218] Cf. *United States v. L.M., 425 F. Supp. 2d 948, 957 (N.D. Iowa 2006)* (finding juvenile proceedings to be covered by the ***CVRA*** only insofar as they are public court proceedings).

[219] ***CVRA*** Subcommittee Memo, supra note 66, at 17 (emphasis in original) (quoting *18 U.S.C. § 3771*(a)(3)(2006)).

[220] *Fed. R. Crim. P. 15(d)(1)*-(2).

[221] The Advisory Committee recommended various changes to the rule in 1974, which Congress modified somewhat in 1975. See Wright, supra note 210, § 241, at 7-8. The changes discussed in this Article were initiated by the Advisory Committee.

[222] Wright, supra note 210, § 244, at 37.

[223] Part of the rationale may have also been to facilitate admission of the deposition testimony at trial, as a defendant has a right to confront adverse witnesses at trial. But the Confrontation Clause does not always guarantee defendants a right to attend a deposition, see, for example, *United States v. Salim, 855 F.2d 944, 955 (2d Cir. 1988),* so the defendant's right to attend the deposition must rest on a broader justification than implementing constitutional requirements.

[224] *United States v. Hayes, 231 F.3d 663, 674 (9th Cir. 2000).*

[225] *In re United States, 878 F.2d 153, 157 (5th Cir. 1989)* (emphasis in original).

[226] Id.

participant in the proceedings," [227] the same considerations demand that victims be able to attend a pretrial deposition. To be sure, crime victims (like other members of the public) will have the opportunity to hear deposition testimony when it is introduced at trial. [228] But that may be a pale substitute for actually observing a witness testify in person. [229] Victims may also be able to facilitate the truth-seeking process by watching witnesses at the deposition and alerting prosecutors or defense attorneys to any false statements that are being made. [230] Rule 15 should, therefore, be amended to ensure that crime victims have a right to attend any deposition.

Rule 17 - Victims' Right to Notice of Subpoena of Confidential Information

The Proposals:

I recommended amending Rule 17 to ensure that subpoenas to third parties seeking personal and confidential information about crime victims would not be **[*902]** abused. Initially, I proposed requiring a court determination of relevance at trial and notice to a victim as follows:

Rule 17(h)(2) - Victim Information. After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. [231]

The Advisory Committee proposed more limited protections for such information as follows:

Rule 17(c)(3) - Subpoena for Personal or Confidential Information About Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim so that the victim has an opportunity to move to quash or modify the subpoena. [232]

The Advisory Committee also proposed the following note to accompany the rule change:

Subdivision(c)(3). This ***amendment*** implements the Crime Victims' Rights Act, codified at *18 U.S.C. § 3771*(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the ***amendment*** requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The ***amendment*** also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.

The ***amendment*** applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand **[*903]** jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

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[227] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[228] See *United States v. McDougal, 103 F.3d 651, 659 (8th Cir. 1996).*

[229] See generally Douglas E. Beloof & Paul G. Cassell, The Victim's Right to Attend the Trial: The Reascendant National Consensus, *9 Lewis & Clark L. Rev. 481, 534-38 (2005)* (discussing reasons victims need to hear testimony in person).

[230] See *id. at 544-45* (advancing this argument about victims attending trials).

[231] Cassell, Proposed ***Amendments***, supra note 4, at 875.

[232] Proposed ***Amendments***, supra note 71, R. 17(c)(3), at 7.

The ***amendment*** seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of the subpoena ex parte, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government. The court may approve or reject the subpoena ex parte, or it may provide notice to the victim, who may then move to quash. In exercising its discretion, the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim. [233]

Having seen the Advisory Committee proposal and accompanying note, I am concerned that the limits on subpoenas found in the United States Supreme Court's decision in United States v. Nixon [234] might be vitiated by a broad rule. To ensure courts consistently apply Nixon's substantive and procedural standards to victim-related subpoenas, I am modifying my earlier proposal to require a court determination of specificity, relevance, and admissibility at trial, as well as notice to the victim, as follows (new language italicized):

Rule 17(c)(3) - Subpoena for Personal or Confidential Information About Victim. After a complaint, indictment, or information is filed, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is specifically described, relevant to and admissible at trial, and that compliance appears to be reasonable. If the court makes such a tentative finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive and may ask the court to revisit any tentative findings. A subpoena shall not be used for discovery purposes or to obtain information for impeachment at trial.

Discussion:

The issues involved in the Rule 17 ***amendments*** are complicated and very important. It is useful to divide the discussion into three parts: (1) the problem the proposals address; (2) the procedural flaws in the Advisory Committee's proposal **[*904]** allowing ex parte subpoenas; and (3) the general lack of authority for subpoenas seeking crime victim information.

(1) The Problem of Subpoenaing Confidential Victim Information

The existing rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the victim knowing. This issue was highlighted recently in the notorious Utah state criminal proceedings involving the kidnapping of Elizabeth Smart. [235] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school (class and teacher lists, report cards, and disciplinary and attendance records) and medical records from her hospital. [236] The school turned over the requested records without notice to the Smart family, while the hospital refused to turn over the requested records. When Elizabeth's father learned that her school records had been turned over to defense counsel, he filed a motion to have the records returned to the school. Prosecutors in the case also objected that they were not given an opportunity to file a motion to quash prior to the production of the records. [237] The matter is apparently still under review in the state courts.

The problem that occurred in the Smart case under the Utah state rules could occur under the federal rules, as the attorney for Elizabeth Smart pointed out to the Advisory Committee in a letter. [238] The federal rules currently permit an objection from the

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[233] Id.

[234] *418 U.S. 683, 700-01 (1974).*

[235] See generally Ed Smart & Lois Smart with Laura Morton, Bringing Elizabeth Home: A Journey of Faith and Hope (2003) (discussing the Smart Case).

[236] Stephen Hunt, Defense Blasted for Obtaining Smart's School Records, Salt Lake Trib., Jan. 14, 2005, at B2.

[237] Pat Reavy, Quash Smart Subpoenas, DA Says, Deseret Morning News, Feb. 1, 2005, at B3.

[238] See Letter from Gregory G. Skordas, attorney for Elizabeth Smart, to Judge Susan Bucklew (May 23, 2005) (on file with author).

witness to whom the subpoena for documents or records is issued, [239] but there is no provision for notifying the interested party (e.g., the victim) when personal or confidential information is subpoenaed from a third party.

A recent federal case illustrates the problem under the current rules. [240] In an assault case, defense counsel used *Federal Rule of Criminal Procedure 17(c)* to obtain a subpoena for the victim's medical records held by the Veterans Administration. [241] The federal district judge approved the subpoena and issued an order, ex parte and under seal, directing the VA to provide defense counsel with **[*905]** the records. [242] Defense counsel then obtained the records, all without knowledge of the prosecutor or the victim. [243] These records included extraordinarily intimate information about the victim, including sensitive medical conditions, medications, psychiatric counseling, and the like. [244] The matter came to the prosecutor's attention - and, thus, the victim's attention - only because defense counsel "warned" the prosecutor, while attempting to negotiate a favorable plea, that taking the case to trial would cause irreparable harm to the victim because, by the time the defense attorney got finished with the victim, the victim would never trust a therapist again. [245] All this happened without any notice to the victim and without any opportunity to present arguments against disclosure of this sensitive information. [246]

Allowing such subpoenas to be delivered without notice to the victim violates the ***CVRA***'s provisions guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" as well as "with fairness." [247] With respect to the protection for dignity and privacy, allowing subpoenas to go directly to third-party custodians of records could provide no protection if the custodian is disinclined to protect the victim's privacy. Subpoenas without notice to victims also raise fairness concerns, particularly if issues implicating the right of privacy are concerned. [248]

(2) Procedural Problems with the Advisory Committee Approach

To ensure protection of crime victims' rights when subpoenas for confidential information are issued, it is necessary to change the federal rules. I proposed an ***amendment*** to guarantee notice to crime victims as well as a court determination that the information was relevant at trial before victims' personal and confidential information could be subpoenaed. The Advisory Committee agreed that Rule 17 needed to be amended, but it proposed more limited protections for victims. The Committee would require court approval before any subpoena issues to a third party seeking information about a victim. However, the court would have discretion about whether to give the victim an opportunity to be heard on the subpoena; and there are no substantive limits on the kinds of information that defendants can subpoena.

Turning first to the procedural problems with the Advisory Committee proposal, the Committee would remit the entire issue of whether to issue a subpoena for personal or confidential information (and, indeed, whether to even tell a victim about such a subpoena) to the discretion of the court. The only protection the Advisory Committee offers is the requirement of a court order **[*906]** approving such a subpoena. The committee gives courts discretion to notify the victim or simply issue the subpoena ex parte.

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[239] *Fed. R. Crim. P. 17(c)*.

[240] See E-mail from Rod Rosenstein, U.S. Attorney for the District of Maryland, to Russell Butler, Maryland Crime Victims' Resource Center, Inc. (Jan. 3, 2007), reprinted in Testimony of Russell Butler to the Federal Criminal Rules Advisory Comm. App. A (Jan. 19, 2007), available at *http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-006.pdf*.

[241] Id.

[242] Id.

[243] Id.

[244] Id.

[245] Id.

[246] Id.

[247] *18 U.S.C. § 3771*(a)(8) (2006).

[248] See infra notes 347-351 and accompanying text.

Subpoenas issued ex parte are plainly unfair to victims. When a victim's personal or confidential information is at stake, it is truly hard to understand how anyone could argue that allowing it to be turned over to the defense without any opportunity to be heard treats victims "fairly," as the ***CVRA*** requires.

The Advisory Committee does not clearly explain when a court should proceed ex parte and when it should follow the standard practice of giving notice to the victim as the affected party. The only justification the Advisory Committee gives for the extraordinary step of allowing ex parte procedures is to avoid forcing "premature disclosure of defense strategy to the government." [249] But when a victim's confidential information is at stake, some interest in concealing "strategy" from the opposing party can hardly be sufficient grounds for ex parte issuance of a subpoena. As the Supreme Court has bluntly explained, our adversary system is not "a poker game in which players enjoy an absolute right always to conceal their cards until played." [250]

Allowing ex parte procedures violates basic principles of fairness. The American Bar Association raised this point quite effectively in its comments to the Advisory Committee on Rule 17. [251] The ABA explained that Canon 3(B)(7) of the Model Code of Judicial Conduct provides in pertinent part that "[a] judge shall accord to every person who has a legal interest in the proceedings, or that person's lawyer, the right to be heard according to law." [252] Rule 17 would allow that precept to be violated by denying some victims a chance to heard before compromising their legal rights to confidentiality in personal and confidential information. Similarly, the ABA noted that its Model Code of Judicial Conduct generally forbids courts from considering ex parte communications. [253] Rule 17, of course, flies in that face of that well-established prohibition. While the Model Code of Judicial Conduct is not binding on federal courts, its principles have generally been viewed as instructive. [254]

Defense attorneys would also be treading on ethical thin ice under proposed Rule 17. The Model Rules of Professional Conduct and the ABA Criminal Justice Standards both provide that "in representing a client, a lawyer shall not … use methods of obtaining evidence that violates the legal rights of … a [third] **[*907]** person." [255] When defense attorneys obtain ex parte subpoenas for a victim's confidential information, they may very well violate the rights of the victim, such as the right to confidentiality preserved in the doctor-patient privilege or psychotherapist privilege.

For reasons such as these, the federal rape shield rule (among other examples) properly requires defendants to always provide notice to the court - and to the victim - before seeking to introduce evidence about a rape victim's prior sexual history. [256] The rape shield rule does not create any exception for situations that might lead to disclosure of defense "strategy." Rule 17 should follow the same approach and insure that victims always have an opportunity to contest disclosure of their personal and confidential information in court.

Any defense interest in withholding strategy must give way to facially neutral rules. Both my proposed ***amendment*** and the Advisory Committee's proposed ***amendment*** apply evenhandedly to both the prosecution and the defense. Thus, the ***amendments*** are not designed to force disclosure of defense strategy, as they may also force disclosure of prosecution strategy

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[249] Proposed ***Amendments***, supra note 71, R. 17, at 8 (emphasis added).

[250] *Williams v. Florida, 399 U.S. 78, 82 (1970)* (citing William J. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L.Q. 279, 292).

[251] Letter from Robert M.A. Johnson, Chair, ABA Criminal Justice Section, to Hon. Peter G. McCabe, Sec'y of the Comm. on Rules of Practice and Procedure (Feb. 1, 2007), available at *www.uscourts.gov/rules/CR%20Comments%202006/06-CR-028.pdf*.

[252] Id. (citing Model Code of Jud. Conduct Canon 3(B)(7) (2004)).

[253] Id.

[254] See Debra Lyn Bassett, Recusal and the Supreme Court, *56 Hastings L.J. 657, 678-79 (2005)* (citing *United States v. Will, 449 U.S. 200, 211-12 & n.12 (1980); Hanrahan v. Hampton, 446 U.S. 1301, 1301 (1980))*.

[255] Model R. Prof'l Conduct 4.4(a) (2007); see also ABA Criminal Justice Study, Standard 4-4.3 (1993).

[256] See *Fed. R. Evid. 412(c)(1)(B)*.

if it is the prosecution who subpoenas confidential victim information. Due process is satisfied as long as the prosecution and the defense have reciprocal rights and courts apply the Rules consistently. [257]

The objectionable feature of the Advisory Committee proposal is that the subpoena could be issued without notice to a crime victim. A narrower issue is whether certain pleadings could be filed on this question on an ex parte basis. Such ex parte filing might be appropriate, in the sense that once the court gives notice that it is considering whether to issue a subpoena, then the defendant, the government, or, indeed, the victim might wish to file parts of their pleadings under seal for good cause shown. Requests for such sealing could be handled in the ordinary course of litigation - once the victim knew that such litigation was occurring.

Even if there is some tangential defense interest in conceding strategy, the Advisory Committee proposal addresses it in the most haphazard way. Consider the Elizabeth Smart example mentioned earlier, in which the defense sent ex parte subpoenas to Elizabeth's school and hospital. Under the Advisory Committee's proposal, a court could still decide to approve those subpoenas ex parte to prevent disclosure of some secret defense "strategy." But once the school and the hospital received the subpoenas, nothing would bar them from revealing the subpoenas' existence to the victim - and, indeed, the world. Thus, the interest the Advisory Committee purports to protect (concealing defense trial strategy) would actually be **[*908]** protected only when the third party, for whatever reason, chose not reveal the subpoena. In the Smart case, for instance, the school did not reveal the defense "strategy" [258] because it simply handed the materials over to the defense - in possible contravention of the Family Educational Rights and Privacy Act. [259] But the hospital refused to hand over Elizabeth's records and contacted the Smart family, which ultimately led to a public outcry over the subpoenas. There is no rhyme or reason to a procedure that is supposed to protect defense strategy but that actually turns on the happenstance of whether third parties choose to notify crime victims or the public about subpoenas they receive.

The haphazardness of the Advisory Committee's approach becomes even clearer when one realizes that defense "strategy" can be protected only where the confidential information happens to rest in the hands of a third party rather than the victim herself. Consider, for example, a rape victim who has talked to a rape crisis counselor, who takes notes of the meeting. A defendant might attempt to subpoena those notes from the counselor. [260] But if the counselor had previously transferred the notes back to the rape victim, then the subpoena would have to be directed to the victim herself - and the victim could then move to quash the subpoena. This is not some academic hypothetical, as rape counselors in Pennsylvania in the 1980s used precisely this procedure to protect their clients against abusive defense subpoenas. [261] Moreover, rape counselors - and, indeed, most third parties involved in maintaining the personal and confidential information of victims - will probably have very strong incentives

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[257] See *Wardius v. Oregon, 412 U.S. 470, 475-76 (1973); United States v. Bahamonde, 445 F.3d 1225, 1229 (9th Cir. 2006); Newman v. Hopkins, 192 F.3d 1132, 1135 (8th Cir. 1999),* vacated ***529 U.S. 1084 (2000);*** *United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 646-47 (7th Cir. 1982).* Indeed, such reciprocity may not even be required if "significant governmental interests" support its omission. See *Wardius, 412 U.S. at 476.*

[258] Such as it was - apparently the only reason for the subpoenas was to try and dig up some dirt on the young kidnapping victim. See Stephen Hunt, Defense Blasted for Obtaining Smart's School Records, Salt Lake Trib., Jan. 14, 2005, at B2.

[259] *20 U.S.C. § 1232g*(b) (2006).

[260] As will be discussed shortly in the next Section of this Article, such a subpoena would likely be inappropriate for substantive reasons as well. See supra Part IV, § 3.

[261] The Pennsylvania Supreme Court initially found that records held by rape counseling centers were subject to only limited protection from defense subpoenas. See *In re Pittsburgh Action Against Rape, 428 A.2d 126, 132 (Pa. 1981).* The results of that unfortunate decision were swift. Rape victims requested the return of their records from the center and, in some cases, even requested termination of the counseling relationship. *Commonwealth v. Wilson, 602 A.2d 1290, 1294 n.6 (Pa. 1992);* Tera Jckowski Peterson, Comment, Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah, *2001 Utah L. Rev. 695;* Beth Stouder, Note, Pennsylvania Establishes New Privilege for Communications Made to a Rape Crisis Center Counselor - In re Pittsburgh Action Against Rape, 55 Temp. L.Q. 1124, 1146 (1982). In light of this serious problem, the Pennsylvania legislature enacted a new, absolute privilege protecting communications to rape crisis counselors from any disclosure without the consent of the victim. See 42 Pa. Cons. Stat. § 5945.1(b) (2000) (upheld against constitutional attack in *Wilson, 602 A.2d at 1297).*

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for disclosing the fact of the subpoena to the victim, because of both ethical and legal considerations. [262] Thus, the Advisory **[*909]** Committee's use of ex parte procedures will only randomly protect defense strategy from disclosure.

The impossibility of truly ex parte procedures for Rule 17 subpoenas to third-parties has been recognized by several court decisions. For example, in United States v. Urlacher, the defendant sought to use Rule 17 to subpoena financial, family, and employment information concerning an individual believed by the defendant to be the government's main witness at trial. [263] The court declined to approve the subpoena ex parte, explaining that the custodian of the records "has a Rule 17(c) motion to quash or modify, and one cannot easily imagine that such a motion should be heard and decided in secret … and hidden from the opposing party and the public." [264] The court went on to explain the constitutional difficulties presented by such an approach, given that the First ***Amendment*** creates a general public right of access to court proceedings. [265]

Even if there is some arguable defense interest in not disclosing "strategy," that interest must be subordinated to the compelling victim interests that are at stake. My proposal (and the Advisory Committee's) applies to third-party subpoenas directed to the victim's personal or confidential information. Congress has commanded that victims must not only be treated with "fairness," but also "with respect for the victim's dignity and privacy." [266] Protecting dignity and privacy requires a hearing when confidential information is at stake.

The Advisory Committee Note on its proposal does obliquely deal with this issue in a way that misstates the relevant legal landscape. The Note accompanying the proposed Rule 17 ***amendment*** states vaguely that, "in exercising its discretion [about whether to give notice of a request for a subpoena], the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim." [267] This imprecise listing of discretionary factors misstates the law. The court is not required to "consider" some victim-related factors and then make a discretionary decision. The ***CVRA*** commands that victims have "the right" to "be treated … with respect for the victim's dignity and privacy." [268] Thus, if withholding notice to a victim fails to respect the victim's dignity and privacy (as I believe it invariably will), then the court must give notice - end of story. [269] The ***CVRA*** flatly directs: **[*910]** "In any court proceedings involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described [in the ***CVRA***]." [270]

The Advisory Committee Note is also an incomplete listing of the victim's rights that are implicated in decisions about issuing subpoenas. From a procedural perspective, if the court holds a hearing on whether to issue the subpoena, the ***CVRA*** entitles a

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[262] Cf. *42 U.S.C. § 254b*(k)(3)(B) (2006) (enforcing confidentiality of medical records).

[263] *136 F.R.D. 55, 551-57 (W.D.N.Y. 1991).*

[264] Id. at 556.

[265] Id. at 556-57. But cf. ***United States v. Beckford, 994 F. Supp. 1010, 1027 (E.D. Va. 1997)*** (noting that Urlacher states the majority rule, but concluding that ex parte procedures should be permitted in "exceptional circumstances").

[266] *18 U.S.C. § 3771*(a)(8).

[267] See Proposed ***Amendments***, supra note 71, R. 17, at 8.

[268] *18 U.S.C. § 3771*(a)(8).

[269] In theory, the Advisory Committee could argue that the ***CVRA*** is unconstitutional in this respect and therefore must give way. But the ***CVRA*** is presumed to be constitutional and the caselaw strongly supports the Act. See, e.g., *Wardius v. Oregon, 412 U.S. 470, 475 (1973)* (finding no constitutional barrier to reciprocal discovery rules that act as a "two-way street"); cf. *Forsythe v. Walters, 38 F. App'x 734, 737 (3d Cir. 2002)* (finding that "application of the ***CVRA*** does not exact a punishment and therefore the ***CVRA*** can not violate the Ex Post Facto Clause").

[270] *18 U.S.C. § 3771*(b)(1) (emphasis added).

crime victim to notice of that proceeding [271] and to an opportunity to attend that hearing, unless the victim's testimony would clearly be materially affected from attending the hearing. [272] From a substantive perspective, subpoenas for personal or confidential materials are often outside the scope of legitimate discovery, as will be explained in the next section. Such subpoenas can also implicate a victim's right to "be reasonably protected from the accused." [273] For example, a defense subpoena to the Department of Motor Vehicles for address information could very directly jeopardize a victim's safety. [274] Yet the Advisory Committee Note makes no mention of such legitimate factors - factors the ***CVRA*** requires courts to consider.

Finally, given all this, if disclosure of defense "strategy" somehow remains the overriding issue in handling a subpoena, there are less-abusive means for dealing with the problem. For example, a court could give the victim notice of the subpoena but also enter an order forbidding the prosecution from using any information it might learn as a result of this disclosure. Such an order is far preferable to the ex parte procedure proposed by the Advisory Committee. For the above reasons, the Advisory Committee's proposal for Rule 17 is insufficiently protective of crime victims' procedural rights. [275]

(3) The Lack of a Basis for Defense Subpoenas for Confidential Information

The Advisory Committee's approach is not only procedurally flawed but also substantively flawed. In particular, the Advisory Committee arguably expands a defendant's power to subpoena confidential material from a victim, thereby creating new rights for defendants at the expense of victims' rights under the **[*911]** ***CVRA***. This violates the Rules Enabling Act, which provides that court-promulgated rules shall not "abridge, enlarge or modify any substantive right." [276]

The Advisory Committee's proposed rule would read: "[A] subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte." [277] The clear implication of this sentence is that, with a court order, a subpoena can be served on a third party requiring production of personal or confidential information. Nothing in the proposed rules (or the Advisory Committee Notes) appears to require any further showing before the subpoena would issue. This seems to give defendants unrestrained subpoena power over confidential information. If this implication is correct, then the Advisory Committee has, remarkably, taken a law designed to provide more protection for victims and used it to create less in clear contravention of the ***CVRA*** and the Rules Enabling Act.

The governing law on subpoenas comes from United States v. Nixon, which interpreted Rule 17 to require a subpoenaing party to show relevancy, admissibility, and specificity of any information sought. [278] In particular, for a subpoena to issue before trial, Nixon requires the moving party to show:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance

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[271] Id. § 3771(a)(2).

[272] Id. § 3771(a)(3).

[273] Id. § 3771(a)(1).

[274] In addition, the ability to subpoena such information would directly undermine current caselaw, which grants the defendant no right to disclosure of the names and addresses of government witnesses before trial. For further discussion, see infra notes 325-335 and accompanying text.

[275] Apparently as a partial response to these concerns, the Advisory Committee made some changes in its proposed ***amendment*** to Rule 17. See infra notes 232-233 and accompanying text.

[276] *28 U.S.C. § 2072*(b).

[277] Proposed ***Amendments***, supra note 71, R. 17(c)(3), at 7.

[278] *418 U.S. 683, 700 (1974).*

of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." [279]

Because of this governing law, I proposed that Rule 17 should itself identify restrictions on a defendant's ability to subpoena confidential information. My proposal incorporates specificity, relevancy, and admissibility components - conforming with, rather than altering, existing law. My current proposal [280] requires the information be specifically described and admissible at trial - and it bars evidence sought for impeachment purposes only. In contrast, the Advisory Committee seemingly enlarges the substantive rights of defendants by failing to reference even a single Nixon factor in its proposal. Thus, unless a court takes it upon itself to ensure the relevancy, specificity, and admissibility of the subpoenas, **[*912]** the Advisory Committee proposal might provide the defendant with license to conduct the very "fishing expedition" that Nixon forbids.

The proposed Advisory Committee Note adds to this confusion. The Note indicates that in considering whether to issue the subpoena, the court should consider "the relevance of the subpoenaed material to the defense." [281] But this is an overly broad formulation. The court should only consider the relevance of the material to the defense at trial, since this is the only permissible basis for a subpoena.

Current law clearly limits Rule 17 subpoenas to evidence that is admissible at trial. [282] The reason for Nixon's limitations of relevance, admissibility, and specificity is that subpoenas are "not intended to provide a means of discovery for criminal cases" but only to "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." [283] With regard to admissibility, Nixon explained that "generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." [284] In other words, documents sought for the narrow purpose of impeachment are not evidentiary for the purposes of Rule 17. [285] In Nixon, only because the prosecutor made a sufficient preliminary showing that the subpoenaed tapes contained "evidence admissible with respect to the offenses charged in the indictment" and that the evidence could be validly used as nonimpeachment evidence, did the Court find the evidence to be subpoenable. [286]

Courts apply Nixon's admissibility test strictly, rejecting, for example, subpoenas for hearsay evidence that would be inadmissible at trial. [287] The cases have recognized that broad subpoenas run afoul of these limitations - including subpoenas seeking information about crime victims. [288] For example, in United States v. Hang, the Eighth Circuit affirmed the district

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[279] *Id. at 699-700* (citing *United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).*

[280] My earlier proposal specifically required that no subpoena would issue "without a finding by the court that the information is relevant to trial." Cassell, Proposed ***Amendments***, supra note 4, at 875 (emphasis added). In view of the importance of the Nixon factors, it now seems desirable to spell them all out, as my current proposal does.

[281] Proposed ***Amendments***, supra note 71, R. 17, at 8.

[282] *Nixon, 418 U.S. at 699-700.*

[283] *Id. at 698-99* (emphasis removed).

[284] *Id. at 701.*

[285] See *United States v. Cherry, 876 F. Supp. 547, 553 (S.D.N.Y. 1995).*

[286] *Nixon, 418 U.S. at 700-702.*

[287] See, e.g., *Cherry, 876 F. Supp. at 553* (rejecting subpoenaed prosecutors' investigative files as inadmissible hearsay).

[288] Cf. *United States v. Alexander, No. 94-10568, 1996 U.S. App. LEXIS 1662, 16-17* (9th Cir. Jan. 18, 1996) (quashing subpoenaed records from rape center because nothing warranted disclosure prohibited by Victims of Crimes Act); *United States v. Cherry, No. 90-5784, 1991 U.S. App. LEXIS 18192, 11-13* (4th Cir. Aug. 12, 1991) (quashing subpoenaed police files because they were in part irrelevant); *Amsler v. United States, 381 F.2d 37, 51 (9th Cir. 1967)* (holding subpoena of Frank Sinatra, regarding ransom money, an oppressive and unreasonable use of the court).

court's refusal to issue subpoenas designed to uncover documents relating to the mental health of a victim and various witnesses. [289] The court described the broad and speculative nature of the request directed toward a hospital, observing that the defense was ""hard- **[*913]** pressed' to describe the information it hoped to discover in the materials." [290] Consistent with Nixon, the court found the defendant's request "exemplified his "mere hope' that the desired documents would produce favorable evidence, and a Rule 17(c) subpoena cannot properly be issued upon a "mere hope.'" [291] Similarly, in State v. Percy, the Vermont Supreme Court upheld the lower court's refusal to order production by the victim. [292] The defendant had requested production of the victim's mental health information, arguing it was necessary for him to present his defense. [293] The Vermont Supreme Court rejected the defendant's arguments, finding that he made no showing of the materiality or helpfulness of the information - "indeed, [the] defendant essentially admitted the underlying acts." [294] The court also found it notable that the information sought was in the hands of a third party - not the State - and that the defendant made a broad request, rather than specifying particular records in the subpoena. [295] In aggregate, the court considered those factors "fatal" to the defendant's request. [296]

These cases were all decided against a constitutional backdrop that must favor crime victims: a criminal defendant has no constitutional right to conduct discovery, while confidential and personal information of crime victims may be protected by a constitutional right of privacy.

The Supreme Court has clearly held that "there is no general constitutional right to discovery in a criminal case." [297] Indeed, the Constitution "has little to say regarding the amount of discovery which the parties must be afforded." [298] The only remotely related due process requirement the Court has recognized is the requirement that prosecutors disclose evidence that is favorable to the accused and material to guilt or punishment [299] - evidence that would deprive the defendant of a fair trial if not disclosed. [300] But even this rule - the Brady rule - is not a discovery rule and it does not reflect any discovery rights. Rather, it is a "self-executing constitutional rule" - a rule of "fairness and minimum prosecutorial obligation." [301] Recognizing this, the Supreme Court has carefully circumscribed Brady: "An interpretation of Brady to create a broad, constitutionally required right of discovery would entirely alter the character and balance of our present systems of **[*914]** criminal justice." [302] Indeed,

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[289] *75 F.3d 1275, 1283-84 (8th Cir. 1996).*

[290] *Id. at 1283.*

[291] Id. (citing *United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980)).*

[292] ***548 A.2d 408, 415 (Vt. 1988).***

[293] ***Id. at 413.***

[294] ***Id. at 414-15.***

[295] Id.

[296] ***Id. at 415.***

[297] *Weatherford v. Bursey, 429 U.S. 545, 559 (1977);* see also *United States v. Ruiz, 536 U.S. 622, 629 (2002)* (quoting *Weatherford, 429 U.S. at 559).*

[298] *Wardius v. Oregon, 412 U.S. 470, 474 (1973).*

[299] See *Brady v. Maryland, 373 U.S. 83, 87 (1963).*

[300] See *United States v. Bagley, 473 U.S. 667, 675 (1985).*

[301] *United States v. Garrett, 238 F.3d 293, 302 (5th Cir. 2000)* (citation and internal quotation marks omitted).

[302] *Bagley, 473 U.S. at 675 n.7* (citation and internal quotation marks omitted).

Brady's requirements are incongruous with traditional discovery, as Brady does not even apply at pretrial stages. [303] *Rule 16 of the Federal Rules of Criminal Procedure* was built on this foundation. The assumption that no right to discovery exists "is still the underlying predicate for Rule 16." [304]

Because there is no constitutional right to discovery, discovery is determined largely by statute and court rule. [305] Discovery statutes typically apply to exculpatory material within the possession or control of the state. [306] For example, in the Supreme Court case of Pennsylvania v. Ritchie, the defendant sought recorded statements made to a youth counselor concerning an alleged assault. [307] The recorded statements were taken and possessed by Pennsylvania's Children and Youth Services, a state-created agency. [308] The Court concluded that due process considerations required an in camera review of the records to see whether they might contain information material to the defense. [309] The Court explained that "it is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." [310] The Court cited the well-known decision of Brady v. Maryland, [311] as authority for this conclusion. [312]

Ritchie and other cases relying on Brady have no relevance to the issue of subpoenas to third parties. "Brady imposes a constitutional duty on prosecutors to turn over exculpatory evidence … ." [313] The rationale for such a rule is that the prosecutor, after initiating criminal charges, should not be the "architect" of an unfair proceeding. [314] Plainly, crime victims (and third parties holding records about crime victims) are not state actors. They are not architects of the criminal proceedings and therefore are not subject to these constitutional restrictions on state action. The Seventh Circuit explained this point clearly in United States v. **[*915]** Hach. [315] There, the defendant sought to compel a third-party witness to turn over her medical and psychiatric records to the court for in camera review. [316] The witness refused to release her records, which were not held by any government agency. [317] The government argued it was powerless to force her to accede to the demand. [318] The Seventh Circuit agreed, holding that "a failure to show that the records a defendant seeks are in the government's possession is fatal to [a Ritchie claim]." [319] The Seventh Circuit noted that the two other opinions it could locate on the due process question had reached precisely the same conclusion. [320] In United States v. Skorniak, the Eighth Circuit held that a defendant could not subpoena medical records of a witness. [321] And the government is under no obligation to seek out potentially exculpatory

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[303] See ***United States v. Frick, 490 F.2d 666, 671 (5th Cir. 1978)*** (citing *Archer v. United States, 393 F.2d 124, 126 (5th Cir. 1968)).*

[304] *United States v. Oxman, 740 F.2d 1298, 1307 (3d Cir. 1984).*

[305] See 4 Wayne R. LaFave et al., Criminal Procedure § 20.3m, at 930-31 (3d ed. 2000).

[306] See, e.g., *Fed. R. Crim. P. 16(a)* (requiring "the government" to disclose to the defense various kinds of information).

[307] *480 U.S. 39, 43 (1987).*

[308] See id.

[309] *Id. at 47.*

[310] *Id. at 57* (emphases added).

[311] *373 U.S. 83 (1963)* (holding government must disclose exculpatory evidence in its possession to the defense).

[312] *Richie, 480 U.S. at 57.*

[313] *Bolduc v. United States, 402 F.3d 50, 56 n.6 (1st Cir. 2005)* (emphasis added). Courts have held that Brady obligations extend only to prosecutors, because the Supreme Court has not imposed this duty on others. See *Villasana v. Wilhoit, 368 F.3d 976, 979 (8th Cir. 2004).*

[314] See *Brady, 373 U.S. at 88.*

[315] *162 F.3d 937 (7th Cir. 1998).*

evidence, the court reasoned. [322] Similarly, a Maryland appellate court, in Goldsmith v. State, denied a defendant's attempt to obtain access to a witness's psychiatric record. [323] After examining the relevant authorities, the court explained: "We find no common law, court rule, statutory or constitutional requirement that a defendant be permitted pretrial discovery of privileged records held by a third party." [324] Thus, crime victims (and third parties holding information about crime victims) will only rarely - if ever - have information a defendant is constitutionally entitled to examine.

Because a defendant has no constitutional right to discovery, any such claim must rest on a statute. Yet the federal statutes, if anything, cut against broad discovery claims. The Jencks Act, [325] for example, restricts access to statements by **[*916]** government witnesses. [326] It specifically mandates that only after a government witness testifies on direct examination shall the statement of the witness be the subject of discovery. [327] The Jencks Act does not even allow access to all statements - a witness statement need only be produced if the statement "relates to the subject matter "as to which the witness has testified'" not if it merely "relates to the subject matter "at issue in [the] case.'" [328] Even then, only a ""substantially verbatim recital of an oral statement made by said witness to an agent'" is discoverable under the Jencks Act. [329] Although the Act was meant to preserve defendants' right to access information that might aid in impeaching government witnesses at trial, "the legislative history expresses a much greater concern with limiting the application of the Jencks decision so that it would not hamper the workings of law enforcement by forcing wholesale disclosure of government materials and files." [330]

The Jencks Act also bars any pretrial disclosure of witness statements. "Congress provided for discovery of statements only after the witness has testified, out of concern for witness intimidation, subornation of perjury, and other threats to the integrity of the trial process." [331] Courts have held true to this congressional determination, blocking defense efforts to obtain pretrial discovery about government witnesses. For example, in United States v. Coppa, the Second Circuit overturned the district court's approval of a scheduling order requiring the government to identify its witnesses in advance of trial. [332] The district court, "mindful of [the Act's] concern" for witness safety, had allowed the government to file ex parte motions delaying discovery of the witnesses' identity where such disclosure would pose a threat to the witnesses' lives or safety. [333] The Second Circuit, however, found this protection insufficient to meet the witness-protective goals of the Jencks Act. Specifically, the

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[316] *Id. at 946.*

[317] Id.

[318] Id.

[319] *Id. at 947.* The Seventh Circuit also noted that the Wisconsin Supreme Court had reached a contrary conclusion, relying on state law grounds. *Id. at 946 n.5.* The Wisconsin decisions do not offer a principled reason for extending Ritchie to private records and should not be regarded as persuasive authority here. See *State v. Shiffra, 499 N.W.2d 719, 722 (Wis. Ct. App. 1993)* (concluding that the issue of application of Ritchie to private records had already been decided in State v. S.H.); *State v. S.H., 465 N.W.2d 238, 241 (Wis. Ct. App. 1999)* (applying Ritchie to private records without any discussion of the issue).

[320] *Hach, 162 F.3d at 947.* Other courts have reached the same result. See, e.g., *United States v. Hall, 171 F.3d 1133, 1145 (8th Cir. 1999)* (upholding decision not to compel disclosure of witness medical and psychiatric records: "the government has no obligation to obtain for a defendant records that it does not already have in its possession or control"); *State ex rel. Romley v. Superior Court, 836 P.2d 445, 452 (Ariz. Ct. App. 1992)* ("Brady emphasizes suppression of evidence by the prosecution, but does not require the victim to cooperate with the defense [to produce medical records held by the victim].").

[321] *59 F.3d 750, 755-56 (8th Cir. 1995).*

[322] Id.

[323] *651 A.2d 866, 868, 877 (Md. 1995).*

[324] *Id. at 873.*

[325] *18 U.S.C. § 3500* (2006).

[326] Id. § 3500(a).

court determined "this remedy does not address the Government's justifiable concerns regarding the risk of witness tampering in circumstances where there is no evidence that the life or safety of a prospective witness is in danger." [334] In other words, Jencks Act protection is not limited to situations where the government shows an actual danger to witnesses - its witness-protective qualities reach much further. [335]

[*917] The lack of grounds for subpoenas seeking victim information is more evident when viewed against a legal landscape that gives defendants no right before trial to obtain even the names of government witnesses. Current law provides no basis for the pretrial disclosure of the names and addresses of government witnesses - including witnesses who are crime victims. For one thing, Rule 16, which governs discovery and inspection in criminal cases, contains no provisions for such disclosure. This omission was purposeful and mirrors the witness-protective purposes of the Jencks Act:

A majority of the Conferees [that is, congressional members determining the language of Rule 16] believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy. [336]

Rule 16, therefore, along with other criminal discovery rules, "does not entitle defendants to pretrial discovery of names and addresses of prospective government witnesses or persons who have knowledge of the case." [337]

By statute, capital cases are exempt from this rule. In capital cases, the accused is entitled to a copy of the indictment and a list of juror and witness names and address - but only three days in advance of the trial. [338] And notably, the same statute explicitly provides for the withholding of this information "if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." [339] No statute authorizes similar disclosures in noncapital cases. As the Eighth Circuit noted in United States v. Hutchings, "neither [Rule 16(a)] governing information subject to disclosure by the Government in criminal cases, nor any other federal rule or statute requires the Government to supply names of potential

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[327] See id. § 3500(b); see also *Fed. R. Crim. P. 26.2* (integrating Jencks Act into the federal rules).

[328] *United States v. Susskind, 4 F.3d 1400, 1404 (6th Cir. 1993).*

[329] *United States v. Martinez, 87 F.3d 731, 739 (5th Cir. 1996)* (quoting *Palermo v. United States, 360 U.S. 343, 351 (1959)).*

[330] *United States v. Bobadilla-Lopez, 954 F.2d 519, 521 (9th Cir. 1992).*

[331] *United States v. Tarantino, 846 F.2d 1384, 1414 (D.C. Cir. 1988).*

[332] *267 F.3d 132, 138, 145-46 (2d Cir. 2001).*

[333] *Id. at 138-39.*

[334] *Id. at 139.*

[335] See, e.g., *United States v. Presser, 844 F.2d 1275, 1285 (6th Cir. 1988)* ("Providing the defense with such a broad right of pre-trial discovery would vitiate an important function of the Jencks Act, the protection of potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial.").

[336] H.R. Rep. No. 94-414, at 12 (1975) (Conf. Rep.), reprinted in 1975 U.S.C.C.A.N. 713, 716.

[337] *United States v. Laurins, 660 F. Supp. 1579, 1584 (N.D. Cal. 1987).*

[338] See *18 U.S.C. § 3432* (2006).

[339] See id.

witnesses to a criminal defendant in a noncapital case." [340] Many other courts have reached substantially the same conclusion. [341]

[*918] A few older cases held that district courts possess authority to compel the government to disclose the identity of its witnesses before trial. However, the basis for such grants of authority now seems defunct. For instance, in United States v. Armstrong, the Ninth Circuit recognized no authority exists in the federal rules for requiring the government to disclose the names of its witnesses. [342] Still, the court held that district courts have authority to require such disclosure based on *Federal Rule of Criminal Procedure 57(b)*. [343] This rule acts as a stopgap: in the absence of controlling law, it allows judges to "regulate practice in any manner consistent with federal law, these rules, and the local rules of the district." [344] In light of the conference report on Rule 16, compelling disclosure of witness names before trial appears inconsistent with the federal rules. And even if the Ninth Circuit's approach was valid at the time Armstrong was decided, such an approach is no longer valid in light of the ***CVRA***. Rule 57(b) only provides a basis for court authority in the absence of controlling law - since 2004, the ***CVRA*** has controlled the treatment of victims. The ***CVRA*** clearly mandates a victim be "reasonably protected from the accused," [345] as well as treated with "fairness and with respect for the victim's dignity and privacy." [346] Disclosure of a victim's name and address before trial is governed by these mandates, not vague gap-filling provisions.

If a defendant cannot even validly compel disclosure of a victim's name and address in advance of trial, it is nonsensical to think a defendant could validly subpoena the same information from the Department of Motor Vehicles or the telephone company - and it is incredible to think a defendant could use the Advisory Committee's rule to subpoena even more personal victim information. The rules would be backward indeed if a defendant were able to subpoena a victim's confidential mental health records in a legal system that disallows compelled disclosure of a witness's name or address. Instead, the only rational conclusion is that because defendants have no right to witnesses' identifying information, they certainly have no right to other sorts of victim-related discovery. Clearly, then, defendants have little constitutional or statutory "heft" behind an argument for subpoenas directed at obtaining victim information.

On the other hand, victims will often have legitimate reasons for resisting such subpoenas - reasons that are protected not only by the ***CVRA*** but also by the Constitution, under current case law, and as part of the right of privacy. [347] One aspect of this due process privacy right is "the individual interest in avoiding **[*919]** disclosure of personal matters" [348] or, in other words, "the

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[340] *751 F.2d 230, 236 (8th Cir. 1984);* accord *United States v. House, 939 F.2d 659, 663 (8th Cir. 1991)* ("Criminal defendants in non-capital cases are not entitled to pretrial disclosure of witnesses.").

[341] See, e.g., *United States v. Pearson, 340 F.3d 459, 468 (7th Cir. 2003); United States v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990); United States v. Barrett, 766 F.2d 609, 617 (1st Cir. 1985); United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970).*

[342] *631 F.2d 951, 954-55 (9th Cir. 1980).*

[343] *Id. at 955.*

[344] *Fed. R. Crim. P. 57(b)*.

[345] *18 U.S.C. § 3771*(a)(1) (2006).

[346] Id. § 3771(a)(8).

[347] My discussion of these issues draws heavily on thoughts from an extremely knowledgeable crime victims' litigator - Wendy Murphy. See Wendy J. Murphy, Crime Victims, Not Defendants, Enjoy Constitutional Rights When the Accused Seeks Access to Private Third-Party Records (2007) [hereinafter Murphy, Crime Victims]; see also Wendy J. Murphy, "Federalizing" Victims' Rights to Hold State Courts Accountable, *9 Lewis & Clark L. Rev. 647 (2005).*

[348] *Whalen v. Roe, 429 U.S. 589, 598-99 (1977).* In his Whalen concurrence, Justice Brennan asserted that if a statute allowed indiscriminate disclosure of personal medical records, "such a deprivation [of privacy] would only be consistent with the Constitution if it were necessary to promote a compelling state interest." *Id. at 607* (Brennan, J., concurring).

privacy interest in keeping personal facts away from the public eye." [349] Consider, for example, the privacy of therapeutic counseling communications. Federal case law establishes that such communications are protected by a constitutional privacy right [350] - a right that would be gutted if defendants were allowed to freely subpoena victims' mental health records. Moreover, some courts and commentators suggested the Fourth ***Amendment***'s prohibition against unreasonable searches and seizures applies to (and may prohibit) court-mandated discovery of victims. [351]

For all these reasons, a defense subpoena seeking third-party information about a crime victim rests on extraordinarily shaky ground. The Advisory Committee must ensure that through casual drafting it does not inadvertently invite more defense subpoenas for such information. The Advisory Committee's current draft may well have that effect, by seemingly authorizing such subpoenas without regard to the numerous restrictions governing their use (and even allowing them to be issued ex parte). The Committee should, instead, follow my approach by indicating very clearly that such subpoenas are only allowed where specifically identified evidence will be obtained that is relevant to and admissible at trial, and **[*920]** that is otherwise reasonable. As a weaker but still positive alternative, the Committee could include an Advisory Committee Note making this point clear. One possible note would be as follows:

Rule 17(c)(3) is intended to provide greater procedural protection for crime victims than exists under current law. It is not intended to expand in any way the permissible grounds for defense subpoenas. Like other trial subpoenas, a defense subpoena seeking victim information must narrowly request only information admissible at trial and may not be used for discovery. See *United States v. Nixon, 418 U.S. 683*[, 700] (1974) (requiring subpoenaing party to "clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity"). A defense subpoena must also not tread on a crime victim's constitutionally-protected privacy interests, see *Whalen v. Roe, 429 U.S. 589, 598-99 (1977),* or statutorily-protected interests to respect for privacy and dignity, see Crime Victims' Rights Act, *18 U.S.C. § 3771*(a) (2000 & Supp. 2006). As a result, such subpoenas will only rarely be proper. See generally Paul G. Cassell, Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure, *2007 Utah L. Rev. 861.* [352]

Rule 18 - Victims' Interests in Setting the Place of Prosecution The Proposals:

I proposed amending Rule 18 to require the court to consider the convenience of victims in setting the place of prosecution as follows:

Rule 18. Place of Prosecution and Trial

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[349] *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989).*

[350] See *Borucki v. Ryan, 827 F.2d 836, 845 (1st Cir. 1987)* (recognizing right to privacy issues that arise with regard to communications to mental health workers); *Caesar v. Mountanos, 542 F.2d 1064, 1072 (9th Cir. 1976)* (finding psychotherapist-patient communications fall within right to privacy); *Haw. Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1038 (D. Haw. 1979)* (finding zone of autonomy protects decision to communicate personal information to psychiatrist); see also *Nat'l Transp. Safety Bd. v. Hollywood Mem'l Hosp., 735 F. Supp. 423, 424 n.2 (S.D. Fla. 1990)* (citation and internal quotations omitted).

[351] See, e.g., *People v. Nokes, 183 Cal. App. 3d 468, 476-78 (Cal. Ct. App. 1986)* (reviewing Fourth ***Amendment*** precedent in its determination of the validity of court-ordered examinations of victims and determining precedent to be contrary to allowing such examinations); see also Murphy, Crime Victims, supra note 347 ("The Fourth ***Amendment*** is not only a right of criminal defendants, but a "right of the people' to be free from unreasonable searches of their "persons, houses, papers and effects' … . Therefore, the Fourth ***Amendment*** protections extended to criminal defendants in Boyd must also be extended to the third parties impacted by criminal litigation."); Troy Andrew Eid, Comment, A Fourth ***Amendment*** Approach to Compulsory Physical Examinations of Sex Offense Victims, *57 U. Chi. L. Rev. 873, 894 (1990)* (arguing that court-mandated physical examinations of victims' of sexual crimes are prohibited by the Fourth ***Amendment***, as interpreted by the Supreme Court). But cf. *Borucki v. Ryan, 827 F.2d 836, 844 (1st Cir. 1987)* (finding information the Fourth ***Amendment*** protects from seizure is not "necessarily entitled to protection under a right of nondisclosure originating in the Fourteenth ***Amendment***").

[352] In response to my criticisms, the Advisory Committee agreed to make some changes in its proposed rule, making it much more difficult (but not impossible) for defendants to obtain an ex parte subpoena. See infra notes 588-592 and accompanying text.

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Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice. [353]

The Advisory Committee adopted this proposal verbatim. [354]

[*921] Discussion:

Little needs be said about the Advisory Committee's agreement with my proposal here, other than to note that the Committee's rationale for this change was "to implement the victim's "right to be treated with fairness' under the Crime Victims' Rights Act." [355] Why the Advisory Committee chose to implement the victims' fairness rights in Rule 18 - and only Rule 18 - is not immediately clear. [356]

Rule 20 - Victims' Views Considered Regarding Consensual Transfer The Proposals:

I proposed that Rule 20 be amended to allow the court to consider the victim's views in any decision to transfer a case as follows:

Rule 20. Transfer for Plea and Sentence

(a) Consent to Transfer. A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns. [357]

I also proposed a similar change should be made to Rule 20(d) regarding transfer of juvenile proceedings. [358]

The Advisory Committee recommended no change to Rule 20. [359]

[*922] Discussion:

The Advisory Committee rejected this proposed change for the following reasons:

The ***CVRA*** does not specifically address transfer. It does give the victim a right to confer with the attorney for the government, *18 U.S.C. § 3771*(a)(5), but that is not the same as requiring the attorney for the government to notify the court of the victim's views regarding transfers. Indeed, the ***CVRA*** provides that "nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *18 U.S.C. § 3771*(d)(6). Accordingly, the

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[353] Cassell, Proposed ***Amendments***, supra note 4, at 878-79.

[354] See Proposed ***Amendments***, supra note 71, R. 18, at 9.

[355] Id. at 352.

[356] See supra notes 95-97 and accompanying text (discussing this point).

[357] Cassell, Proposed ***Amendments***, supra note 4, at 879-80.

[358] Id. at 879-80.

[359] Proposed ***Amendments***, supra note 71.

CVRA contemplates that the attorney for the government will consider the victim's interests in exercising prosecutorial discretion, including the discretionary determination whether to consent to a Rule 20 transfer. The Subcommittee was not persuaded that the rule should disturb this statutory balance by requiring the attorney for the government to advise the court of a victim's objection to a Rule 20 transfer. In appropriate cases, the attorney for the government should appraise the court of the victim's view. [360]

The Advisory Committee is able to claim that the ***CVRA*** does "not specifically address transfer" only because it reviewed an amputated ***CVRA*** - that is, a ***CVRA*** without a right to fairness. Under an unblinkered fair reading of the ***CVRA***, the right to fairness applies "specifically" to Rule 20 transfer decisions, no less than the Rule 18 decision to set the place of prosecution just discussed and, indeed, all other decisions in the criminal justice process. Thus, the Advisory Committee has unfairly stacked the deck in deciding that it would not "disturb this statutory balance," when it chose not to weigh the victim's right to fairness as part of that balance.

Even under its truncated view of the statute, the Advisory Committee does envision that the prosecutors will confer with victims about Rule 20 transfer decisions. But the Committee did not want to require prosecutors to notify courts of a victim's objection, venturing only that "in appropriate cases, the attorney for the government should appraise the court of the victim's views." [361] The Committee is coy on the question of when it would not be appropriate for the prosecutor to fail to notify a court of the victim's views. Whenever an unrepresented crime victim objects to transferring a case, prosecutors, as officers of the court, have a duty to pass that objection along to the court as relevant **[*923]** information bearing on the transfer decision. [362] The rule should state that fact directly.

Finally, nothing in my proposal would impair prosecutorial discretion. My proposal deals solely with ensuring that victim information is passed along to the judge who must approve a transfer decision. The government remains entirely free to make whatever decision it wants on the issue and argue whatever position it believes is appropriate. Moreover, the ***CVRA*** itself envisions that the government may have obligations to assert victims' rights. For starters, the ***CVRA*** requires prosecutors to "make their best efforts" to see that victims are "accorded" their rights. [363] In addition, the ***CVRA*** gives prosecutors the ability to "assert" victims' rights. [364] This provision was designed to ensure that victims' rights are not inadvertently lost because a victim lacks legal counsel. As Senator Kyl explained, "This provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights … because the crime victim is not available at a particular point in the trial … ." [365] In light of its obligations to accord victims their rights and to enforce those rights, the government should at least inform the court when a victim has concerns about a transfer.

Rule 21 - Victims' Views Considered Regarding Transfer for Prejudice The Proposals:

I proposed that Rule 21 be amended to require consideration of the victim's interest in whether a case should be transferred as follows:

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision. [366]

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[360] ***CVRA*** Subcommittee Memo, supra note 66, at 17.

[361] Id. (emphasis added).

[362] Cf. *State v. Casey, 2002 UT 29, PP 9-13, 44 P.3d 756* (noting prosecutors' obligation to relay to the court victim's request to be heard).

[363] *18 U.S.C. § 3771*(c)(1) (2006).

[364] Id. § 3771(d)(1).

[365] 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[366] Cassell, Proposed ***Amendments***, supra note 4, at 880.

The Advisory Committee recommended no change to this rule. [367]

Discussion:

The Advisory Committee rejected this change because, in its view, the fact that the ***CVRA*** did not specifically address transfer decisions precluded any ***amendment***:
[*924]

Judge Cassell grounds his proposal on the general provision of the ***CVRA*** that gives a victim a right to be treated with "fairness." *18 U.S.C. § 3771*(a)(8). The Subcommittee was not persuaded that this general language warranted an ***amendment*** that would require the court to consider the victim's views. In the case of transfers for prejudice, the preferences of the victim could not outweigh the defendant's right to a fair proceeding. In the case of transfers for convenience, the statutory right to confer with the attorney for the government provides the mechanism for incorporating the victim's views. As in the case of Rule 20, the Subcommittee declined to go beyond the carefully crafted limitations of the statute. In appropriate cases, the attorney for the government should appraise the court of the victim's views. [368]

Once again, the Advisory Committee's position clashes with the statute. The Committee does not argue (nor does it seem plausible to argue) that transferring a case to a distant location without even considering the victim's view treats the victim fairly. Instead, the Committee ducks the implications of the right to fairness because it is "general language," as though a "general" command from Congress can be ignored.

Perhaps recognizing the weakness of its position, the Advisory Committee goes on to craft a policy argument against victims being heard. It divides transfer cases into two types - those for convenience and those for prejudice - and concludes that victims should not enjoy a guaranteed right to be heard in either situation. In neither case is the analysis convincing.

With regard to transfers for convenience, the Committee contends that the victim's right to confer with prosecutors is sufficient protection. But a victim's conference with those very same government authorities who find it convenient to move the case hardly will give victims much comfort - much less the right to fairness that Congress has mandated. The Committee also is less than clear when it directs prosecutors to advise the court of the victim's objections "in appropriate cases." It is hard to think of any case when a prosecutor would be justified in concealing an unrepresented victim's concerns from the court. [369] It is far simpler - and, more to the point, simply fair - to ensure that the court will always consider a victim's views on transfer.

With regard to transfers to avoid prejudice, the Advisory Committee concludes that a victim's views could not "outweigh" the defendant's right to a fair proceeding. But no one argues that victims' views will necessarily outweigh a defendant's argument; the limited point is simply that victims' views should be considered in the balance. Moreover, a victim may be able to demonstrate that a defendant's argument is unsupported or that other, less burdensome alternatives to **[*925]** transferring a case exist. Surely these are sufficiently important reasons to let a victim be heard before a case is moved.

The Advisory Committee also appears to overlook the constitutional grounding that a victim's opposition to a transfer decision enjoys. In contrast to the ***Sixth Amendment***, which gives defendants in a state prosecution a right to trial in their home state, [370] Article III simply commands that in a federal prosecution, "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes have been committed." [371] This Article III vicinage right was designed to protect not only the rights of the defendant but also the rights of the community - including victims in the

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[367] Proposed ***Amendments***, supra note 71.

[368] ***CVRA*** Subcommittee Memo, supra note 66, at 17-18.

[369] In the case of a represented victim, the prosecutor could reasonably rely on the victim's counsel to present appropriate arguments.

[370] ***U.S. Const. amend. VI*** ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … ." (emphasis added)).

[371] U.S. Const. art. III, § 2 (emphasis added).

community. [372] The provision is designed to secure a trial within the same political community ("the state") in which the victim would likely reside. [373]

The Supreme Court's decisions on right of public access to trials bolsters the understanding of the Article II's provision to protect the community interest. In cases such as Richmond Newspapers, Inc. v. Virginia, the Court has held that implicit in the First ***Amendment*** is a guarantee of the public's right to attend trials. [374] Compelling victims' interests underlie this guarantee. As the Court has explained, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct." [375] And as Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly, … . have an interest in observing the course of a prosecution." [376] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution." [377]

For purposes of this Article, it is not necessary to definitively trace how victims' constitutional interests play out against a defendant's right to avoid a prejudicial trial. The very limited point here is merely that victims should be heard on any transfer, so that a judge can make a fully informed decision. Even if the judge determines to transfer a case, the victim may have valuable information for the judge on where to transfer the case (for example, to an adjacent district or state **[*926]** rather than a distant one) or how to impanel an unbiased jury (for example, importing a jury rather than exporting the trial). [378]

An illustration of the general approach of the proposed rule comes from the leading case of State v. Timmendequas, [379] decided by the New Jersey Supreme Court. In Timmendequas, the trial judge imported a jury from a distant community to hear a capital case rather than forcing the family of a murdered young girl to travel to another district. [380] Construing New Jersey state law provisions similar to the ***CVRA***'s, the New Jersey Supreme Court explained that the trial judge properly considered the views of the victim's family:

Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That ***amendment*** marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system.

The purpose of the Victim's Rights ***Amendment*** was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." One of the enumerated rights guaranteed for victims is "to have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible."

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[372] See also Drew L. Kershen, Vicinage, 29 Okla. L. Rev. 801 (1976). See generally Cassell, Proposed ***Amendments***, supra note 4, at 880-84; Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, *75 N.Y.U. L. Rev. 1658 (2000).*

[373] See *United States v. Bishop, 76 F. Supp. 866, 868 (D. Or. 1948).*

[374] *448 U.S. 555, 575-76 (1980).*

[375] *Press-Enter. Co. v. Superior Court, 464 U.S. 501, 509 (1984).*

[376] *Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979)* (Blackmun, J., concurring in part and dissenting in part).

[377] *Richmond Newspapers, 448 U.S. at 571.*

[378] See generally Beloof, Cassell & Twist, supra note 6, at 392-99 (reviewing caselaw on the victim's interest in venue decisions).

[379] *737 A.2d 55 (N.J. 1999),* cert. denied, ***534 U.S. 858 (2001).***

[380] *Id. at 64-69.*

… .

… . The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision. [381]

Timmendequas demonstrates that victims can have legitimate interests in transfer decisions that can be accommodated without violating defendants' rights. Rule 21 ought to be amended to allow victims to provide that kind of information to the judge before any transfer decision is made. [382]

[*927] Rule 23 - Victims' Views Considered Regarding Nonjury Trial The Proposals:

I proposed that the court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves after considering the views of any victims. [383]

The Advisory Committee did not recommend any change to this rule. [384]

Discussion:

Here again, the Advisory Committee declined to adopt my recommendation because it goes "beyond the specific provisions of the ***CVRA***, which do not address the issues whether the trial should be to the court or to a jury." [385] It is not necessary to repeat the arguments about the victim's right to fairness here, other than to note that the "preferred" trial method in the federal courts is a jury trial. [386] Why it is fair to deviate from that preferred method without first listening to the victims is not immediately clear.

But, for the sake of argument, assume that nothing in the ***CVRA*** requires the Advisory Committee to change this rule. The fact remains that the Advisory Committee could still change the rule if there were good reasons to do so. In view of this fact, it is surprising that the Committee never defends the logic behind allowing a court to dispense with a jury trial without even hearing from a victim. To help protect the general public interest in trial by jury, Rule 23 currently requires not only prosecutor

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[381] *Id. at 76* (citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor. Id.

[382] The Advisory Committee recently recommended a change to Rule 21(b) that does not address the points concerned in this Article. See infra notes 585-586 and accompanying text.

[383] Cassell, Proposed ***Amendments***, supra note 4, at 884.

[384] Proposed ***Amendments***, supra note 71.

[385] ***CVRA*** Subcommittee Memo, supra note 66, at 18.

[386] *Singer v. United States, 380 U.S. 24, 35 (1965)* ("Trial by jury has been established by the Constitution as the "normal and … preferrable mode of disposing of issues of fact in criminal cases.'") (alteration in original) (citation omitted). See generally Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, *152 U. Pa. L. Rev. 33, 68 (2003).*

approval, [387] but also court approval. [388] Any approval **[*928]** requires careful weighing of the competing concerns. The Supreme Court has instructed that

the duty of the trial court … [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. [389]

This is a "serious and weighty responsibility." [390]

To discharge that serious and weighty responsibility, the Advisory Committee should draft Rule 23 so that the trial court should receive as much relevant information as possible. The victim may be well situated to provide useful information about how the public will view a nonjury trial. The proposed rule change takes the modest step of allowing the victim to be heard before the court approves any nonjury trial.

(New) Rules 32(e), (f), (h), and (i) - Disclosure of the Presentence Report to Victims and Opportunity for Victims to Object and Be Heard [391] The Proposals:

In the federal system, the presentence report is a critical part of the sentencing process. I therefore recommended that the prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:
[*929]

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

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[387] *Fed. R. Crim. P. 23(a)(2)*. See generally ABA Standards for Criminal Justice § 15-1.2, cmt. at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against). But see Adam H. Kurland, Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend *Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 316 (1993) (arguing that the requirements of prosecutorial consent and court approval should be removed from Rule 23(a)).

[388] *Fed. R. Crim. P. 23(a)(3)*; cf. Akhil Reed Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131, 1196-98 (1991)* (suggesting that jury trial right might not be waivable).

[389] *Patton v. United States, 281 U.S. 276, 312-13 (1930)* (internal quotation marks omitted).

[390] *United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985)* (internal citation omitted).

[391] In addition to the changes to Rule 32 discussed here, the Advisory Committee essentially adopted verbatim my proposals to amend Rules 32(a), 32(c)(1)(B), and 32(d)(2)(B). Compare Cassell, Proposed ***Amendments***, supra note 4, at 886, 887, 891, with Proposed ***Amendments***, supra note 71, R. 32(a), 32(c)(1)(B), 32(d)(2)(B), at 10-15. There is, accordingly, no need to discuss those proposed rules here.

The Advisory Committee also declined to add my proposal that the probation officer determine whether the victim wished to have any material included in the presentence report. See Cassell, Proposed ***Amendments***, supra note 4, at 889. I will rely on my original article to make the case for this particular change. See id. at 889-91

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence. [392]

I further recommended that victims be given the opportunity to object to and be heard on disputed issues in the presentence report as follows:

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

… .

(h) Notice of Intent to Consider Other Sentencing Factors. [393] Before the court may rely on a ground not identified either in the **[*930]** presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of - or summarize in camera - any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party or any victim to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

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[392] Cassell, Proposed ***Amendments***, supra note 4, at 892.

[393] This rule was amended in December 2006, after my earlier article was published, to change "departure" language to conform with the new, post-Booker regime. I have accordingly changed the language quoted in the text above to conform to the current language.

(B) must - for any disputed portion of the presentence report or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

[*931] (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons. [394]

The Advisory Committee recommended no changes to these rules. [395]

Discussion:

The ***CVRA*** entitles victims to be heard on disputed Federal Sentencing Guidelines ("Guidelines") issues and, as a consequence, to review parts of the presentence report relevant to those issues. The ***CVRA*** gives victims "the right to be reasonably heard at any public proceeding in the district court involving … sentencing." [396] The ***CVRA*** provision (among other things) codifies the right of crime victims to give in court what is known as a "victim impact statement." [397]

The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one - to be "reasonably heard" at the sentencing proceeding. The victim's right to be "reasonably heard" implicitly includes a right for the victim to speak to disputed Guidelines issues. As Senator Kyl explained, the victim's right includes the right to make sentencing recommendations:

When a victim invokes this right during … sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and sentencing recommendations. [398]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do). [399] For example, if the victim wishes to recommend a sixty-month sentence when the maximum guideline range is only thirty months, that sentencing recommendation may be meaningless unless a **[*932]** victim can provide a basis for recalculating the Guidelines or departing or varying [400] from the Guidelines.

Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated: "The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the … sentencing of the accused." [401] Again, it is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence.

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[394] Cassell, Proposed ***Amendments***, supra note 4, at 901-02.

[395] See Proposed ***Amendments***, supra note 71.

[396] *18 U.S.C. § 3771*(a)(4) (2006).

[397] See generally Beloof, Cassell & Twist, supra note 6, at 625-90 (discussing victim impact statements); Cassell, Balancing the Scales, supra note 6, at 1395-96.

[398] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). See generally Beloof, Cassell & Twist, supra note 6, at 625-90 (discussing three types of victim impact information).

[399] See, e.g., *United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005)* (giving "heavy weight" to the Guidelines' recommendation).

[400] See *United States v. Wilson, 355 F. Supp. 2d 1269, 1272 (D. Utah 2005)* (discussing "departures" and "variances").

[401] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

In addition, an independent basis for victims reviewing presentence reports is the victim's broad right under the ***CVRA*** to be "treated with fairness" [402] and right to restitution, as I argued in my earlier article. [403]

Thus, the ***CVRA*** should be understood as giving victims the right to relevant information in the presentence report about the Guidelines and to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing matters. Many states follow a similar approach and give victims access to presentence reports as part of the victim-impact process. [404]

Since I made my proposal, the Ninth Circuit has considered the question of whether to reverse a district court that declined to provide the entire presentence report to a fraud victim. In an opinion containing only one substantive paragraph, the Ninth Circuit affirmed the district court, which had rejected a victim's argument that "the ***CVRA*** confers a general right for crime victims to obtain **[*933]** disclosure of the [presentence report]." [405] The Ninth Circuit stated tersely that the district court did not "commit legal error." [406]

Although strong arguments can be made against Kenna, [407] the case is not on point to my proposal. First, Kenna involved a claim of a "general right" to access to the presentence report, apparently untethered to any particular need for access. My ***amendment*** would be limited to situations where victims seek "relevant" contents of the presentence report to make a victim impact statement at sentencing. Second, the victim in Kenna sought the entire presentence report. The Ninth Circuit pointedly observed: "We note that Kenna refused the district court's offer to consider disclosure of specific portions of the [presentence report]." [408] My proposal tracks what the district court offered to Kenna - that a victim would have access to "relevant contents of the presentence report."

Because victims have a right of access to relevant parts of the presentence report, the question then arises of how to provide that access. In my earlier article, I recommended the simplest solution to the competing concerns would be to disclose the report, upon request, to victims through the prosecutor. The prosecutor could filter out irrelevant confidential information and assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors.

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402 *18 U.S.C. § 3771*(a)(8) (2006).

403 Cassell, Proposed ***Amendments***, supra note 4, at 894-96; see also Testimony of Paul G. Cassell to the U.S. Sentencing Comm'n (Feb. 15, 2005), available at *http://www.ussc.gov/hearings/02_15_05/cassell_testimony.pdf* (last visited Feb. 22, 2008) (advancing similar arguments).

404 *Ala. Code § 15-23-73(b)* (1995) (giving victim "right to review a copy of the presentence investigative report, subject to the applicable federal or state confidentiality laws"); *Alaska Stat. § 12.55.023* (2006) (giving victim right to look at portions of sentencing report); Ariz. Const. art. II, § 2.1(a)(7) (giving victim right to review presentence report when available to the defendant); *Ariz. Rev. Stat. Ann. § 13-4425* (2001) (giving victim right to review presentence report "except those parts excised by the court or made confidential by law"); Col. Rev. Stat. § 24-72-304(5) (2007) (giving prosecutor discretion to allow victim or victim's family to see presentence report); *Fla. Stat. § 960.001(1)(g)(2)* (2006) (giving victim right to review presentence report); *Idaho Code Ann. § 19-5306(1)(a)* (2002) (giving victim right to review presentence report); *Ind. Code § 35-40-5-6(b)* (1998) (giving victim right to read and "respond to" material contained in the presentence report); La. Const. art. I, § 25 (giving victim "right to review and comment upon the presentence report"); *Mont. Code Ann. § 46-18-113(1)* (2007) (giving prosecutor right to disclose contents of presentence report to victim); *Or. Rev. Stat. § 137.077(2)* (2005) (presentence report must be made available to victim).

405 *In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006).*

406 Id.

407 See *Brief for the Petitioner, In re Kenna, 453 F.3d 1136 (9th Cir. 2006)* (No. 06-73352). Cf. Matthew B. Riley, Note, Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports, *2007 Utah L. Rev. 235, 235* (discussing Kenna and urging that crime victims receive "as much of the report as possible without infringing on specific privacy concerns held by criminal defendants").

408 *In re Kenna, 453 F.3d at 1137.*

But the ***CVRA*** already gives victims the right to "confer" with prosecutors [409] - and presumably they will be conferring regarding the important topic of sentencing. It is important to emphasize that my proposal would require prosecutors to give all relevant information to the victim; in other words, prosecutors would serve as a conduit to the victim, but not a controller of the victim.

The Advisory Committee declined to adopt my proposal, opining that "the prosecutor should remain the victim's source of information regarding the sentencing process and the contents of the presentence report, and the prosecutor should have discretion to determine what information from the presentence report should be imparted to the victim." [410] This reasoning clashes directly with the ***CVRA***'s guiding principle: that victims deserve their own rights in the criminal process. Congress wanted victims to become participants with rights "independent of the government or the defendant … ." [411] For this reason, the ***CVRA*** allows the **[*934]** victim to assert rights independently of the government. [412] Senator Kyl explained the victim's right to independent action directly: "[There is no authority for] the government's attorney … to compromise or co-opt a victim's right… . The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when." [413]

One of the victim's independent rights includes the opportunity to make "sentencing recommendations." [414] Congress's command that victims be independent participants cannot be faithfully implemented if prosecutors control the information victims receive. If allowed to do so, prosecutors could simply feed the victim information supporting the government's view, while withholding information undercutting it. [415] Nothing in the ***CVRA*** provides any support for this approach. [416]

The Advisory Committee was also concerned that presentence reports "are typically treated as confidential, because they include a great deal of personal information about the defendant … ." [417] But this concern was easily handled by my requirement that prosecutors pass along only "relevant" contents of the presentence reports. Personal information only tangentially connected to sentencing issues would not be disclosed. And if personal information about the defendant were directly connected to sentencing issues, then fairness entitles the victim to that information to formulate a sentencing recommendation. After all, by the time of sentencing, the defendant has been found guilty, beyond a reasonable doubt, of harming a victim. By committing a crime against the victim, the defendant has certainly forfeited some privacy interests - including the chance to keep from the victim information relevant to sentencing. It is also important to recall that this information is not truly confidential in the sense that no one else **[*935]** will see it. It has already been disclosed to the probation officer, defense counsel, the prosecutor, and the judge.

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[409] *18 U.S.C. § 3771*(a)(5) (2006).

[410] ***CVRA*** Subcommittee Memo, supra note 66, at 18.

[411] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[412] See *18 U.S.C. § 3771*(d)(1) (a victim's rights may be asserted by both the prosecutor and the victim or victim's representative).

[413] 150 Cong. Rec. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[414] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[415] The Advisory Committee's view that prosecutors should control what information the victim receives is so fundamentally at odds with the animating principles of the ***CVRA*** that it makes one wonder where it came from. Interestingly the view seems to have originated in a small subcommittee with a representative from the Justice Department but no crime victims rights representative. See ***CVRA*** Subcommittee Memo, supra note 66, at 1 (noting that Deborah Rhodes, Counselor to the Asst. Atty. Gen. of the Criminal Division, served on the subcommittee drafting this language).

[416] At another point in its memorandum, the ***CVRA*** Subcommittee refers to *18 U.S.C. § 3771*(d)(6), which provides that "nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." ***CVRA*** Subcomittee Memo, supra note 66, at 20. But the simple act of giving information in a court document (the presentence report) to crime victims does not impair the government's decision of whether and how to prosecute a defendant. See supra notes 363-365 and accompanying text (discussing impairment issue under Rule 20).

[417] ***CVRA*** Subcommittee Memo, supra note 66, at 18.

Once the victim receives relevant information from a presentence report, the victim no less than other participants at sentencing should be entitled to be heard on any disputed issues. For example, in a fraud case, if the defendant claims to have swindled only $ 5,000 and the government claims the loss is $ 10,000, the victim should be entitled to press her argument that the loss was $ 40,000. To do otherwise, is to deprive the victim of an opportunity to participate in the sentencing process and to turn the victim impact statement into a meaningless charade.

The Advisory Committee's view on this point is curious. The Advisory Committee did not directly quarrel with the position that victims should have the opportunity to be heard on disputed sentencing issues. Instead, the Advisory Committee would only go so far as to suggest that it

felt it would be desirable for the courts gradually to flesh out what the right to be heard means in this [sentencing] context (determining, for example, when the right to be heard would include the right to introduce evidence). It is by no means clear that the ***CVRA*** contemplates that victims will be entitled to access all of the particulars of the presentence report and be entitled to litigate issues concerning the application of various guidelines, etc. [418]

This view is objectionable on many levels. First, given the congressional purpose of fundamentally changing the way crime victims are treated in the criminal justice process, it can hardly be desirable for courts to "gradually" determine what rights victims have. As Senator Kyl explained, "A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims." [419] The ***CVRA*** was "meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." [420]

Second, the Committee diffidently opines that "it is by no means clear" that victims have the right to litigate disputed issues. [421] I will turn to the substance of that claim shortly. But even assuming it to be true, a fundamental purpose of the Federal Rules of Criminal Procedure is to provide clarity on issues that would otherwise have to be litigated. [422] The Advisory Committee could be "clear" that victims can litigate by simply putting in place my proposed rule. To do otherwise **[*936]** is, unfortunately, to invite continued uncertainty over a point of vital importance to crime victims.

Finally, perhaps the reason that the Advisory Committee would venture only that it is unclear whether victims have the right to dispute sentencing issues was a reluctance to stake out the contrary position. To maintain that victims cannot dispute sentencing issues would collide with both statutes and common sense. As for statutory requirements, it is hard to understand how victims will be "reasonably heard" at sentencing (as the ***CVRA*** commands) if they cannot contest the factors that may well drive a sentence - the Guidelines calculations. Moreover, Congress has already directly mandated that victims will have the opportunity to dispute sentencing factors when they relate to restitution. [423] Thus, if the Advisory Committee really wanted to stake out a victims-can't-litigate-at-sentencing position, it would have to awkwardly carve out a restitution exception. Finally, a victim is simply not treated with "fairness" if she is entirely excluded from the Guidelines process. The Supreme Court has explained that "it is … fundamental that the right to … an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.'" [424] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows - what the recommended Guidelines range is. Yet Congress plainly

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[418] ***CVRA*** Subcommittee Memo, supra note 66, at 19.

[419] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[420] Id. (statement of Sen. Kyl); see also 150 Cong. Rec. S4263 (Apr. 22, 2004) (statement of Sen. Feinstein) (describing the ***CVRA*** as a "new and bolder approach than has ever been tried before in our Federal System").

[421] ***CVRA*** Subcommittee Memo, supra note 66, at 19.

[422] See supra notes 103-310 and accompanying text (providing illustrations of rules changes made to provide clarity).

[423] See *18 U.S.C. § 3664*(d)(2)(A) (2006) (probation officer shall disclose to victim amount subject to restitution as calculated by the probation officer and the opportunity of the victim to file an affidavit seeking greater restitution); see also id. § 3771(a)(6) (giving victims "the right to full and timely restitution as provided in law").

[424] *Fuentes v. Shevin, 407 U.S. 67, 80 (1972)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552 (1965))* (emphasis added).

intended to pass a law establishing "fair play for crime victims, meaningful participation of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process … ." [425]

By building victims into the Guidelines process, my proposal would also provide an important procedural protection to defendants. My proposed ***amendment*** to Rule 32(f) would require that the victim's attorney or the prosecutor would raise any reasonable objection to the presentence report before the sentencing hearing, so that it could be discussed at a presentence conference and then presented in an organized fashion to the sentencing judge. I would also require either the victim's attorney or the prosecutor to give notice to defense counsel and the court where an upward departure argument might rest on any information provided by the victim. [426] Setting up the procedures in this way creates an orderly process for victim objections to affect sentencing - with fair notice to the defense. Otherwise, the court - and the defendant - might hear for the first time at sentencing that the prosecution was considering an upward departure based on information in the victim impact statement.

[*937] The courts of appeals have split on the need for advance notice of an upward departure based on victim impact statements. In United States v. Dozier, the Tenth Circuit held that a district court is required to give notice to a defendant before departing upward from the advisory guideline range based on victim impact statements. [427] The breadth of that holding may be limited, however, by unusual facts: the presentence report did not identify victim impact information as a possible basis for an upward departure and the government conceded that a sentencing remand was appropriate. The Third Circuit has expressly declined to follow Dozier. In United States v. Vampire Nation, [428] the Third Circuit held that, in light of the Supreme Court's decisions making the Guidelines advisory, [429] a defendant is always on notice that a judge might find a sentencing factor calling for a sentence higher than that advised by the Guidelines. [430] With respect to victim impact statements, the Third Circuit highlighted the fact that victim impact statements at the sentencing hearing might provide a new, previously undisclosed ground for an upward (or downward) departure:

The right of victims to be heard is guaranteed by the Crime Victims' Rights Act ("***CVRA***") … . The right is in the nature of an independent right of allocution at sentencing. See *18 U.S.C. § 3771*(a)(4) (affording victims a "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"). Under the ***CVRA***, courts may not limit victims to a written statement. See *Kenna v. United States District Court, 435 F.3d 1011, 1017 (9th Cir. 2006)* (Kozinski, J.) ("Limiting victims to written impact statements, while allowing the prosecutor and the defendant the opportunity to address the court, would treat victims as secondary participants in the sentencing process. The ***CVRA*** clearly meant to make victims full participants."). Given that it would be impossible to predict what statements victims might offer at sentencing, it would be unworkable to require district courts to provide advance notice of their intent to vary their discretionary sentence based on victim statements that had not yet been made. [431]

The contrasting positions of the Tenth and Third Circuits is part of a larger disagreement between the circuits on the extent to which the notice requirements in the criminal rules continue to operate under the now-advisory Guidelines regime. [432]

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[425] 150 Cong. Rec. S4264 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); see also *Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006).*

[426] See Cassell, Proposed ***Amendments***, supra note 4, at 901-03.

[427] *444 F.3d 1215, 1217-18 (10th Cir. 2006).*

[428] *451 F.3d 189 (3d Cir. 2006),* cert. denied, ***127 S. Ct. 424 (2006).***

[429] See *United States v. Booker, 543 U.S. 220, 222 (2004).*

[430] *Vampire Nation, 451 F.3d at 196.*

[431] *Id. at 197 n.4.*

[432] The Second, Fourth, and Ninth Circuits have ruled that Rule 32(h) continues to apply. See *United States v. Anati, 457 F.3d 233, 236-37 (2d Cir. 2006); United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006); United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).* The Third, Seventh, Eighth, and Eleventh Circuits have held the opposite. See *United States v. Irizarry, 458 F.3d 1208, 1212*

Focusing specifically on the issue of victim impact information, the **[*938]** Third Circuit is correct that, under the current rules, it is "unworkable" to provide advance notice of upward (or downward [433]) departures based on victim allocution at the sentencing hearing. Under my proposal, however, victims would be integrated into the presentence process for determining Guidelines issues, thereby ensuring that the defense has fair notice of any upward departure and the government has fair notice of any downward departure. Regardless of whether the Guidelines are advisory, this is the fairest way to proceed for defendants, the prosecution, and victims.

(New) Rule 32(i)(4) - Victims' Right to be Reasonably Heard at Sentencing The Proposals:

Even before passage of the ***CVRA***, the Federal Rules of Criminal Procedure gave victims of crimes of violence or sexual abuse the right to be heard at sentencing. After the ***CVRA*** extended such rights to all victims, I proposed simply striking the limitation in the rule so that it would apply to all victims as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence … . [434]

The Advisory Committee tracked my change of striking the crimes of violence and sexual abuse limitation; but the Committee also substituted language from the ***CVRA*** about being reasonably heard as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence to be reasonably heard. [435]

[*939] Discussion:

My proposal retained the current language in Rule 32 allowing the victim "to speak or submit any information about the sentence"; the Advisory Committee would allow the victim "to be reasonably heard" at sentencing - language lifted from the ***CVRA***.

In this area, the Advisory Committee has paradoxically used the ***CVRA*** as an occasion for possibly restricting victims' rights. Under Rule 32(i)(4)'s current language, there is no doubt that the victim could "speak" at sentencing (that is, give an oral statement). Under the proposed language, litigation could result about whether victims could be "reasonably heard" without being allowed to speak (that is, be confined to purely written submissions). Indeed, during the Advisory Committee meeting on the proposal, the Advisory Committee reporter conceded that "courts would have to construe exactly what [the phrase] meant as situations came before them." [436]

It is worth reflecting for a moment on how backward the Advisory Committee's approach to this issue is. Before the ***CVRA***'s enactment, victims of crimes of violence and sexual assault had the right under Rule 32(i) "to speak" at sentencing (along with the right to submit information). When Congress enacted the ***CVRA***, the Advisory Committee and the Judicial Conference had

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(11th Cir. 2006); United States v. Vampire Nation, 451 F.3d 189, 195-98 (3d Cir. 2006); United States v. Walker, 447 F.3d 999, 1006-07 (7th Cir. 2006); United States v. Egenberger, 424 F.3d 803, 805 (8th Cir. 2005). The First Circuit has held only that the failure to provide notice does not constitute plain error. See United States v. Mateo, No. 06-1805, 2006 WL 1195676, at 1 (1st Cir. May 5, 2006).

[433] For a helpful correction to the idea that victims' interests are always adverse to defense interests at sentencing, see generally Benji McMurray, The Mitigating Power of a Victim Focus at Sentencing, 19 Fed. Sent'g Rep.125 (2006).

[434] Cassell, Proposed ***Amendments***, supra note 4, at 903.

[435] Proposed ***Amendments***, supra note 71, R. 32(i)(4)(B), at 13. The Advisory Committee also proposes striking out existing language in the rule allowing guardians or family members to exercise the right to speak on behalf of minor and incapacitated victims. For criticism of this deletion, see supra notes 117-125 and accompanying text.

[436] Advisory Committee Minutes, supra note 68, at 14 (comment of Prof. Beale).

both approved broadening that rule to give all victims the right to speak. [437] (The Judicial Conference withdrew this proposed rule to allow reconsideration in light of the ***CVRA***.) The ***CVRA*** gave victims the right to be "reasonably heard" at sentencing. Of course, the ***CVRA***'s obvious goal was to significantly expand the rights of crime victims. With respect to the right to speak in particular, one of the ***CVRA***'s primary sponsors stated: "this section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right." [438] Yet, in the wake of all this, the Advisory Committee now proposes a rule that does not guarantee that victims have the right to speak, leaving this to the courts to construe on a case-by-case basis. This retreat on victims' rights truly stands the ***CVRA*** on its head.

The Advisory Committee should directly state that victims have the right to speak at sentencing, as the only courts to have reached the issue have held. [439] For **[*940]** instance, in United States v. Kenna, Judge Kozinski [440] explained that the ***CVRA***'s legislative history "discloses a clear congressional intent to give crime victims the right to speak at proceedings covered by the ***CVRA***." [441] The court first highlighted the following statement by Senator Kyl:

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. [442]

Senator Dianne Feinstein, another primary sponsor of the bill, remarked that Senator Kyl's understanding of the bill was "[her] understanding as well." [443]

In addition to these floor statements, the Kenna court cited a committee report for the proposed constitutional ***amendment*** to protect victims' rights. The Senate Report on the ***amendment*** - an ***amendment*** that contained language nearly identical to the language in the eventually enacted ***CVRA*** - reads that:

The victim's right is to "be heard." The right to make an oral statement is conditioned on the victim's presence in the courtroom … . Victims should always be given the power to determine the form of the statement. Simply because a decision making body, such as the court … has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement … . The Committee does not intend that the right to be heard be limited to "written" statements, because the victim may wish to communicate in other appropriate ways. [444]

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[437] See Advisory Committee on Criminal Rules, Criminal Rules Docket (Historical), *http://www.uscourts.gov/rules/Criminal_Docket.pdf* (last visited Feb. 22, 2008).

[438] 150 Cong. Rec. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[439] See *Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1015-16 (9th Cir. 2006); United States v. Degenhardt, 405 F. Supp. 2d 1341, 1345 (D. Utah. 2005);* see also *United States v. Turner, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005)* (opining in dicta that § 3771(a)(4) "requires the victim to be given an opportunity actually to be "heard' rather than afforded some alternate means of communicating her views"); cf. *United States v. Marcello, 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005)* (holding that in the unique context of detention hearings, victims have no right to speak, particularly when the witness has no direct information to provide the court).

[440] See generally Douglas E. Beloof, Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kosinki in Kenna and Judge Cassell in Degenhardt, 19 Fed. Sent'g Rep. 36 (2006) (identifying victims of crime as participants at sentencing by analyzing the ***CVRA*** and the significant caselaw).

[441] *Kenna, 435 F.3d at 1016.*

[442] *Id. at 1015* (quoting 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyle)).

[443] Id. (quoting 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

[444] *Id. at 1016* (quoting S. Rep. No. 108-191, at 38 (2003)).

Based on this legislative history, Kenna concluded that crime victims have the right to speak at ***CVRA***-covered proceedings. [445] Kenna explained that this interpretation advanced the purposes of the ***CVRA***, for the "statute was enacted to **[*941]** make crime victims full participants in the criminal justice system." [446] The Advisory Committee should follow that lead and provide that victims are guaranteed a right to speak at sentencing. [447] Of course, in cases involving numerous victims (for example, a massive fraud case), the ***CVRA*** itself allows courts to fashion a "reasonable procedure" to accommodate the competing concerns. [448]

Rule 44.1 - Discretionary Appointment of Counsel for Victim The Proposals:

I proposed that the court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising his or her rights. [449]

The Advisory Committee did not propose any change in the Rules on this subject. [450]

Discussion:

The Advisory Committee never discussed this particular proposed change, so it is possible that its failure to adopt it was an oversight. [451] In any event, here it is perhaps useful to emphasize just a few points in favor of this proposal.

While the ***CVRA*** does not create a right to counsel for victims, nothing in the Act deprived the courts of their preexisting inherent authority. The courts generally have the right to appoint volunteer counsel in civil cases, [452] a power that would seem to extend to criminal cases. Indeed, the Supreme Court has left open the question of whether federal courts possess the inherent authority to require counsel **[*942]** to provide legal services to the poor. [453] The local rules of some federal courts already explicitly recognize this power. [454] In addition, Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent any person unable to afford counsel." [455] And before Gideon v. Wainwright, [456] courts could request

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[445] Id.

[446] Id.

[447] In possible response to such concerns as I raise here, the Advisory Committee modified the Advisory Committee Note to this rule. See infra notes 587-589 and accompanying text.

[448] *18 U.S.C. § 3771*(d)(2) (2006).

[449] Cassell, Proposed ***Amendments***, supra note 4, at 912-16.

[450] See Proposed ***Amendments***, supra note 71.

[451] See ***CVRA*** Subcommittee Memo, supra note 66, at 17-20 (listing my proposals that the subcommittee decided not to recommend; my proposed Rule 44.1 change not among them).

[452] See generally Judy E. Zelin, Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action, 52 A.L.R. 4th 1063 (1987 & Supp. 2004) (collecting and analyzing cases considering the issue of whether the courts can appoint counsel in civil actions to represent indigents).

[453] *Mallard v. U.S. Dist. Court, 490 U.S. 296, 307, 308 n.8 (1989).*

[454] See, e.g., D. Utah Civ. R. 83-1.1(b)(3) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.").

[455] ***28 U.S.C. § 1915***(e)(1) (2006) (emphasis added).

[456] *372 U.S. 335 (1963).*

that lawyers provide assistance to indigent criminal defendants. Presumably, that same power extends to requesting assistance for crime victims. [457] In light of all these facts, federal courts have the inherent power to request attorneys to represent indigent crime victims.

An illustration of this power is found in a decision by the U.S. District Court for the Western District of North Carolina in United States v. Stamper. [458] In this rape case, a dispute arose over the admission of certain psychiatric reports concerning the victim that the defense alleged demonstrated a pattern of making false allegations of sexual abuse. [459] She requested independent counsel to protect her privacy interests. [460] After consulting with the victim, the court appointed counsel for her. [461] The court then allowed her counsel to participate in hearings regarding the evidence, including cross-examination of the relevant witnesses. [462]

My proposed rule would simply confirm the existing discretionary power of the courts to appoint volunteer counsel demonstrated in cases like Stamper. The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims pro bono.

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority close at hand in the criminal rules. Rule 44 already covers the subject of appointing counsel for defendants in great detail, so adding a Rule 44.1 addressing victims' counsel is a natural corollary. In addition, prosecutors are obligated by the ***CVRA*** to "advise the crime victim that the crime victim can seek advice of an attorney with respect to the rights described in subsection (a)." [463] This may frequently **[*943]** require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate. For all these reasons, the Rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

Rule 46 - Victims' Right to Be Heard Regarding Defendant's Release from Custody The Proposal:

I proposed that a victim should be given the right to offer views regarding the defendant's release from custody and that the court should consider those views as follows:

(k) Victims' Right to Be Heard. A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims. [464]

The Advisory Committee proposed no change to this rule. [465] It did, however, propose a global rule that would give victims a right to be heard at proceedings involving release:

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[457] See Beloof, Cassell & Twist, supra note 6, at 381-82 (suggesting this conclusion).

[458] *766 F. Supp. 1396, 1397 (W.D.N.C. 1991).*

[459] *Id. at 1396.*

[460] *Id. at 1397.*

[461] Id.

[462] Id.

[463] *18 U.S.C. § 3771*(c)(2) (2006).

[464] Cassell, Proposed ***Amendments***, supra note 4, at 917.

[465] See Proposed ***Amendments***, supra note 71 (showing no proposed change for Rule 46(k)).

Rule 60. Victims

(a) Rights of Victims.

. . . .

(3) Right to Be Heard.

The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release . . . involving the crime. [466]

Discussion:

The Advisory Committee's global proposal gives victims the right to be "heard" on release decisions; but it fails to spell out what effect, if any, the **[*944]** victim's statement would have after the court heard the victim. In other words, the Advisory Committee proposal seemingly codifies an empty gesture.

In contrast, my proposal would take the straightforward and important step of requiring a court to consider the views of the victim in determining any release decision. [467] That requirement is added directly into the rule governing release decisions - Rule 46. Adding a specific rule with specific consequences is far preferable to the Advisory Committee's approach and is consistent with the ***CVRA***'s goal of ensuring "reasonable conditions of pre-trial and post-conviction relief that include protections for the victim's safety." [468]

Rule 48 - Victims' Views on Dismissal to be Considered The Proposals:

I proposed that the court should be required to consider the views of victims in deciding whether to grant a government's motion to dismiss a case as follows:

Rule 48. Dismissal

(a) By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims. [469]

The Advisory Committee proposed no change to this rule. [470]

Discussion:

The Advisory Committee declined to adopt this recommendation for several reasons:

The Subcommittee recognized that victims will have a great interest in whether charges are dismissed. The ***CVRA*** does not, however, explicitly address dismissals, and it speaks only of not excluding the [victim] from, and providing the [victim with] … a right to be reasonably heard at public proceedings in the district court. If the government moves for dismissal there is ordinarily no public proceeding. (When there is a **[*945]** public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule [60].)

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[466] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 16.

[467] Existing law has places where a victim's views could profitably be brought to bear. See, e.g., *18 U.S.C. § 3142*(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

[468] See, e.g., 150 Cong. Rec. S10910, S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[469] Cassell, Proposed ***Amendments***, supra note 4, at 918.

[470] See Proposed ***Amendments***, supra note 71 (showing no proposed change for Rule 48).

In light of the statutory statement in 18 U.S.C. § 3771(d)(6) that nothing in the ***CVRA*** "shall be construed to impair the prosecutorial discretion of the Attorney General," as well as the separation of powers issues raised by judicial review of the government's decision to terminate a prosecution, the Subcommittee was not persuaded that the rule should be amended to require the court to consider the victim's views on dismissal. When there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government under 18 U.S.C. § 3771(a)(5). [471]

The Advisory Committee's opening premise is clear enough - victims do indeed have "great interest" in whether charges are dismissed. But after this promising start, the Committee's logic is hard to track. The Advisory Committee seems to be of the view that, in situations where a court considers a motion to dismiss at a public proceeding, the victim would be heard. [472] Yet the proposed Rule the Committee cites for this proposition - proposed Rule 60 [473] - is actually drafted so narrowly that the victim would have no right to be heard on such a motion. [474]

In situations where the court considered a motion to dismiss without a public proceeding, the Advisory Committee takes the view that the ***CVRA*** does not "explicitly address" the subject. This view assumes, of course, that the victim's right to fairness does not come into play when the prosecution moves to drop previously filed charges. This assumption is incorrect. Rule 48 already requires leave of court for a dismissal. In determining whether to grant leave, current case law requires the court to consider whether dismissal is "clearly contrary to manifest public interest." [475] The existing caselaw requires that the impact on a victim be considered in addressing a motion to dismiss. A dismissal is "clearly contrary to the public interest" if the prosecutor appears to be motivated by animus toward the victim. [476] Under the command of the ***CVRA***, the victim thus must be treated with fairness when the dismissal motion is addressed, as my proposal provides.

[*946] When the government files a motion to dismiss criminal charges involving a specific victim, the only way to protect that victim's right to be treated fairly is to consider the victim's views on the dismissal. [477] To treat a person with "fairness" is conventionally understood as treating them "justly" and "equitably." [478] A victim is not treated justly and equitably if her views are never before the court.

The Advisory Committee also alludes vaguely to "separation of powers issues raised by judicial review of the government's decision to terminate a prosecution." Here the Advisory Committee may be stepping out of line and questioning the Supreme Court. In 1944, the Court itself added the requirement to Rule 48 that prosecutors obtain leave of court before dismissing any indictment. [479] Thus, if there are separation of powers "issues" about judicial review of dismissals, they have existed for more than half a century by virtue of specific Supreme Court action.

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[471] ***CVRA*** Subcommittee Memo, supra note 66, at 20.

[472] Id. ("When there is a public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule [60].").

[473] In the subcommittee draft, the rule cited is actually numbered Rule 43.1. See ***CVRA*** Subcommittee Memo, supra note 66, at 20. Later, without any substantive change, Rule 43.1 was renumbered as Rule 60.

[474] See Proposed ***Amendments***, supra note 71, R. 60, at 15-20 (giving victims a right to be heard only as to proceedings concerning "release, plea, or sentencing") (discussed at infra notes 524-539 and accompanying text).

[475] United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975).

[476] In re Richards, 213 F.3d 773, 787 (3d Cir. 2000); see also United States v. Hamm, 659 F.2d 624, 629-30 (5th Cir. 1981).

[477] Accord United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006).

[478] Black's Law Dictionary 633 (Bryan A. Garner ed., 8th ed. 2004) (defining the adjective "fair").

[479] See Fed. R. Crim. P. 48 advisory committee's note recounting the history of the 1944 adoption.

The Advisory Committee's next argument is that to allow victims to be heard on dismissals would violate the ***CVRA***'s requirement that nothing in the Act "shall be construed to impair the prosecutorial discretion of the Attorney General." [480] But it is hard to understand how allowing information from a victim to go to a court "impairs" the government's discretion. Particularly given that courts must already review the public interest in reviewing dismissal motions, executive branch power is not impaired when a court hears from a victim in making its determination whether to approve. [481]

The Advisory Committee's final argument is that "when there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government … ." [482] The passive voice ("taken into account") obscures the overarching fact that it is the government itself that is proposing to dismiss the charges. The victim deserves to be heard not merely by the government agency proposing to drop the charges, but by the independent branch of government - the judiciary - that will review that proposal. For all these reasons, Rule 48 should be amended to ensure that victims are heard because charges are dismissed.

[*947] Rule 50 - Victims' Right to Proceedings Free From Unreasonable Delay The Proposals:

I proposed that a victim's right to proceedings free from unreasonable delay should be recognized as follows:

Rule 50. Prompt Disposition

(a) Scheduling Preference. Scheduling preference must be given to criminal proceedings as far as practicable.

(b) Defendant's Right Against Delay. The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.

(c) Victim's Right Against Delay. The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record. [483]

The Advisory Committee proposed no change to this Rule. [484]

Discussion:

Victims have speedy trial rights under the ***CVRA***, which grants victims the right "to proceedings free from unreasonable delay." [485] In addition, child victims previously had the right to a "speedy trial" in certain situations. [486]

In view of these statutory rights, I proposed supplementing the existing rule on scheduling (Rule 50) to fold in victims' rights. The Advisory Committee did not explicitly discuss this proposal, suggesting that its failure to act was possibly due to oversight. [487] Further suggesting oversight is the Advisory Committee's repeated statements that it "sought to incorporate, but not go

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[480] *18 U.S.C. § 3771*(d)(6) (2006).

[481] See *Heaton, 458 F. Supp. 2d at 1271-73* (reaching this conclusion). In Heaton, the government did not challenge this holding and, after the decision requiring it to submit the victim's views, filed a pleading to that effect, all without any apparent separation of powers problem.

[482] ***CVRA*** Subcommittee Memo, supra note 66, at 20.

[483] Cassell, Proposed ***Amendments***, supra note 4, at 918-19.

[484] Proposed ***Amendments***, supra note 71.

[485] *18 U.S.C. § 3771*(a)(7) (2006).

[486] Id. § 3509(j).

[487] See ***CVRA*** Subcommittee Memo, supra note 66, at 17-20 (cataloging my proposals that the subcommittee did not adopt; Rule 50 not mentioned).

beyond, the rights created by statute" and that it "adopted the statutory language whenever possible." [488] Yet under the Advisory Committee's proposed changes, victims' speedy trial rights under the ***CVRA*** are not incorporated into the Rules.

Victims should have their rights regarding scheduling reflected in the rule dealing with scheduling issues. My proposed rule closely tracks the language of **[*948]** the ***CVRA***. [489] It does add a provision that victims would be heard on a motion to continue a proceeding. [490] This provision is consistent with the definitive legislative history. As Senator Kyl explained: "This provision [in the ***CVRA***] should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay." [491] My proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime. The Task Force noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance … be clearly stated on the record." [492] Several states have adopted similar provisions. [493]

Rule 53 - Closed-Circuit Transmission of Proceedings for Victims The Proposals:

I proposed that closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so. [494]

The Advisory Committee proposed no change to this rule. [495]

[*949] Discussion:

I proposed to facilitate a victim's protected right to attend a trial by allowing closed-circuit broadcasting of a trial. The Advisory Committee did not act on this proposal for reasons that are unclear, as it did not include this proposed change in the catalog of my proposals that it was rejecting. [496]

Perhaps the Advisory Committee felt that it had sufficiently addressed the subject in its proposed changes to Rule 60. There the Committee simply tracked language in the ***CVRA*** and provided that "if the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subsection (a), the court must fashion a reasonable procedure

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[488] Proposed ***Amendments***, supra note 71, at 2.

[489] See id.

[490] Id. at 19.

[491] 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

[492] President's Task Force, Final Report, supra note 8, at 76.

[493] See, e.g., *Ariz. Rev. Stat. Ann. § 13-4435(B)* (2001) (requiring courts to "state on the record the reason for the continuance"); *Utah Code Ann. § 77-38-7(3)(b)* (2005) (requiring the court to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

[494] Cassell, Proposed ***Amendments***, supra note 4, at 922.

[495] Proposed ***Amendments***, supra note 71.

[496] ***CVRA*** Subcommittee Memo, supra note 66, at 17-20.

to give effect to these rights that does not unduly complicate or prolong the proceedings." [497] Thus, in a situation where numerous victims might overwhelm courtroom seating capacity, the court might craft a reasonable alternative procedure to assure attendance rights. One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a facility sufficiently large to accommodate all the victims. This was the procedure followed in the Oklahoma City bombing case. [498]

But tracking the ***CVRA*** is not enough. The language for my proposed rule comes from another statute, *42 U.S.C. § 10608*(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles. [499] The Advisory Committee repeatedly proposed folding language from the ***CVRA*** straight into the Federal Rules of Criminal Procedure. But if the goal is to fold statutes into the Rules, other relevant victims' statutes should be folded in as well.

While folding in a provision on closed-circuit broadcasting, there appears to be no good reason to limit such transmissions to such situations where venue has been transferred. The ***CVRA*** mandates that the courts must always craft "reasonable procedures" to protect the rights of multiple victims. [500] The proposed rule simply authorizes courts to allow such transmissions in appropriate cases. Interestingly, the ***CVRA***'s drafters specifically endorsed the closed-circuit procedure. [501]

[*950] For reasons that have yet to be articulated, the Advisory Committee has not only failed to act on my proposal but it has left in place a conflict between a statute and Rule 53. As noted above, *42 U.S.C. § 10608*(a) specifically trumps Rule 53 in situations where cases have been transferred more than 350 miles. [502] The Rules should at least be amended to fix that conflict. [503] While fixing that problem, the Advisory Committee should also adopt my change, which faithfully implements the ***CVRA***'s commands.

(New) Rule 60(a)(1) - Notice of Proceedings for Victims The Proposals:

I proposed requiring federal prosecutors to give notice to crime victims of their rights and the court process as follows:

Rule 10.1 Notice to Victims.

(a) Identification of Victim. During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.

(b) Notice of Case Events. During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

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[497] Proposed ***Amendments***, supra note 71, R. 60(b)(3), at 24 (tracking *18 U.S.C. § 3771*(d)(2) (2006)).

[498] Jo Thomas, Trial To Be Shown in Oklahoma for Victims, N.Y. Times, Jan. 30, 1997, at A14; Paul G. Cassell & Robert F. Hoyt, The Tale of Victims' Rights, Legal Times, Dec. 23, 1996, at 32.

[499] *42 U.S.C. § 10608*(a).

[500] *18 U.S.C. § 3771*(d)(2).

[501] See 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (noting that, because of multiple victims in the Oklahoma City bombing case, closed-circuit broadcasting used; this is "merely one example" of how a court could fashion an appropriate procedure to accommodate multiple victims).

[502] *42 U.S.C. § 10608*(a).

[503] Perhaps it could be argued that Rule 53 itself accommodates any conflict because its prohibition of broadcasting applies "except as otherwise provided by a statute or these rules." *Fed. R. Crim. P. 53*. But reliance on that language is a bit odd because it should go without saying that nothing in the Rules can trump a substantive statute passed by Congress. See *28 U.S.C. § 2072*(b). Moreover, as a simple matter of drafting clarity, it is desirable to have the Rules themselves avoid conflicts with statutes. Otherwise, courts may inadvertently follow the Rules in violation of the statutory command. See, e.g., Cassell, Barbarians at the Gates, supra note 6, at 516 (recounting how this happened in the Oklahoma City bombing case).

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;

(2) The release or detention status of a defendant or suspected offender;

(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;

(4) The right to make a statement about pretrial release of the defendant;

(5) The victim's right to make a statement about acceptance of a plea of guilty or nolo contendere;

[*951] (6) The victim's right to attend public proceedings;

(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances. [504]

The Advisory Committee proposed to add language in its global victims rule (Rule 60(a)(1)) that would give victims notice only of court proceedings:

Rule 60. Victims

(a) In General.

(1) Notice of a Proceeding. The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime. [505]

Discussion:

The difference between my proposal and the Advisory Committee's is that I would give victims notice of both the hearings held in a case and the fact that they can speak at some of those hearings; in contrast, the Advisory Committee would give victims notice only of the hearings. For example, I would place in the rule a requirement that victims be notified of their right to make a statement at bail, plea, and sentencing hearings and told when the hearings would be held. The Advisory Committee would tell the victim only when the hearings would be held. [506]

[*952] The Committee proposal disregards both the law and sound public policy. The ***CVRA*** directs that government investigating and prosecuting agencies "shall make their best efforts to see that crime victims are notified of, and accorded,

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[504] Cassell, Proposed ***Amendments***, supra note 4, at 859-60.

[505] Proposed ***Amendments***, supra note 71, R. 60, at 22.

[506] The Committee did agree with my recommendation that the notice should be provided by the Justice Department, not the courts. See Cassell, Proposed ***Amendments***, supra note 4, at 861-64. Originally, the ***CVRA*** Subcommittee had proposed that the Rules be silent on this important issue. See Advisory Committee Minutes, supra note 68, at 14 (suggesting that "it is not clear whose burden it would be to provide such notice" and "Professor Beale recommended the passive phrasing"). Apparently at some point after the meeting, the Advisory Committee chose to place the notification burden squarely on the government. See *Advisory Committee Report, supra* note 69, at 5. The Advisory Committee apparently recognized that this requirement was already the law, as found in another statute, *42 U.S.C. § 10607*(b), (c)(3)(A)-(D).

their rights [in the ***CVRA***]." [507] Because the Advisory Committee's promised approach was to "incorporate, but not go beyond, the rights created by the statute," [508] it is surprising to see that the Committee decided not to incorporate the ***CVRA***'s right for victims to be "notified of … their rights." Here again, perhaps it simply overlooked this right of victims. [509]

As a policy matter, leaving out this right threatens to cripple crime victims' right to speak at bail, plea, and sentencing hearings. If victims are unaware of their rights to speak, they may unwittingly forfeit that right. Of course, few victims are knowledgeable about the steps in the criminal justice process. Just as criminal defendants receive advice of their Miranda rights, victims should receive advice of their rights.

Although the Committee did not justify its decision to exclude the right to notice, it might conceivably argue that because this right does not involve the conduct of a public judicial proceeding, it does not belong in the Rules. The Committee advanced such an argument to defend its decision to ignore some other aspects of the ***CVRA*** in its proposed rule changes. [510]

Such an argument, at least if advanced with respect to notice issues, would lack merit. First, and most important, the rights at issue are directly bound up with judicial proceedings: at issue is notice about the right to speak at bail, plea, and sentencing proceedings. Moreover, this right directly bears on those proceedings. It is designed to ensure that a judge at these hearings will have all relevant information, including information from crime victims.

Second, it is not true that the Federal Rules of Criminal Procedure only cover judicial proceedings. To provide a few straightforward examples: Rule 11 authorizes prosecutors and defense attorneys to "discuss and reach a plea agreement"; [511] Rule 16 provides that, upon request, a prosecutor "must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control"; [512] Rule 41 requires a police officer executing a search warrant to "give a copy of the warrant and a receipt for the property taken to the person from whom **[*953]** … the property was taken"; [513] and Rule 49 requires parties to serve their legal pleadings on each other. [514] Although these rights may have some ultimate effect on a court proceeding, none of them involves the conduct of a judicial proceeding. If they are "in bounds" for the Rules of Criminal Procedure, the subject of notice about rights to a hearing would seem to fit comfortably as well.

Turning to how to draft a rule giving victims notice of their rights, it is easy to reformulate my proposal so that it tracks the more abbreviated style preferred by the Advisory Committee. Such a rule would read as follows (underlined language being added to the Advisory Committee's proposed language):

(1) Notice of a Proceeding. The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime and of the rights the victim has at those proceedings.

It is not unreasonable to ask prosecutors to give victims notice of their rights. As long ago as 1982, the President's Task Force of Victims of Crime concluded that the prosecutor is "in the best position to explain to victims the legal significance of various motions and proceedings." [515] The Attorney General Guidelines for Victim and Witness Assistance already require

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[507] *18 U.S.C. § 3771*(c)(1) (emphases added).

[508] *Advisory Committee Report, supra* note 69, at 2.

[509] See id. at 17-20 (purporting to catalog Cassell proposals rejected; notice of rights not included).

[510] See id. at 13 (listing rights that "seem to fall outside the parameters of the Federal Rules of Criminal Procedure).

[511] *Fed. R. Crim. P. 11(c)(1)*.

[512] Id. 16(a)(1)(E).

[513] Id. 41(f)(1)(C) (Supp. 2007).

[514] Id. 49(a)-(b).

[515] President's Task Force, Final Report, supra note 8, at 64.

prosecutors and their agents to provide notice to crime victims for their rights, [516] as do some states. [517] To ensure that the Justice Department has sufficient resources to provide notice, the ***CVRA*** authorizes $ 25 million over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems. [518] The Advisory Committee should therefore add language to its proposed rule change to require prosecutors to give victims notice of their rights.

[*954] (New) Rule 60(a)(1) - Proceeding Without Notice to a Victim The Proposals:

I proposed spelling out what would happen in circumstances where a court wanted to proceed with a hearing but no notice had been given to a victim as follows:

(b) Proceeding With and Without Notice. The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interest of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court ensures that notice will be properly provided to that victim for all subsequent public proceedings. [519]

The Advisory Committee did not propose any such change. [520]

Discussion:

It seemed desirable to me to spell out how courts should proceed when victims lacked notice of a hearing. In contrast, the Advisory Committee has chosen not to address the subject.

By not addressing the subject, the Advisory Committee may be suggesting that the court is forbidden from moving forward when a victim has not been given notice of a proceeding. The caselaw makes clear that when a defendant has not been given notice, any subsequent court action is void. [521] The ***CVRA***'s legislative history shows that the same rule was to apply for victims. As Senator Kyl explained,

It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself. [522]

[*955] In light of the fact that a court might otherwise be barred from proceeding when a victim has not been given notice, it still seems preferable to me to spell out a way to allow the court to move forward while simultaneously protecting victims' interests. But I will not elaborate the point further here.

(New) Rule 60(a)(2) - Victims' Right to Attend Trials Both the Advisory Committee and I proposed a rule that guarantees victims the right to attend court proceedings except in those very rare instances where the victim's testimony would be

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[516] See Attorney General Guidelines, supra note 161, at 23.

[517] See, e.g., Ala. Code. § 15-23-62 (LexisNexis 1995) (requiring law enforcement officers to give victims initial description of their rights and "the name and telephone number of the office of the prosecuting attorney to contact for further information").

[518] See Pub. L. No. 108-405, ***118 Stat. 2260, 2264-65 (2004);*** see also 150 Cong. Rec. S4267 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("We authorized an appropriation of to assure … that moneys would be made available to enhance the victim notification system, managed by the Department of Justice's Office for Victims of Crime, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important states of development.") (emphasis added).

[519] Cassell, Proposed ***Amendments***, supra note 4, at 904-05. I proposed adding this as new Rule 43.1, but discuss it here as new Rule 60(a)(1) to track the Advisory Committee's nomenclature.

[520] Proposed ***Amendments***, supra note 71.

[521] See Wright, supra note 210, § 721, at 13.

[522] 150 Cong. Rec. S10910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (reprinted in Appendix B).

materially altered by attending the trial. [523] Because the Advisory Committee proposal essentially tracks my proposal, it is not necessary to discuss this issue here.

(New) Rule 60(a)(3) - Victims' Right to be Heard on Bail, Plea, Sentencing and Other Issues The Proposals:

I proposed not only specific rules allowing victim to be heard at release, plea, and sentencing hearings but also a general rule giving victims the right to be heard on all issues directly affecting their rights as follows:

Right to be Heard on Victims' Issues. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right. [524]

The Advisory Committee proposed only a narrow rule giving victims the right to be heard at only three specific points in the process - bail, plea, and sentencing hearings:

Right to Be Heard. The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime. [525]

[*956] Discussion:

The Advisory Committee's proposed general rule on the victim's right to be heard is inferior to weaving that right into the specific rules on release, plea, and sentencing. This issue is discussed earlier in this Article. [526] The larger issue to pursue here is the silence of the Advisory Committee on how a court should proceed when a victim's rights under the ***CVRA*** are at stake in other proceedings. For example, what if the court is considering continuing a trial in violation of a victim's right to "proceedings free from unreasonable delay"? [527] Or excluding the victim from a proceeding in violation of a victim's right "not to be excluded from … public court proceeding"? [528] Or turning over to the defense personal and confidential information about the victim in violation of a victim's right "to be treated with fairness and with respect for the victim's dignity and privacy"? [529] Or giving a defendant the victim's home address in an alibi situation in violation of the victim's right to be "reasonably protected from the accused"? [530]

My proposed rule would state directly that the victim has the right to be heard on such issues. How the Advisory Committee would handle such issues is unclear. The Advisory Committee's proposed rule on the victim's right to be heard only confers such a right for three specific hearings. The listing of three hearings might seem to suggest victims could not be heard elsewhere. But denying victims a chance to be heard at other hearings where their rights are implicated is such an obvious violation of fundamental notions of fairness (not to mention the victim's right to fairness under the ***CVRA***) that one should be reluctant to ascribe that position to the Advisory Committee.

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[523] See Cassell, Proposed ***Amendments***, supra note 4, at 904-11; Proposed ***Amendments***, supra note 71, R. 60(a)(2), at 16; see also *In re Mikhel, 453 F.3d 1137, 1139-40 (9th Cir. 2006)* (reversing district court decision excluding victims from trial under the ***CVRA***); Beloof & Cassell, supra note 229, at 519-20 (concluding that the ***CVRA*** grants a "nearly unqualified" right for the victim to attend a trial).

[524] Cassell, Proposed ***Amendments***, supra note 4, at 905, 911.

[525] Proposed ***Amendments***, supra note 71, R. 60(a)(3), at 16.

[526] See supra notes 464-468 and accompanying text (proposing ***amendments*** to Rule 48 regarding release); supra notes 151-158 and accompanying text (proposing ***amendments*** to Rule 11 regarding pleas); supra notes 434-448 and accompanying text (proposing ***amendments*** to Rule 32).

[527] *18 U.S.C. § 3771*(a)(7) (2006).

[528] Id. § 3771(a)(3).

[529] Id. § 3771(a)(8); see also supra notes 231-351 and accompanying text (discussing ***amendments*** to Rule 17).

[530] *18 U.S.C. § 3771*(a)(1); see also supra notes 177-213 and accompanying text (discussing this question).

Part of the confusion here may stem from two different ways in which victims can be heard. The first way is when the victim's statement is effectively built into the proceeding at issue. At sentencing hearings, for example, the ***CVRA*** envisions a specific point in the process where the victim will have a chance to make a statement - the victim's allocution. [531] This is what the ***CVRA*** means when it refers to the victim's "right to be heard" at sentencing proceedings (along with plea and bail proceedings). But the listing of victims' rights to be heard at those three specific hearings could not possibly have meant that victims would have to remain silent at all other hearings.

[*957] The ***CVRA*** envisions victims being heard in second sense - in arguing in favor of their rights. The ***CVRA*** directly gives victims and their representatives the right to "assert" their rights. [532] These rights can be asserted by a victim's representative (that is, an attorney). [533] The ***CVRA*** also allows victims to file motions asserting their rights which must be taken up "forthwith." [534] These are all ways in which victims can properly be heard. [535]

The ***CVRA***'s legislative history makes it unmistakably clear that victims would be heard at other points in the process. Senator Feinstein explained that the basic goal of the ***CVRA*** was to give victims the right to "participate in the process where the information that victims and their families can provide may be material and relevant … ." [536] Senator Kyl also noted that the act's enforcement provisions would give victims rights to be heard throughout the process:

[The ***CVRA***'s enforcement provisions] allow[] a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, [to stand with other counsel in the well of the court,] and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victims' rights in a timely way. [537]

As one illustration of how this right to be heard operates, consider the victim's right to proceedings free from unreasonable delay. [538] Presumably, this right encompasses a victim's opportunity to be heard before a case is delayed. As Senator Kyl stated: "This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay." [539]

In view of all the different ways in which crime victims can be heard, it is appropriate to have a rule that speaks broadly to the subject and protects victims' right to be heard whenever their rights are at stake. My proposed rule achieves that goal.

[*958] (New) Rule 60(b) - Enforcement of Victims' Rights The Proposals:

I proposed folding into the procedures a victim's right to assert an error as follows:

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

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[531] See supra notes 434-448 and accompanying text (discussing victim allocution).

[532] *18 U.S.C. § 3771*(d)(1).

[533] Id.

[534] Id. § 3771(d)(3).

[535] See, e.g., United States v. Tobin, No. 04-CR-216-01-SM, 2005 WL 1868682, at 2 (D.N.H. July 22, 2005) (allowing putative victim to assert right to proceedings free from unreasonable delay even though bail, plea, or sentencing hearing not at issue).

[536] 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein).

[537] 150 Cong. Rec. S4269 (Apr. 22, 2004) (statement of Sen. Feinstein) (emphases added).

[538] *18 U.S.C. § 3771*(a)(7).

[539] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added) (reprinted in Appendix B).

(b) Preserving a Claim of Error. A party or a victim may preserve a claim of error by informing the court - when the court ruling or order is made or sought - of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by *Federal Rule of Evidence 103*. [540]

The Advisory Committee proposed incorporating some of the language of the ***CVRA*** dealing with enforcement of victims' rights as follows:

Rule 60. Victim's Rights.

… .

(b) Enforcement and Limitations.

(1) Time for Decision. The court must promptly decide any motion asserting a victim's rights under these rules.

(2) Who May Assert Rights. The rights of a victim under these rules may be asserted by the victim or the attorney for the government.

(3) Multiple Victims. If the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subsection (a), the court must fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings.

(4) Where Rights may be Asserted. The rights described in subsection (a) must be asserted in the district in which a defendant is being prosecuted for the crime.

(5) Limitations on Relief. A victim may make a motion to re-open a plea or sentence only if:

(A) the victim has asked to be heard before or during the proceeding at issue and the request was denied;

[*959] (B) the victim petitions the court of appeals for a writ of mandamus within 10 days of the denial and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) No New Trial. In no case is a failure to afford a victim any right under these rules grounds for a new trial. [541]

Discussion:

I proposed to essentially create a rule for victims to assert error, leaving additional details to be treated elsewhere. The Advisory Committee proposed to fold into the Rules of Criminal Procedure some of the enforcement provisions and restrictions in the ***CVRA***.

Because the Advisory Committee's proposal largely tracks the ***CVRA***, much in it is unobjectionable. But the Advisory Committee deviates from the ***CVRA***'s language in five places for reasons that are unexplained - and unexplainable. The patient reader of this Article may not be surprised that all five of these deviations operate in the same direction - to reduce a crime victim's rights from what Congress has commanded.

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[540] Cassell, Proposed ***Amendments***, supra note 4, at 921-22.

[541] Proposed ***Amendments***, supra note 71, R. 60(b), at 16-18.

First, in Proposed Rule 60(b)(1), the Advisory Committee has watered down the ***CVRA***'s directive that a court must decide any victim's motion "forthwith" [542] to "promptly." While there is nothing wrong with this change as a matter of style, [543] it does appear to reduce the speed with which courts will have to act to enforce victims' rights. "Forthwith" can be interpreted to be more exacting requirement than "promptly." [544] Given that the Advisory Committee's premise that, where possible, it "should incorporate" the language of the ***CVRA***, [545] it is unclear why it chose to substitute "promptly" for the "forthwith" requirement.

Second, in Proposed Rule 60(b)(2), the Advisory Committee has inexplicably left out the right of the victim's representative to assert a victim's right (along with **[*960]** the victim herself and the prosecutor). [546] This omission is criticized earlier in this Article. [547]

Third, in Proposed Rule 60(b)(5)(a) through (c), the Advisory Committee sets out three requirements for a victim to file a motion to reopen a sentence - requirements taken straight from the ***CVRA***. [548] Without explanation, however, the Advisory Committee then leaves out the ***CVRA***'s qualification to these restrictions - "this paragraph does not affect the victim's right to restitution as provided in Title 18, United States Code." [549]

Fourth, in Proposed Rule 60(b)(4), the Advisory Committee has left out the ***CVRA***'s venue provision which allows a victim to assert her rights "if no prosecution is underway, in the district court in the district in which the crime occurred." [550] In contrast to the other three omissions just noted, the Advisory Committee specifically discussed whether to track the italicized language in its proposed rule on asserting rights. Remarkably, it decided to take the statutory language out of the Rules:

Judge Levi expressed concern over the final phrase in Rule [60(b)(4)], which gives a victim the right to assert rights "if no prosecution is underway, in the court in the district in which the crime occurred." Judge Jones said the Crime Victims Rights Act affords victims certain rights even in the absence of a case. Judge Levi noted, however, that the criminal rules only apply to proceedings in filed cases. Judge Jones explained that the subcommittee had decided to include it because there might be a pre-prosecution proceeding of some sort to which the provision might apply. There was discussion as to whether a grand jury investigation might qualify as such. Professor Beale said that, while the Act might give victims certain rights, such as being treated respectfully, Judge Levi was probably correct that the rights covered by the criminal rules could only be asserted with respect to a case being prosecuted. After further discussion, Judge Jones said the phrase would be deleted, as Judge Levi had suggested. [551]

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[542] *18 U.S.C. § 3771*(d)(3).

[543] See Bryan A. Garner, A Dictionary of Modern Legal Usage 372 (2d ed. 1995).

[544] See, e.g., ***Amella v. United States, 732 F.2d 711, 713 (9th Cir. 1984)*** "["Forthwith'] connotes action which is immediate, without delay, prompt, and with reasonable dispatch."); *Ayers v. Coughlin, 530 N.E.2d 373, 375 (N.Y. 1988)* ("We reiterate that the statutory mandate to commit individuals to the officials responsible for their custody "forthwith' means that it is done without delay, at once, promptly. "Forthwith' signals immediacy.").

[545] ***CVRA*** Subcommittee Memo, supra note 66, at 1-2.

[546] Compare Proposed ***Amendments***, supra note 71, R. 60(b)(2), at 17, with *18 U.S.C. § 3771*(d)(1) (2006) (victims' rights may be asserted by "the crime victim or the crime victim's lawful representative, and the attorney for the Government") (emphasis added).

[547] See supra notes 117-133 and accompanying text. For the Advisory Committee's response to this criticism, see infra notes 578-579 and accompanying text.

[548] See *18 U.S.C. § 3771*(d)(5)(a)-(c).

[549] Id. § 3771(d)(5).

[550] Id. § 3771(d)(3) (emphasis added).

[551] Advisory Committee Minutes, supra note 68, at 15 (discussing now-renumbered Rule 43(1)(b)(3)).

This resulted in the Advisory Committee proposing a rule that recites only half of the ***CVRA***'s venue provision. The rule as proposed by the Advisory Committee provides that "the rights described in [the rules] must be asserted in **[*961]** the district in which a defendant is being prosecuted for the crime," [552] leaving silent what a victim should do if no prosecution is underway.

Once again, the confusion that the Advisory Committee discovered in the statute stems from the committee's failure to give effect to (among other things) the victim's right to fairness. The ***CVRA*** extends the requirement for fair treatment not only to prosecutors and courts, but also to all "officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime … ." [553] (I will call this the ***CVRA***'s "coverage provision.") It is, of course, easily conceivable that investigative agencies might violate a victim's right to fairness before formal criminal proceedings were initiated. Because "no prosecution is underway" in such circumstances, the victim would need to assert their rights (in the language of the ***CVRA***'s venue provision) "in the district court in the district in which the crime occurred."

Under the Advisory Committee's proposal, a victim who is treated unfairly by a federal investigative agency will lack any place to assert her right to fair treatment - in contravention of a teaching that traces back at least to Marbury v. Madison that "where there is a legal right, there is also a legal remedy." [554] The Advisory Committee, however, seems to think that this is not a problem to be addressed in the Rules because the rights covered by the criminal rules "could only be asserted with respect to a case being prosecuted." But, of course, this assumption depends on limiting the rights in the ***CVRA*** to such narrow provisions as the right to be "heard" on sentencing and other issues, because these rights attach only to "any public proceeding." [555] This assumption fails if the right to be treated fairly (not to mention the right to be treated with dignity and respect and other rights) is in the mix - as ***CVRA***'s plain language demands.

The Advisory Committee seemed to recognize the venue problem for cases with no prosecution underway when it discussed the fact that victims may now have rights in the grand jury process (a subject squarely covered by the criminal rules [556]). But other examples exist as well. For example, federal agents may improperly tread on a victim's rights through a search warrant (another subject covered by the criminal rules [557]). Or in the course of their investigation, they may mishandle evidence in a way that treads on a victim's dignity (improperly disseminating a nude or pornographic photograph of a victim, for instance. [558]) In **[*962]** all these situations, victims are at least entitled to a forum to assert their rights to be treated with fairness and with respect for their dignity and privacy - yet the Advisory Committee has excised the ***CVRA***'s venue provision that provides the forum.

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[552] Proposed ***Amendments***, supra note 71, Rule 60(b)(4), at 17.

[553] *18 U.S.C. § 3771*(c)(1) (emphasis added).

[554] *5 U.S. (1 Cranch) 137, 163 (1803).*

[555] *18 U.S.C. § 3771*(a)(4).

[556] *Fed. R. Crim. P. 6*. See generally Beloof, Cassell & Twist, supra note 6, at 335-79 (discussing victims' rights and the grand jury process).

[557] See *Fed. R. Crim. P. 41*.

[558] Cf. Donohue v. Hoey, No. 02-1405, 2004 WL 2095661, at 22-24 (10th Cir. Sept. 21, 2004) (finding no § 1983 right to damages for alleged mishandling of nude photograph during state police investigation).

The examples given in the text are just illustrations, and there may be many more situations where a victim's rights might be violated before charges are filed. In particular, the victim might not receive notice of their rights before charges are filed. The Justice Department's own guidelines provide that a victim must receive notice of rights "at the earliest opportunity after detection of a crime at which it may be done without interfering with an investigation." *Dep't of Justice, Attorney General Guidelines, supra* note 161, at 23. Moreover, existing federal law requires the same notification, although this law is found outside the ***CVRA***. See *42 U.S.C. § 10607* (notice to victim must be given at "the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation.").

It is important to emphasize one argument the Advisory Committee does not appear to make: that the ***CVRA*** applies only to charged crimes. Any such argument would not only fly squarely in the face of the ***CVRA***'s venue and coverage provisions applying victims' rights against investigating agencies, but also of the ***CVRA***'s clear legislative history. Discussing the ***CVRA***'s definition of a crime victim, [559] Senator Kyl said the statute used an "intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." [560]

At least one federal magistrate judge has suggested, in dicta, that - in spite of Senator Kyl's plain statement - the ***CVRA*** might not apply until charges have been filed. [561] His primary reason for doing so, however, was that the Supreme Court's decision in Hughey v. United States, [562] suggested this result. To be sure, the victims statute at issue in Hughey (the Victim Witness Protection Act) did employ a similar definition of "victim" as that found in the ***CVRA***. But Hughey turned on the fact that other language in the restitution statute provided that ""a defendant convicted of an offense' may be ordered to "make restitution to any victim of such offense.'" [563] Such a straightforward holding says little about a statute - such as the "fairness" provision in the ***CVRA*** - that contains no such limiting language regarding persons "convicted … of [an] offense." Moreover, the magistrate judge did not discuss the ***CVRA***'s coverage and venue provisions, which plainly dictate that the ***CVRA*** applies to crimes not yet charged. For all these reasons, the **[*963]** Advisory Committee should apply the ***CVRA*** as written and include a venue provision both for prosecuted and not-yet-prosecuted crimes.

Fifth, and most important, in proposed Rule 60(b)(2), the Advisory Committee gives victims the power to assert rights "under these rules." As has been noted throughout this Article, the Rules as they would be amended by the Advisory Committee leave out many of the victims' rights under the ***CVRA***. For example, the victims right to a speedy trial has not been included in the proposed rule changes. [564] By giving victims the power to only assert the limited number of rights listed "under these rules," the Advisory Committee ignores many victims' rights under the ***CVRA***. At the very least, the language should be changed to make clear that victims to assert all rights that they have under the ***CVRA***.

One change that the Advisory Committee should not make is worth brief mention: The Advisory Committee should not add a provision for a fact-finding hearing to determine whether someone is a "victim" of crime. In its comment on the pending proposed ***amendments***, the National Association of Criminal Defense Lawyers ("NACDL") has proposed such a procedure. The rationale it gives is that "the conferring of "rights' on the "victim' comes, in general, at the expense of the defendant. Thus, due process requires that a provision be added to these Rules for a factfinding hearing, to be held whenever the proper labeling of a person as "victim,' is in dispute … ." [565]

The NACDL's rationale is patently defective. The rights in the ***CVRA*** do not interfere with any rights of the defendant, as pointed out throughout this Article. [566] For instance, for victims to be notified of court hearings, to attend those hearings, and

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[559] See supra notes 117-133 and accompanying text (discussing ***amendments*** to Rule 1).

[560] 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); cf. *United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006)* ("Although some of the other rights in the Crime Victims' Rights Act (such as the right to be heard and the right to not be excluded) are limited to "public proceedings,' the right to fairness is not so restricted.").

[561] *United States v. Turner, 367 F. Supp. 2d 319, 326-27 (E.D.N.Y. 2005).*

[562] *495 U.S. 411 (1990).*

[563] *Id. at 415-16* (emphases added) (quoting 18 U.S.C. § 3579(a)(1) (1982 ed. Supp. IV)).

[564] See supra notes 483-493 and accompanying text.

[565] Peter Goldberger, Statement on Behalf of the Nat'l Assoc. of Crim. Defense Lawyers Before the Advisory Comm. on Criminal Rules 4 (Jan. 26, 2007).

[566] While the ***CVRA*** extends to uncharged crimes, it is also obvious that "the ***CVRA*** does not grant victims any rights against individuals who have not been convicted of a crime." *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 564 (2d Cir. 2005)* (emphasis added); accord Searcy v. Skinner, No. 6:06-1418-GRA-WMC, 2006 WL 1677177, at 2 (D.S.C. June 16, 2006). Like the constitutional ***amendment*** it was patterned on, the ***CVRA*** extends rights against the government - that is, rights "not to be victimized again through the process by which government

to speak at those hearings does not interfere with the defendant's right to be notified of those hearings, attend those hearings, and to speak at those hearings. Perhaps this is why the NACDL could only assert that "in general" victims' rights harm defendants - the NACDL did not provide a single supporting example.

Moreover, the procedure that the NACDL would put in place - a full evidentiary hearing with the defendant able to cross-examine the victim to be determine "victim" status - is novel and unwarranted. While crime victims' rights have existed in all fifty states and the federal system for the last two decades, no **[*964]** jurisdiction has ever required anything like this. [567] Instead, procedural issues of how to determine victim status are left to the sound discretion of the trial courts.

To give a defendant an automatic right to challenge victim status raises constitutional and other problems. A defendant who simply complained about a victim designation would lack "standing" under Article III of the Constitution, because there would be no "threatened or actual injury resulting from the putatively illegal action." [568] Moreover, to give defendants free license to cross-examine victims about whether they were truly victims would obviously create a right to discovery in a criminal case that contradicts current law [569] and circumvents the stringent limitations on depositions of witnesses found in Rule 15. [570] The potential for abusive questioning of victims in such hearings (where no jury is present to be alienated) should also not be overlooked. [571] The victims' rights provisions in this country have never been used to give defendants new rights to question and potentially traumatize victims. The ***CVRA***'s expansion of victims' rights should not be the occasion to start. [572]

V. Conclusion

This Article has tried to make the case for specific changes to the Federal Rules of Criminal Procedure to protect crime victims' rights, particularly those rights listed in the ***CVRA***. The Article has attempted to sketch out one way that the Rules could be amended to do this while at the same time contending that the Advisory Committee's pending victims' rights proposals are too restrictive. In concluding the Article, it may be useful to raise broader concerns about the Advisory Committee's minimalist approach.

In reviewing the Advisory Committee's proposals, some might reach the conclusion that the Committee treated the victims issue as a chore to be survived rather than an opportunity to be seized. One can read the Committee's proposals and the minutes of its discussions without finding much enthusiasm for the idea of crime victims becoming a part of the criminal justice process. This reluctance may be part of a larger phenomenon of hostility by the legal culture to crime victims, as other scholars and I have argued elsewhere. [573]

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officials prosecute, punish and release accused or convicted offenders." Tribe & Cassell, supra note 28; accord S. Rep. 106-254, at 1-2 (2000) (Victims' Rights ***Amendment*** designed to guarantee victims participatory rights in government process). That is why the ***CVRA*** states that the rights must be afforded by government agencies and actors. See *18 U.S.C. § 3771*(c)(1) (2006).

[567] Communication from Professor Douglas Beloof, Director of the National Crime Victims Law Institute (Jan. 19, 2007) (on file with author).

[568] *Warth v. Seldin, 422 U.S. 490, 499 (1975)* (internal quotation omitted).

[569] See supra notes 206-211 and accompanying text.

[570] See supra note 210 and accompanying text.

[571] See Cassell, Proposed ***Amendments***, supra note 4, at 1434-37 (explaining how cross-examination of victims at Utah's preliminary hearings has traumatized victims).

[572] The Advisory Committee ultimately agreed with this position, and added language to a Committee Note stating simply that the court could make findings to resolve any dispute about who was a victim. See infra note 580.

[573] See, e.g., Cassell, Proposed ***Amendments***, supra note 4, at 534 ("The "legal culture' … is one that has not made room for crime victims."); Edna Erez, Victim Participation in Sentencing: And the Debate Goes On … , 3 Int'l Rev. of Victimology 17, 29 (1994) (noting socialization of legal scholars "in a culture and structure that do not recognize the victim as a legitimate party in criminal proceedings"); see also Stephanos Bibas, Transparency and Participation in Criminal Procedure, *81 N.Y.U. L. Rev. 911, 964 (2006)* (suggesting crime victims can effectively monitor the behavior of "insiders" in the system).

[*965] Any lack of interest in crime victims is regrettable and might lead to harmful consequences. Congress has decided that crime victims must be fully integrated into the federal criminal justice system. The Rules of Criminal Procedure are an important part of that system and must fully reflect the congressionally protected interests of crime victims. If the judiciary will not do the job, no doubt Congress will step in to finish the task. Indeed, Congress will be looking carefully at the ***CVRA***'s effectiveness in changing the system in 2008, as it directed the General Accounting Office to "prepare and submit to the appropriate committees a report" on the effectiveness of the act at that time. [574]

It would be unfortunate if initiative for rules on crime victims were to pass from the courts to Congress. The courts do have institutional advantages in assessing changes in the Rules. [575] The rulemaking committees are staffed with judges who have long experience in applying rules of procedure. And the rulemaking process itself guarantees considerable public involvement and careful deliberation about any rules that are ultimately adopted.

But having a good rulemaking process is one thing; producing a good product is another. Unfortunately, the Advisory Committee's current proposals do not treat crime victims fairly and, even more indisputably, do not fully implement Congress's commands in the ***CVRA***. As the ***CVRA*** directs, crime victims are now participants in the federal criminal justice system. The Federal Rules of Criminal Procedure must faithfully reflect that new reality and ensure that crime victims, no less than prosecutors and defendants, are treated fairly throughout the process.

VI. Afterword

After this Article was completed in January 2007, several significant developments occurred that are relevant to rule changes discussed here. First, several members of Congress wrote the Advisory Committee to explain that they were concerned about the timid approach to implementing the ***CVRA***. Then, in the spring and summer of 2007, the Advisory Committee itself made several changes to the Rules discussed in this Article. Finally, as anticipated in the conclusion to this Article, Congress has begun to move on legislation that would finish the task of enshrining crime victims' rights in the federal rules. Rather than revise the Article in light of these subsequent developments, it seemed to make more sense to let the Article stand as originally written and supplement it with a brief afterward discussing each of these developments.

[*966]

A. Congressional Public Comment on the Advisory Committee's Proposed Rules

Public comment on the Advisory Committee's proposed rule changes closed in February 2007. As comment was closing, several members of Congress wrote the Committee, confirming that they too are troubled by the minimalist approach to the proposed ***CVRA amendments***. On February 15, 2007, Senator Jon Kyl wrote to the Committee to express his "strong concern" about the proposed ***amendments***. He explained as follows:

As a sponsor of the Act, I believe that passage by overwhelming majorities in both the House and the Senate signifies Congress's intent to provide crime victims with substantive rights and protections in federal court. But the proposed ***amendments*** do little more than reiterate limited parts of the statute. Crime victims have been mistreated by the federal criminal justice system for far too long. To comply with Congress's intent, the Advisory Committee must take decisive and … comprehensive action to thoroughly amend the rules and fully ensure that crime victims are protected in federal courts. [576]

Senator Kyl went on to say he "fully endorsed" my specific proposals, indicating that they were, however, in some areas "too cautious." [577]

B. The Advisory Committee's Response to this Article and Other Public Comments

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[574] Pub. L. No. 108-405, § 104(b)(2), ***118 Stat. 2260, 2265*** (codified as amended at *18 U.S.C. § 3771* (Supp. 2006)).

[575] See generally Peter G. McCabe, Renewal of the Federal Rulemaking Process, *44 Am. U. L. Rev. 1655,1687-91 (1995).*

[576] Letter from Senator Jon Kyl to Hon. David F. Levi, Chairman, Comm. on Rules of Practice and Procedure 1 (Feb. 16, 2007).

[577] Id. at 3.

In response to this Article and to other public criticisms of its rules, the Advisory Committee made several modest changes to its proposed rules. These changes are discussed in numerical order here. Other than these changes, no significant changes were made to the proposed rules discussed here. The Advisory Committee has submitted them all to the Supreme Court and, unless the Court takes the unusual step of disavowing them, they will go into effect on December 1, 2008.

Rule 1. In apparent response to my criticism that the definition of "victim" found in Rule 1 intentionally excluded a victim's "representative," [578] on April 16, 2007, the Advisory Committee amended its proposed Rule 60 to allow a victim's representative to assert a right. Rule 60(b)(2) now provides: "A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized **[*967]** by *18 U.S.C. § 3771*(d) and (e)." [579] This change insures that victims' representatives will be able to assert victims' rights. The Advisory Committee also added language to the Committee Note stating that courts could make appropriate findings to resolve any dispute about who is a victim. [580]

Rule 5. At its October 1, 2007 meeting in Utah, the Advisory Committee approved a proposed change to Rule 5 regarding detention hearings. The proposed addition to Rule 5 reads: "In making the decision to detain or release the defendant, the judge must consider the right of the victim to be reasonably protected from the defendant." [581] This language was lifted almost straight from Senator Kyl's proposed legislation implementing the ***CVRA*** [582] (which is discussed in the next section). This seems like a valuable addition to the Rules, helping to protect victims' rights in detention decisions.

Rule 12.1. At its April 16, 2007 meeting, the Advisory Committee apparently agreed with my conclusion that courts lack authority to force a victim to meet with a defendant [583] and struck language recommending such a meeting from its Committee note. [584]

Rule 12.3. Also at its October 1, 2007 meeting, the Advisory Committee responded to my point that the same language appears in both Rule 12.1 (alibi defense) and Rule 12.3 (public authority defense) regarding disclosure of addresses of crime victims. [585] It therefore proposed to add the same changes to Rule 12.3 that it added to Rule 12.1. [586] Unfortunately, for the reasons discussed at length here, now the language in both Rule 12.1 and 12.3 is insufficiently protective of victims' rights. [587]

Rule 17. At its April 16, 2007 meeting, the Advisory Committee revised its rule on subpoenas for confidential information to read: "Before entering the order and unless there are exceptional circumstances, the court must require that notice be given to the victim so that the victim can move to quash or modify the subpoena or otherwise object." [588] This change responds to objections from the American Bar Association, other groups, and me that the earlier rule encouraged ex parte **[*968]** issuance

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[578] See supra notes 117-126 and accompanying text.

[579] Proposed ***Amendments***, supra note 71, R. 60(b)(2), at 17 (emphasis added).

[580] Memorandum from Hon. Susan C. Bucklew, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure app. a, at 271-72 (May 19, 2007) [hereinafter Bucklew Memo], available at *http://www.uscourts.gov/rules/Reports/CR05-2007.pdf*.

[581] Memorandum from Professor Sara Sun Beale, Reporter, Advisory Comm. on Fed. Rules of Criminal Procedure, to Members of the Criminal Rules Advisory Comm. 136 (Sept. 2, 2007) [hereinafter Beale Memo].

[582] S. 1749, 110th Cong. § 5 (2007).

[583] See supra notes 206-211 and accompanying text.

[584] Bucklew Memo, supra note 580, app. a, at 277.

[585] See supra notes 202-203 and accompanying text.

[586] Beale Memo, supra note 581, app. at 7.

[587] See supra notes 187-191 and accompanying text (explaining why changes to Rule 12.1 leave victims' addresses vulnerable to unfair disclosure).

[588] Bucklew Memo, supra note 580, app. a, at 283.

of subpoenas for confidential information and thus violated important due process principles. [589] The new rule is an improvement, in that it limits ex parte procedures to "exceptional circumstances." The Committee note then offers two illustrations of exceptional circumstances. One is unobjectionable - where "evidence … might be lost or destroyed if the subpoena were delayed" [590] - a standard exigent circumstance that justifies moving rapidly. But the other illustration - "a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy" [591] - remains quite problematic, for reasons discussed earlier. [592]

Rule 21. Also at its October 1, 2007 meeting, the Advisory Committee approved a very modest change to Rule 21(b), regarding transfer of cases for convenience. The change reads:

Rule 21. Transfer for Trial

… .

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, and victim, and the witnesses, and in the interests of justice.

This change is modest, because (in my estimation) relatively few federal cases involving victims are transferred for "convenience" under Rule 21(b). The more common situation is transfers for prejudice under Rule 21(a). [593] Thus, this change is, at best, relatively inconsequential.

In any event, the change is defective. While the proposed rule lets the judge consider the victim's interest in determining whether to transfer, the Advisory Committee did not adopt my recommendation to let crime victims be heard on transfer decisions. [594] Without a mechanism for passing victim information along to the judge, an instruction to the judge to consider the victims' interest is essentially meaningless. The Advisory Committee should remedy this defect by giving victims the right to be heard on transfer decisions.

Rule 32. In possible response to my point that victims deserve the right to be "heard" at sentencing hearings by speaking directly to the judge, [595] on April 16, 2007, the Advisory Committee modified its note to Rule 32(i)(4). The note now reads: "Absent unusual circumstances, any victim who is present should be **[*969]** allowed a reasonable opportunity to speak directly to the judge." [596] While this is an improvement over earlier language, it still remains unclear what sorts of "unusual circumstances" the Advisory Committee has in mind that would permit a judge to deny a victim her right under the ***CVRA*** to speak. It is also odd that the Advisory Committee Note would apparently allow a judge to exclude a victim in some circumstances, when the only two reported decisions on the issue have held directly to the contrary that victims have an unequivocal right to speak to the judge. [597]

Rule 60. In response to public comments, the Advisory Committee made several modest changes to Rule 60. Rule 60(a)(2) was revised to make clear that the duty to permit full attendance arises in the context of the victim's possible exclusion. [598] As

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[589] See supra notes 347-351 and accompanying text.

[590] Bucklew Memo, supra note 580, app. a, at 282.

[591] Id.

[592] See supra notes 249-257 and accompanying text.

[593] See, e.g., supra notes 366-382 and accompanying text (discussing transfer for prejudice in two cases).

[594] See supra note 366 and accompanying text.

[595] See supra notes 434-448 and accompanying text.

[596] Beale Memo, supra note 580, app. at 7.

[597] See *Kenna v. U. S. Court for Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006); United States v. Degenhardt, 405 F. Supp. 1341, 1343-44 (D. Utah 2005);* see also *United States v. Turner, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005)* (reaching same conclusion).

[598] Bucklew Memo, supra note 580, app. a, at 299, 302-03.

discussed in connection with Rule 1 above, [599] Rule 60(b)(2) was revised to make clear that a victim's "representative" could assert a victim's right.

C. The Last Word? Legislation to Fully Implement the ***CVRA***

Unsatisfied with the timid approach taken by the Advisory Committee on the ***CVRA***, Senator Jon Kyl introduced legislation to comprehensively amend the federal rules on June 29, 2007. Senator Kyl explained that the Advisory Committee's ***amendments*** "do little more than reiterate limited parts of the statute." [600] Agreeing with the major premise of this Article - that crime victims must be treated fairly in the criminal justice process - Senator Kyl noted: "Of particular importance, the ***CVRA*** guaranteed that crime victims would have the right to be treated with "fairness.' My proposed ***amendments*** would add to the Federal rules the changes needed to treat crime victims fairly." [601] Senator Kyl was also concerned about delay by the Advisory Committee in moving forward with comprehensive ***amendments***:

Congress enacted the ***CVRA*** in October 2004. In the almost 3 years since then, I have waited patiently to give the federal courts the first opportunity to review the need for rule changes. At the same time, though, I have made clear my position, as one of the cosponsors of the ***CVRA***, that Congress expected significant reforms in the Federal rules. As I explained to my colleagues at that time, the crime victims' **[*970]** community in this country was looking to the ***CVRA*** to serve as a model for the states and a formula to fully protect crime victims. [602]

Accordingly, Senator Kyl proposed a long string of direct ***amendments*** to the Federal Rules of Criminal Procedure to comprehensively protect victims' rights.

Some of the legislation that Senator Kyl proposed tracked my proposals in this Article. For example, he proposed ***amendments*** to a number of rules - including Rules 2, 10.1, [603] 11(b)(4), 11(c)(1), 11(c)(2), 12.1, 12.3, 15, 21(e), 32(f)(1), 32(h), 43.1, 44, 46, and 50(c) - largely tracking my proposals.

But other proposed changes went well beyond those I propose here. For example, Senator Kyl proposed changing Rule 4's provision dealing with execution of arrest warrants to require reasonable efforts to give notice to victims about the initial appearance of an arrested suspect. [604] Along the same lines, Senator Kyl would give victims reasonable notice of any decision to release a defendant at the initial appearance [605] as well as notice of any pretrial conference. [606] He also would give federal prosecutors authority to release to a victim any discovery materials that have been released to the defendant. [607] To assist non-English speaking crime victims, he proposes to give the courts authority to appoint an interpreter for the victim. [608] Senator Kyl's bill would also require disclosure to the victim of any presentence report "except any portion of such report excised by the court for compelling reasons or made confidential by law." [609] And his bill would require that the victim be given a reasonable opportunity to be heard before any motion for a new trial is granted. [610]

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[599] See supra notes 117-126 and accompanying text.

[600] 153 Cong. Rec., S8746 (daily ed. June 29, 2007) (statement of Sen. Jon Kyl).

[601] Id.

[602] Id. at S8747.

[603] My proposed Rule 10.1 regarding notice to crime victims (which Senator Kyl largely tracked) is discussed in this Article as Rule 60(a)(1). See supra notes 505-519 and accompanying text.

[604] S. 1749, 110th Cong. § 4 (2007).

[605] Id. § 5.

[606] Id. § 15.

[607] Id. § 13.

[608] Id. § 18.

[609] Id. § 19.

[610] Id. § 21.

As of this writing, the ultimate disposition of Senator Kyl's bill remains uncertain. But what is certain is that congressional interest in crime victims' rights will remain strong. Congress has been working on far reaching crime victims' rights legislation for several decades now and, indeed, many in Congress favor an ***amendment*** to the United States Constitution to protect victims' rights. [611] Against that backdrop, it is unlikely that Congress will permit the Federal Rules of Criminal Procedure to only haphazardly protect victims' rights. If the Advisory Committee does not complete the task of comprehensively reforming the Rules to protect victims, Congress almost certainly will - and should - finish the job.

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[611] See supra notes 30-35 and accompanying text.

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DAVID SCHOEN

ARTICLE: Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act

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Text

[*837]

I. Introduction

Crime victims are virtually absent from the Federal Rules of Criminal Procedure. The sixty federal rules comprehensively cover every aspect of federal criminal proceedings - from initial appearance through preliminary hearing, arraignment, acceptance of pleas, trial, and sentencing. Yet the rules substantively mention victims only once, briefly recognizing the right of some victims to speak at sentencing. [1]

The federal rules can no longer leave victims unmentioned. In October 2004, Congress passed and President Bush signed into law the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (***CVRA***). [2] The ***CVRA*** transforms crime victims into participants in the criminal justice process by (among other things) guaranteeing them notice of court hearings, the right to attend those hearings, and the opportunity to testify at appropriate points in the process. These new victims' rights will reshape the federal criminal justice system and force significant changes to the Federal Rules of Criminal Procedure to reflect the victim's expanded role. This Article offers comprehensive proposals for changing the federal rules to both implement the ***CVRA*** and reflect sound public policy. The ***CVRA*** dictates changes like these to the Federal Rules of Criminal Procedure because only by integrating victims into the federal rules will Congress's goal of making victims participants in the process be fully realized.

This Article is divided into five parts. Following this introduction, Part II reviews the current absence of victims from the federal rules. Surprisingly, even where the rules cover issues of great concern to victims, victims somehow go unmentioned.

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[1] See *Fed. R. Crim. P. 32(i)(4)(B)*; discussion infra note 3 and accompanying text.

[2] Crime Victims' Rights Act, Pub. L. No. 108-405, ***118 Stat. 2261 (2004)*** (codified at *18 U.S.C.A. 3771* (West 2004 & Supp. 2005)). The ***CVRA*** was part of a much larger piece of legislation that addressed a variety of subjects, known as the "Justice for All Act." See generally Steven J. Twist, On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act, 9 Lewis & Clark L. Rev. (forthcoming 2005).

Part II then discusses the crime victims' rights movement and concludes with a brief sketch of the events leading to the ***CVRA***'s enactment.

[*838] Part III discusses why it is necessary to amend the federal criminal rules to incorporate victims. Although the ***CVRA*** is a federal statute that automatically trumps any conflicting procedural rule, procedural rules drive day-to-day courtroom practices. Given that Congress was particularly concerned about integrating victims into the fabric of the criminal justice system, the Advisory Committee on Criminal Rules should amend the rules to directly reflect the ***CVRA***'s requirements.

Part IV provides a rule-by-rule analysis of the changes needed in the Federal Rules of Criminal Procedure to implement the ***CVRA***. Of particular importance is new language protecting crime victims' rights to be notified of and to be present and heard at public criminal proceedings. Congress should also implement the right to notice in a new rule mandating that prosecutors keep victims apprised of criminal proceedings. In addition, the rules should also reflect victims' rights to attend court proceedings and to testify at bail, plea, and sentencing hearings. Part IV also discusses other significant changes needed to conform the rules to the ***CVRA***: defining "victim," giving victims notice before confidential information is subpoenaed, allowing victims to be heard before cases are transferred to remote districts, giving victims access to relevant parts of the pre-sentence report, permitting courts to appoint counsel for victims, and protecting the victim's right to proceedings free from unreasonable delay. Part V contains a brief conclusion.

II. The Missing Victims of Crimes

Crime victims are absent from the Federal Rules of Criminal Procedure. Yet this is not because victims lack vital interests in criminal cases. As the ***CVRA*** recognizes, victims have vital concerns throughout the criminal process. This section recounts the absence of victims from the federal criminal rules, then contrasts that absence with the aims of the victims' rights movement. The movement has argued successfully before state legislatures and Congress for the recognition of crime victims' rights - with these efforts culminating in the passage of the ***CVRA***, protecting crime victims' rights in the federal system.

[*839]

A. The Victim's Absence from the Current Federal Criminal Rules

The sixty Federal Rules of Criminal Procedure provide the architecture for the entire federal criminal court process, including initial appearance, preliminary hearing, arraignment, acceptance of pleas, trial, and sentencing. One would expect that the rules would frequently mention crime victims, given the subjects - such as bail, scheduling, and restitution - that directly concern victims. Yet amazingly, the current rules substantively use the word "victim" only a single time.

The single direct reference to victims is Rule 32(i)(4)(B), which directs that before imposing a sentence, "the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence." [3] The word "victim" appears in passing in only two other rules: Rule 12.4 requires the government to disclose to the court any organizational "victim," [4] and the heading of Rule 38(e) mentions "Restitution" and "Notice to Victims," but the text of the rule does not contain the term "victim." [5]

Victims deserve far more than the single reference in Rule 32. While later parts of this Article work through the rules section-by-section to illustrate where victims have been unfairly ignored, [6] a few examples here will prove the point. The rules currently fail to give victims any right to be heard regarding whether a judge should accept a plea, even though the judge must evaluate the public interest in deciding whether to do so. [7] The rules fail to require notice to victims before their confidential

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[3] *Fed. R. Crim. P. 32(i)(4)(B)*.

[4] Id. at 12.4(a)(2).

[5] Id. at 38(e) (mentioning "victim" in the heading of the rule).

[6] See discussion infra Part IV.

[7] See *Fed. R. Crim. P. 11*; discussion infra notes 148-53 and accompanying text.

information is subpoenaed from third parties - such as schools or medical providers - even though victims have compelling privacy interests to protect. [8] And the rules do not protect the victim's right to attend trials, despite **[*840]** victims' long history of having at least some protected interest in observing trials and other proceedings. [9]

One provision conveniently encapsulates the surprising absence of victims from the rules: Rule 32(d)(2)(B). The drafters of this rule [10] appear to have been so afraid to utter the word "victim" that they did not use the term even when describing the person harmed by a crime. Rule 32(d)(2)(B) directs that a presentence report contain "verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed." [11] The phrasing of this provision is striking for several reasons. It eschews the straightforward term "victim," preferring instead the obscuring phrase "individual against whom the offense has been committed." The provision also uses the responsibility-obscuring passive voice in describing the individual "against whom" the offense has been committed, leaving the reader to wonder who might have committed that offense (the defendant, perhaps?). Interestingly, the provision requires that information about the victim be "verified." Fair enough - until one realizes that the directly adjacent provision regarding information about the defendant lacks a similar verification requirement. [12] Why would information about the victim need to be verified while information about the defendant would not? Finally, the provision requires that victim information be stated in a "nonargumentative" style. Again, the adjacent defendant's provision contains no such direction. [13] In short, even a rule that seemingly must mention victims - the rule dictating preparation of a presentence report describing the crime - manages to avoid mentioning the word.

B. The Victims' Rights Movement

That victims are missing from the Federal Rules of Criminal Procedure exemplifies their treatment in the modern American **[*841]** criminal justice system. As one commentator has described the situation, the victim is "seen at best as "the forgotten man' of the system and, at worst, as being twice victimized, the second time by the very system to which he has turned for justice." [14] The absence of victims conflicts with "a public sense of justice keen enough that it has found voice in a nationwide victims' rights movement." [15]

The crime victims' rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system. Led by feminist and civil rights activists, victims' advocates argued that the criminal justice system had become preoccupied

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[8] See *Fed. R. Crim. P. 17*; discussion infra notes 177-91, and accompanying text.

[9] See *Fed. R. Crim. P. 43*; discussion infra notes 269-300 and accompanying text.

[10] To be clear, Congress, not the Advisory Committee on Criminal Law and Procedure, drafted the language of this rule. See Victims of Crime Act of 1984, Pub. L. No. 98-473, *98 Stat. 2014 (1984)* (directly amending Rule 32).

[11] *Fed. R. Crim. P. 32(d)(2)(B)* (emphasis added).

[12] Id. at 32(d)(2)(A).

[13] Id.

[14] William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 Am. Crim. L. Rev. 649, 650 (1976).

[15] *Payne v. Tennessee, 501 U.S. 808, 834 (1991)* (Scalia, J., concurring) (internal quotation marks omitted). See generally Douglas Evan Beloof, Paul G. Cassell & Steve J. Twist, Victims in Criminal Procedure 29-37 (2005); Shirley S. Abrahamson, Redefining Roles: The Victims' Rights Movement, 1985 Utah L. Rev. 517; Douglas Evan Beloof, The Third Model of Criminal Process: The Victim Participation Model, *1999 Utah L. Rev. 289* [hereinafter Beloof, The Third Model of Criminal Process]; Paul G. Cassell, Balancing the Scales of Justice, *1994 Utah L. Rev. 1373, 1380-82;* Abraham S. Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 514 (1982); Erin Ana O'Hara, Victim Participation in the Criminal Process, *13 J.L. & Pol'y 229 (2005);* William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, *32 Stan. J. Int'l L. 37 (1996).*

with defendants' rights to the exclusion of crime victims' legitimate interests. [16] These advocates urged reforms to give more attention to victims' concerns, including protecting the victim's right to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

The victims' rights movement received considerable impetus with the publication in 1982 of the Report of the President's Task Force on Victims of Crime. [17] The Task Force concluded that the criminal justice system "has lost an essential balance … . The system has deprived the innocent, the honest, and the helpless of its protection … . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed." [18] The Task Force advocated **[*842]** multiple reforms. It recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution. [19] The Task Force also urged that courts receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they are also called as witnesses. [20] In its most sweeping recommendation, the Task Force proposed a federal constitutional ***amendment*** to protect crime victims. The Task Force proposed adding to the ***Sixth Amendment***'s protections for defendants' rights a provision allowing crime victims to be present and heard: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." [21]

In the wake of that recommendation, crime victims' advocates considered how best to pursue a federal constitutional ***amendment*** that would protect victims' rights throughout the country. Recognizing the difficulty of obtaining the consensus required to amend the United States Constitution, advocates decided to go to the states first to pursue state victims' rights ***amendments***. This "states-first" strategy [22] met with considerable success. To date, some thirty states have adopted victims' rights ***amendments*** to their own state constitutions. [23] While these ***amendments*** take various forms, Arizona's ***amendment*** illustrates the types of rights typically protected. The Arizona constitutional provision gives victims the broad right to "be treated with fairness, respect, and dignity, and to **[*843]** be free from intimidation, harassment, or abuse, throughout the criminal justice process." [24] It also specifically confers a right to "be present at, and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present." [25] The ***amendment*** further allows victims to be heard at bail, plea, and sentencing hearings. [26]

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[16] See generally Beloof, Cassell & Twist, supra note 15, at ch. 1; Douglas E. Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, *2005 BYU L. Rev. 255* [hereinafter Beloof, The Third Wave of Crime Victims' Rights]; Cassell, supra note 15, at 1381-82.

[17] President's Task Force on Victims of Crime, Final Report 114 (1982).

[18] Id.

[19] Id. at 63.

[20] Id. at 72-73.

[21] Id. at 114.

[22] See S. Rep. No. 108-191, at 3 (2004), as reprinted in 2004 U.S.C.A.N.

[23] Alaska Const. art. I, 24; Ariz. Const. art. II, 2.1; Cal. Const. art. I, 12, 28; Colo. Const. art. II, 16(a); Conn. Const. art. I, 8(b); Fla. Const. art. I, 16(b); Idaho Const. art. I, 22; Ill. Const. art. I, 8.1; Ind. Const. art. I, 13(b); Kan. Const. art. 15, 15; La. Const. art. 1, 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26(A); Mo. Const. art. I, 32; Neb. Const. art. I, 28; Nev. Const. art. I, 8(2); N.J. Const. art. I, 22; N.M. Const. art. 2, 24; N.C. Const. art. I, 37; Ohio Const. art. I, 10(a); Okla. Const. art. II, 34; Or. Const. art. I, 42-43; R.I. Const. art. I, 23; S.C. Const. art. I, 24; Tenn. Const. art. 1, 35; Tex. Const. art. I, 30; Utah Const. art. I, 28; Va. Const. art. I, 8-A; Wash. Const. art. 1, 35; Wis. Const. art. I, 9(m). These ***amendments*** passed with overwhelming popular support.

[24] Ariz. Const. art. II, 2.1(A)(1).

[25] Id. 2.1(A)(3).

[26] Id. 2.1(A)(4).

The movement also successfully prodded the federal system to recognize victims' rights. In 1982 Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act (VWPA). [27] The VWPA had three primary goals: (1) to expand and protect the role of victims and witnesses in the criminal justice process; (2) to ensure that the federal government used all available resources to protect and assist victims without infringing defendants' constitutional rights; and (3) to provide a model for state and local legislation. [28] Since passage of the VWPA, Congress has remained active in this area of the law, passing several acts further protecting victims' rights, such as the Victims of Crime Act of 1984, [29] the Victims' Rights and Restitution Act of 1990, [30] the Violent Crime Control and Law Enforcement Act of 1994, [31] the Antiterrorism and Effective Death Penalty Act of 1996, [32] and the Victim Rights Clarification Act of 1997. [33] Other federal statutes have been passed to deal with specialized victim situations such as child victims and witnesses. [34]

[*844] These statutes spawned guidelines for how federal prosecutors should treat crime victims. The VWPA required the Attorney General to develop guidelines for the Department of Justice. [35] To implement this Act, the Attorney General developed guidelines designed to assist victims during the criminal justice process, mandating protocol, separate waiting areas at court, the prompt return of the victim's property, and victim training for law enforcement personnel. [36] The guidelines also directed that prosecutors notify victims about available services, major case events, consultations with the prosecutor, and the opportunity for consultation about the prosecution. [37] In 2000, Attorney General Reno updated and expanded the guidelines. The revised guidelines heightened the notification requirements, requiring prosecutors and law enforcement agents to notify victims of important criminal justice events and to confer with victims about important decisions in the process. [38]

Among the federal victims' statutes, the Victims' Rights and Restitution Act of 1990 is noteworthy. This Act purported to create a comprehensive list of victims' rights in the federal criminal justice process. It commanded that "[a] crime victim has the following rights" and then listed various procedural rights, including the right to "be treated with fairness and with respect for the victim's dignity and privacy," [39] to "be notified of court proceedings," [40] to "confer with [the] attorney for the Government in the case," [41] and to attend court proceedings even if called as a witness. [42] The statute also directed the Justice Department

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[27] Pub. L. No. 97-291, *96 Stat. 1248 (1982)* (codified as amended in scattered sections of 18 U.S.C.).

[28] Id.

[29] Pub. L. No. 98-473, *98 Stat. 2170 (1984)* (codified as amended at *42 U.S.C. 10601*-03 (2000); *18 U.S.C. 3013;* id. 3671).

[30] Pub. L. No. 101-647, ***104 Stat. 4820 (1990)*** (codified as amended at *42 U.S.C. 10601,* 10606-07).

[31] Pub L. No. 103-322, ***108 Stat. 1796 (1994)*** (codified as amended in scattered sections of U.S.C.).

[32] Pub. L. No. 104-132, ***110 Stat. 1214 (1996)*** (codified as amended in scattered sections of U.S.C.).

[33] Pub. L. No. 105-6, ***111 Stat. 12*** (codified as amended at *18 U.S.C. 3510).*

[34] See, e.g., *18 U.S.C. 3509* (protecting rights of child victim-witnesses); Pub L. No. 101-647, ***104 Stat. 4789 (1990).***

[35] Victim and Witness Protection Act, Pub. L. No. 97-291, 6(a), *96 Stat. 1248, 1252 (1982).*

[36] U.S. Dep't of Justice, Office of the Att'y Gen., Attorney General Guidelines for Victim and Witness Assistance (1995).

[37] Id.

[38] U.S. Dep't of Justice, Office of the Att'y Gen., Attorney General Guidelines for Victim and Witness Assistance 31-37 (2000) [hereinafter 2000 A.G. Guidelines]. The Guidelines were recently revised. See U.S. Dept. of Justice, Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance (2005) [hereinafter 2005 A.G. Guidelines].

[39] *42 U.S.C. 10606*(b)(1) (repealed 2004).

to make "its best efforts" to ensure **[*845]** that victims' rights were protected. [43] Yet this federal statute never successfully integrated victims into the federal criminal justice process and instead became something of a dead letter. Because Congress passed the ***CVRA*** in 2004 to remedy the problems with the 1990 Act, a brief review of the law's shortcomings is valuable.

Curiously, the 1990 Victims' Rights and Restitution Act was codified in Title 42 of the United States Code - the Title dealing with "Public Health and Welfare." Such placement effectively limited the Act's effectiveness because federal practitioners reflexively consult Title 18, the Title that covers "Crimes and Criminal Procedure," [44] for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in a single West publication entitled the Federal Criminal Code and Rules. This publication is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because West Publishing never included the Victims' Rights Act in this book, the statute was essentially unknown even to experienced judges and attorneys. [45]

The prime illustration of the ineffectiveness of the Victims' Rights and Restitution Act comes from the Oklahoma City bombing case. [46] While one might expect victims' rights would have been fully protected during such a high profile trial, in fact victims were denied one fundamental right: the right to observe court proceedings. During a pretrial motion hearing, the district court sua sponte precluded any victim who wished to provide victim impact testimony at sentencing from observing proceedings in the case. [47] The court based its ruling on *Rule 615 of the Federal Rules of Evidence* - the so-called "Rule on Witnesses." [48] Thirty-five victims and survivors of **[*846]** the bombing then filed a motion for reconsideration. [49] They noted that the district court apparently had overlooked the Victims' Rights Act giving victims the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." [50] The district court denied the motion for reconsideration. [51] It concluded that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible. [52] Unlike the original ruling, which was explicitly premised on Rule 615, the later ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence. [53]

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[40] Id. 10606(b)(3) (repealed 2004).

[41] Id. 10606(b)(5) (repealed 2004).

[42] Id. 10606(b)(4) (repealed 2004). Testifying victims can attend proceedings unless the victim's testimony "would be materially affected" by hearing other testimony at trial. Id.

[43] Id. 10606(a) (repealed 2004).

[44] 18 U.S.C. (2000).

[45] Last year, I wrote a letter to West Publishing requesting that they include the law in their book. That request became moot with the passage of the ***CVRA***, which moved victims' rights from obscurity in Title 42 to centrality in Title 18, thereby guaranteeing them a spot in the West publication.

[46] See generally Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights ***Amendment***, *1999 Utah L. Rev. 479, 515-22* (discussing the Oklahoma City bombing case in greater detail).

[47] See United States v. McVeigh, No. 96-CR-68, 1996 WL 366268, at 2 (D. Colo. June 26, 1996).

[48] Id. at 2-3 (discussing application of *Fed. R. Evid. 615*).

[49] Motion of Marsha and Tom Kight et al. and the National Organization for Victim Assistance Asserting Standing To Raise Rights Under the Victims' Bill of Rights and Seeking Leave To File a Brief as Amici Curiae, United States v. McVeigh, No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Sept. 30, 1996). I represented a number of the victims on this matter on a pro bono basis, along with able co-counsel Robert Hoyt, Arnon Siegel, and Karan Bhatia of the Washington, D.C. law firm of Wilmer, Cutler, and Pickering, and Sean Kendall of Boulder, Colorado.

[50] *42 U.S.C. 10606*(b)(4) (1994) (repealed 2004). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting of the trial, *42 U.S.C.A. 10608*(a) (West Supp. 1998), and on a First ***Amendment*** right of access to public court proceedings. See *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980)* (finding First ***Amendment*** right of court access).

The victims subsequently filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling. [54] Three months later, a Tenth Circuit panel rejected the victims' claims. [55] The circuit found "a number of problems with the excluded witnesses' reliance on the Victims' Rights Act." [56] Indeed, the circuit found that the Act created no obligations for courts:

[*847]

The statute charily pledges only the "best efforts" of certain executive branch personnel to secure the rights listed. The district court judge, a judicial officer not bound in any way by this pledge, could not violate the Act. Indeed, the Act's prescriptions were satisfied once the government made its arguments against sequestration - before the district court even ruled. [57]

Efforts by both the victims and the Department of Justice to obtain a rehearing were unsuccessful, [58] despite the support of separate briefs urging such a rehearing from forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims' groups in the nation. [59]

In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress clearly providing that victims should not have to decide between testifying at sentencing or watching the trial. A bill was introduced to provide that watching a trial in a capital case does not constitute grounds for denying a victim the chance to provide an impact statement. In a matter of weeks, Congress passed the Victims Rights Clarification Act of 1997, [60] but even that specific statute failed to protect the bombing victims' rights. The district court in the Oklahoma City case found that the statute had constitutional problems. [61]

Because of the difficulty accompanying the statutory protection of victims' rights, victims advocates decided to press for a federal constitutional ***amendment***. They argued that the statutory **[*848]** protections could not sufficiently guarantee victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia." [62] As the Justice Department reported:

Efforts to secure victims' rights through means other than a constitutional ***amendment*** have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past [twenty] years, and many states have responded

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[51] McVeigh, 1996 WL 366268 at 25.

[52] Id. at 24.

[53] See id.

[54] Petition for Writ of Mandamus, Kight et al. v. Matsch, No. 96-1484 (10th Cir. Nov. 6, 1996) (on file with author).

[55] *United States v. McVeigh, 106 F.3d 325, 328 (10th Cir. 1997),* superseded by statute, *18 U.S.C. 3510.*

[56] *Id. at 334-35.*

[57] *Id. at 335* (internal citation omitted).

[58] See Order, United States v. McVeigh, No. 96-1469, 1997 WL 128893, at 3 (10th Cir. Mar. 11, 1997).

[59] See *Brief for Amici Curiae Washington Legal Foundation and United States Senator Don Nickles and 48 Other Members of Congress, United States v. McVeigh, 106 F.3d 325* (10th Cir. Feb. 14, 1997) (No. 96-1469); *Brief for Amici Curiae States of Oklahoma, Colorado, Kansas, New Mexico, Utah, and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325* (10th Cir. Feb. 14, 1997) (No. 96-1469); Brief for Amici Curiae National Victims Center, Mothers Against Drunk Driving, National Victims' Constitutional ***Amendment*** Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in *Support of Rehearing, United States v. McVeigh, 106 F.3d 325* (10th Cir. Feb. 17, 1997) (No. 96-1469).

[60] Pub. L. No. 105-6, ***111 Stat. 12 (1997).***

[61] See generally Cassell, supra note 46, at 519-20 (recounting problems).

[62] Laurence H. Tribe & Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B5.

with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights. [63]

To place victims' rights in the Constitution, victims advocates - led most prominently by the National Victims Constitutional ***Amendment*** Network [64] - approached the President and Congress regarding a federal ***amendment***. [65] On April 22, 1996, Senators Kyl and Feinstein with the backing of President Clinton introduced a federal victims' rights ***amendment***. [66] The ***amendment*** was intended to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation." [67] A companion resolution was introduced in the House of Representatives. [68] The proposed ***amendment*** embodied seven core principles: (1) the right to notice of proceedings, (2) the right to be present at the proceedings, (3) the right to be heard, (4) the right to notice of the defendant's **[*849]** release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: the right to standing to enforce these rights. [69] The 104th Congress did not pass the ***amendment***.

On January 21, 1997, the opening day of the first session of the 105th Congress, Senators Kyl and Feinstein reintroduced the victims' rights ***amendment***. [70] A series of hearings were held that year in both the House and the Senate. [71] Kyl and Feinstein reintroduced the ***amendment*** the following year. [72] The Senate Judiciary Committee held hearings [73] and passed the proposed ***amendment*** out of committee. [74] Yet again, the full Senate did not consider the ***amendment***.

In 1999, Senators Kyl and Feinstein again proposed the ***amendment***, [75] and on September 30, 1999, the Judiciary Committee voted, as before, to send the ***amendment*** to the full Senate. [76] But on April 27, 2000, after three days of floor debate, the ***amendment*** was shelved when it became clear that its opponents, who objected to constitutionalizing victims' rights, possessed the necessary votes to sustain a filibuster. [77] At the same time, hearings on the companion measure were held in the House. [78]

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[63] Focusing on the Administration of Justice and the Enforcement of Laws: Dep't of Justice Oversight Hearing Before the S. Judiciary Comm., 104th Cong. 23-24 (1997) (statement of Janet Reno, Att'y Gen. of the United States).

[64] See *http://www.nvcan.org*. See generally Twist, supra note 2.

[65] For a comprehensive history of victims' efforts to pass a constitutional ***amendment***, see Twist, supra note 2.

[66] S.J. Res. 52, 104th Cong., 2d Sess. (1996).

[67] S. Rep. No. 108-191, at 1-2 (2003); see also S. Rep. No. 106-254 (2000).

[68] H.R.J. Res. 174, 104th Cong., 2d Sess. (1996).

[69] See S.J. Res. 65, 104th Cong., 2d Sess. (1996).

[70] S.J. Res. 6, 105th Cong., 1st Sess. (1997).

[71] See, e.g., Victims' Rights ***Amendment***: Hearings Before the Sen. Judiciary Comm., 105th Cong., 2d Sess. (1997).

[72] S.J. Res. 44, 105th Cong., 2d Sess. (1998).

[73] Victim's Rights ***Amendment***: Hearings Before the Sen. Judiciary Comm., 105th Congress (1998).

[74] See 144 Cong. Rec. S11,010 (daily ed. Sept. 28, 1998) (statement of Sen. Kyl).

[75] S.J. Res. 3, 106th Cong., 1st Sess. (1999).

[76] 146 Cong. Rec. S2966 (daily ed. Apr. 27, 2000).

[77] See id.

[78] H.R.J. Res. 64, 106th Cong., 1st Sess. (2002).

Discussions about the ***Amendment*** began again soon after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein reintroduced the ***Amendment*** in the Senate, [79] and the following day, President Bush announced his support. [80] On May 1, **[*850]** 2002, a companion measure was proposed in the House. [81] On January 7, 2003, Senators Kyl and Feinstein proposed the ***amendment*** as Senate Judiciary Resolution 1. The Senate Judiciary Committee held hearings in April of that year, [82] followed by a written report supporting the ***Amendment***. [83] Shortly thereafter, a motion to proceed to consideration of the measure was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the ***amendment***. After it became clear that the necessary super-majority votes to amend the Constitution were not attainable, victims' advocates turned their attention to enacting a comprehensive victims' rights statute.

C. The Crime Victims' Rights Act

The Crime Victims' Rights Act ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than to continue pursuing the more ambitious goal of a federal constitutional ***amendment***. In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push yet again for a federal constitutional ***amendment***. Conceding that the ***amendment*** had only majority support in Congress rather than the necessary super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. [84] In exchange for backing off from the federal ***amendment*** in the short term, victims' advocates received near-universal congressional support for a "broad and encompassing" statutory victims' bill of rights. [85] This new approach not only established a string of victims' rights but also provided funding for victims' legal services and created remedies for the violation of victims' rights. [86] The victims' **[*851]** movement is currently evaluating the success of the statute before deciding whether to continue pushing for a federal ***amendment***. [87]

The Crime Victims' Rights Act gives victims "the right to participate in the system." [88] To facilitate such participation, the Act grants victims eight specific rights:

(1) The right to be reasonably protected from the accused;

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;

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[79] S.J. Res. 35, 107th Cong., 2d Sess. (2002).

[80] 149 Cong. Rec. S82 (daily ed. Jan. 7, 2003) (statement of Sen. Kyl).

[81] H.R.J. Res. 91, 107th Cong., 2d Sess. (2002).

[82] A Proposed Constitutional ***Amendment*** To Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Judiciary Comm., 108th Congress, 108-189 (2003).

[83] S. Rep. No. 108-191 (2003).

[84] See Twist, supra note 2.

[85] 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[86] Id. at S4263 (statement of Sen. Feinstein).

[87] Id. (statement of Sen. Feinstein); see also Att'y Gen. Alberto R. Gonzales, Prepared Remarks at the Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating that a federal victims' rights ***amendment*** remains a priority for President Bush), available at *http://www.usdoj.gov/ag/speeches/2005/02282005* agremarkshov.htm.

[88] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). For a description of victim participation, see Beloof, The Third Model of Criminal Process, supra note 15.

HOUSE_OVERSIGHT_017723

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;

(5) The reasonable right to confer with the attorney for the Government in the case;

(6) The right to full and timely restitution as provided in law;

(7) The right to proceedings free from unreasonable delay;

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy. [89]

Rather than relying merely on the "best efforts" of prosecutors to vindicate rights, the ***CVRA*** also contains specific enforcement **[*852]** mechanisms. [90] Most importantly, it directly gives victims standing to assert their rights, addressing a flaw in the earlier enactment. [91] The Act provides that rights can be "asserted" by "the crime victim, the crime victim's lawful representative, and the attorney for the Government." [92] The victim or the government may appeal any denial of a victim's right through a writ of mandamus on an expedited basis. [93] The courts are also required to "ensure that the crime victim is afforded the rights" in the new law. [94]

These changes were intended to make the victim "an independent participant in the proceedings." [95] Congress desired to modify what it viewed as the unfair treatment of crime victims; in particular, congressional sponsors of the ***CVRA*** cited the Oklahoma City bombing case as the kind of decision that they intended the new law to overrule. [96]

III. The Need To Place Victims' Rights in the Rules

With the ***CVRA*** in place as the law of the land, the Federal Rules of Criminal Procedure should be amended to conform to the statute. While one court has derisively referred to the Act as mere "mushy, feel good legislation," [97] it in fact substantively changes the posture of crime victims on a whole host of issues. In the wake of the Act, victims now must be folded into the process through which federal courts conduct criminal cases, including bail, plea, trial, and sentencing hearings. The Federal Rules of Criminal Procedure - the "playbook" of the federal courts - should reflect this fact.

Some might agree that victims now have a number of new rights, but nonetheless dispute the need for a rules ***amendment***. After all, it might be argued, the ***CVRA*** in fact creates substantive rights for crime victims. Because nothing in the federal procedural **[*853]** rules can modify substantive rights, [98] the ***CVRA*** will trump any conflicting provision in the federal rules. [99] In other words, the ***CVRA*** will automatically govern federal criminal proceedings even if the rules remain as written.

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[89] *18 U.S.C.A. 3771*(a) (West 2004 & Supp. 2005).

[90] Id. 3771(d).

[91] Cf. Beloof, The Third Wave of Crime Victims' Rights, supra note 16 (identifying the lack of victim standing as a pervasive flaw in victims' rights enactments).

[92] *18 U.S.C.A. 3771*(d)(1).

[93] Id. 3771(d)(3).

[94] Id. 3771(b).

[95] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[96] Id. at S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[97] ***United States v. Holland, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005).***

[98] See *28 U.S.C. 2072*(b) (2000).

[99] See, e.g., *Miguel v. Country Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002).*

While this argument is legally precise, as a practical matter, compelling reasons justify amending the federal rules to include victims. Congress intended that the ***CVRA***'s new rights not be "simply words on paper," but rather "meaningful and functional" reforms. [100] To that end, Congress mandated that courts shall "ensure" that crime victims are "afforded the rights" conveyed by the ***CVRA***. [101] To effectively ensure that victims' rights are protected, these rights must become part of the warp and woof of the criminal process. That can occur only if the federal rules - the day-to-day operations manual of the courts - spell out how to integrate victims into the process.

Judges and practitioners frequently refer to the Federal Rules of Criminal Procedure for guidance as to how to conduct hearings. If victims' rights are left out of the federal rules, the strong possibility exists that courts may mistakenly disregard victims' rights under the ***CVRA***. A good illustration comes from Rule 11, which spells out in some detail how judges should conduct a hearing accepting a plea. The judge is required to personally inform the defendant of certain specified rights and ensure that the defendant understands he will be waiving those rights. [102] The judge must also determine that the defendant is voluntarily entering the plea and that there is a factual basis for the guilty plea. [103] Under the ***CVRA***, victims now also have the right to be heard before the judge accepts any plea. [104] This is a new right, [105] which judges are not accustomed to administering. Unless the victim's right to be heard is specifically spelled out in Rule 11's plea procedures, some judges may inadvertently disregard it.

[*854] The Oklahoma City bombing case further demonstrates how courts sometimes blindly follow the federal rules without considering superseding statutes. In that case, the court excluded victim-witnesses from certain proceedings, relying solely on *Federal Rule of Evidence 615* in making its determination. In denying the witnesses entrance to the proceedings, the court was apparently unaware of the provision in the Victims' Rights and Restitution Act protecting a victim's right to attend. [106] This deficiency was called to the attention of the Advisory Committee on the Federal Rules of Evidence. [107] The committee acknowledged the need to include victims in the evidence rules and later added a new provision reflecting the victim's right to attend. [108]

One reason for including victims' rights in the rules is to avoid litigation about the negative inferences that might be drawn if victims' rights are not in the rules. It is a well-settled principle of statutory construction that expressio unius est exclusio alterius (the expression of one thing implies the exclusion of the other). This canon of construction applies to the federal rules as much as to statutes. [109] Because the rules repeatedly spell out situations in which the defendant has the right to have his interests considered but say nothing about victims, it might be argued that the rules have implicitly determined that a victim's interests are irrelevant. To return to the Rule 11 plea example, given that the criminal rules specify that a court must address the defendant but lack any comparable requirement for victims, it might be inferred that victims cannot speak at plea hearings. Any

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[100] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[101] *18 U.S.C.A. 3771*(b) (West 2004 & Supp. 2005).

[102] *Fed. R. Crim. P. 11(b)(1)*.

[103] Id. at 11(b)(2), (b)(3).

[104] *18 U.S.C.A. 3771*(a)(4).

[105] Cf. *42 U.S.C. 10606*(b) (listing victims' rights; right to be heard at pleas not included) (repealed by *18 U.S.C. 3771).*

[106] See supra note 45 and accompanying text.

[107] See Letter from Paul G. Cassell to Advisory Comm. (on file with author).

[108] See *Fed. R. Evid. 615* advisory committee's notes (1998 ***Amendments***).

[109] See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).*

HOUSE_OVERSIGHT_017725

such conclusion would be contrary to the plain language of the ***CVRA***. [110] To avoid possible confusion, the rules should be clear on this point.

An additional reason for integrating victims into the federal rules is that Congress seemingly expects this to happen. Congress adopted the ***CVRA*** with the express goal of making the new law "a formula **[*855]** for success" and a "model for our States." [111] Congress clearly wants the new law aggressively implemented, thereby avoiding the need for further legislative action or even, possibly, a federal constitutional ***amendment***. Congress is watching to see whether the Judiciary (and the Executive) will fully and fairly implement this new Act. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress." [112]

Construing the ***CVRA*** to require changes is also appropriate because the Act is remedial legislation. As the Supreme Court has instructed, "When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." [113] The congressional sponsors described the victims' rights in the ***CVRA*** as "broad rights," [114] the significance of which should not "be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." [115]

A final reason for amending the rules is that crime victims' groups are looking for the effective implementation of the ***CVRA***. They are urging that the federal rules be comprehensively amended to reflect victims' rights; indeed, they have even suggested that Congress should directly amend the federal rules to include victims' rights. [116] The Judiciary would be well advised not to ignore these lobbying efforts. Victims have proven very effective at advancing legislation in Congress, particularly where they have legitimate grievances about how they have been treated. [117]

Moreover, allowing the initiative for drafting of rules to pass from the Judiciary to Congress is not ideal. The Advisory Committee on Federal Rules of Criminal Procedure includes many skilled **[*856]** members with considerable experience in drafting rules. The Committee is well aware of the ***CVRA***. Shortly after the passage of the ***CVRA***, the Committee withdrew a modest victim ***amendment*** it was proposing in anticipation of the need to make more extensive changes, [118] and is already working on proposed ***amendments*** to the rules. [119] It is preferable to have victims integrated into the federal rules through careful drafting by the Committee rather than by the potentially blunderbuss approach of direct congressional action.

For all these reasons, the Federal Rules of Criminal Procedure should be comprehensively amended to recognize the interests of crime victims and thereby to allow victims to be full participants in the criminal process.

IV. Proposed ***Amendments*** to the Federal Rules of Criminal Procedure To Implement the ***CVRA***

With the goal of effectively implementing the ***CVRA*** firmly in mind, the remainder of this Article proposes twenty-eight specific rule changes for consideration by the Advisory Committee on Criminal Rules. The individual sections that follow first

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[110] *18 U.S.C.A. 3771*(a)(4) (Victims have "the right to be … heard" at any public proceeding "involving … [a] plea.").

[111] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[112] Id. at S4271 (statement of Sen. Leahy).

[113] *California v. Am. Stores Co., 495 U.S. 271, 279 n.4 (1990)* (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 428 (1st Cir. 1990)).*

[114] 150 Cong. Rec. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[115] Id. (statement of Sen. Feinstein).

[116] Interview with Steve J. Twist, Nat'l Victims' Constitutional ***Amendment*** Network (March 11, 2005).

[117] See supra notes 27-34 and accompanying text (recounting victims' legislation passed by Congress).

[118] See infra note 223 and accompanying text.

[119] Telephone interview with Judge Susan C. Bucklew, Chair, Adv. Comm. on Fed. Rules of Criminal Procedure (May 2005).

recite a specific proposed change followed by the rationale for that change as both a matter of law and of policy. For convenience, this Article discusses the proposed changes sequentially, beginning with Rule 1.

Rule 1 - Definition of "Victim"

The Proposal:

Rule 1 should be amended to include the following definition of a victim:

"Victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as **[*857]** suitable by the court, may assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative.

The Rationale:

The ***CVRA*** directly defines "victim" using this language, [120] which ought to be folded into the rules for convenience. The rules currently define such terms as "attorney for the government," "federal judge," and "petty offense." [121] "Victim" should likewise be defined.

A definition is required for a second reason: Rule 32 currently contains a differing definition of "victim" as "an individual against whom the defendant committed an offense for which the court will impose sentence." [122] Because that definition varies from that mandated by the ***CVRA***, it must be changed. Furthermore, the ***CVRA***'s definition comes with an interpretative history. [123] The ***CVRA***'s definition of "victim" is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (MVRA). [124] In turn, the MVRA drew on the 1982 Victim Witness Protection Act (VWPA). [125] As a result, the ***CVRA*** uses a definition of "victim" that is more than twenty-two years old and that has not produced major administrative or definitional problems. Courts will be able to draw from that history to determine who qualifies as a "victim." [126]

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[120] *18 U.S.C.A. 3771*(e) (West 2004 & Supp. 2005).

[121] See *Fed. R. Crim. P. 1(b)(1)*, *1(b)(3)*, *1(b)(8)*.

[122] Id. at 32(a)(2).

[123] See generally Beloof, Cassell & Twist, supra note 15, at 49-69 (reviewing different definitions of "victim" for purposes of crime victims' legislation).

[124] See *18 U.S.C. 3663A*(a)(2). For differences from the old law, see Twist, supra note 2.

[125] See *18 U.S.C. 3663*(a)(2).

[126] See, e.g., *Hughey v. United States, 495 U.S. 411 (1990)* (holding that VWPA limited "victim" to victims of the actual offense of conviction so that district court could not order restitution on basis of charges that were dropped as part of plea agreement); *United States v. Follet, 269 F.3d 996 (9th Cir. 2001)* (holding that a free clinic was not a "victim" of the defendant's rape of his niece); *Moore v. United States, 178 F.3d 994 (8th Cir. 1999)* (holding that a bank customer was "victim" of attempted bank robbery under MVRA where defendant pointed a sawed-off shotgun at the customer and the teller, who were standing only two feet apart, while demanding money), cert. denied, ***528 U.S. 943 (1999);*** *United States v. Sanga, 967 F.2d 1332 (9th Cir. 1992)* (holding that foreign national who conspired to be brought into United States illegally was still a "victim" of the conspiracy where her smuggler threatened her life and forced her to work as live-in maid once she had arrived); *United States v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004)* (holding that "victim" in manslaughter case under MVRA was murdered person himself and not the estate), rev'd on other grounds, *United States v. Serawop, 410 F.3d 656 (10th Cir. 2005).* See generally John F. Wagner, Jr., Annotation, Who Is a "Victim," So as To Be Entitled to Restitution Under Victim and Witness Protection Act, 108 A.L.R. Fed. 828 (2005).

A few new issues will need to be litigated. For example, the Hughey case noted above conflicts with the views of Senator Jon Kyl, co-sponsor of the ***CVRA***, who explained that the definition of "victim" in the ***CVRA*** is an intentionally broad definition because "all victims of

HOUSE_OVERSIGHT_017727

[*858] Rule 1 also appears to be the best place to include the ***CVRA***'s language about a "representative" of a victim. This language, too, draws from the restitution statutes. [127]

Rule 2 - Fairness to Victims in Construction

The Proposal:

Rule 2 should be amended to require fairness to victims in construing the rules as follows:

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

The Rationale:

The ***CVRA*** broadly mandates that victims have the right to "be treated with fairness and with respect for the victim's dignity and privacy." [128] This creates a substantive right to fairness, similar to that found in various state victims' rights ***amendments*** - including the **[*859]** ***amendment*** found in Senator Kyl's home state of Arizona. [129] This broad reading was explained by Senator Kyl, who, along with Senators Feinstein and Hatch, was the primary legislative sponsor of the ***CVRA***: "The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process." [130]

In light of victims' new substantive right to fairness, Rule 2 should be amended to make clear that all of the rules must be construed to be fair to victims no less than to the government and defendants.

(New) Rule 10.1 - Notice of Proceedings for Victims

The Proposal:

A new Rule 10.1 should be added to guarantee victims their right to notice of proceedings as follows:

Rule 10.1 Notice to Victims.

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crime deserve to have their rights protected, whether or not they are the victim of the count charged." See 150 Cong. Rec. S10,910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). At least one court has suggested that, as a matter of discretion, it is desirable to notify even victims of uncharged conduct under the ***CVRA***. See *United States v. Turner, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005)* (concluding that, absent reason to think otherwise, any person who the government asserts has been harmed by a crime or who self-identifies as such qualifies as a "victim"); cf. *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 561 (2d Cir. 2005)* (holding that the ***CVRA*** does not grant victims any rights against individuals not convicted of a crime, but the government can attempt to obtain voluntary restitution from such persons).

[127] See, e.g., *18 U.S.C. 3663A*(a) (same definition of victim "representative").

[128] *18 U.S.C.A. 3771*(a)(8) (West 2004 & Supp. 2005).

[129] See, e.g., Ariz. Const. art. II, 2(A)(1) (victim's right "to be treated with fairness, respect, and dignity"); see also Alaska Const. art. I, 24 (victim's right "to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); Idaho Const. art. I, 22 (victim's right "to be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); Ill. Const. art. I, 8.1 (victims "to be treated with fairness and respect for their dignity"); Mich. Const. art. I, 24 (victims "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.J. Const. art. I, P 22 (victim's right to "be treated with fairness, compassion and respect by the criminal justice system"); N.M. Const. art. II, 24 (the "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, 10a (victims "shall be accorded fairness, dignity, and respect in the criminal justice process"); Tex. Const. art. I, 30(a)(1) ("right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); Utah Const. art. I, 28(1)(a) (victim's right to be "treated with fairness, respect, and dignity"); Wis. Const. art. I, 9m (victim's right to be treated with "fairness, dignity and respect for their privacy"). See generally Cassell, supra note 15, at 1387-88 (discussing victims' right to fairness in Utah).

[130] 150 Cong. Rec. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

(a) Identification of Victim. During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.
[*860]

(b) Notice of Case Events. During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;

(2) The release or detention status of a defendant or suspected offender;

(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;

(4) The right to make a statement about pretrial release of the defendant;

(5) The victim's right to make a statement about acceptance of a plea of guilty or nolo contendere;

(6) The victim's right to attend public proceedings;

(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.

The Rationale:

This proposed change stems from the ***CVRA***'s requirement that victims have the "right to reasonable, accurate, and timely notice of **[*861]** any public court proceeding … involving the crime." [131] Senator Feinstein explained the importance of giving victims notice:

Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. [132]

Under the ***CVRA***, then, victims of the crime allegedly committed by the defendant [133] are entitled to notice of court proceedings. The tricky issue is who should provide that notice to victims. This responsibility must fall on prosecutors and their investigative agents for several reasons. First, prosecutors and their agents are the only parties who know the identity of the victims at the outset of the case. After a bank robbery, for example, it is the FBI agents who respond and interview the tellers.

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[131] *18 U.S.C.A. 3771*(a)(2).

[132] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); see also id. at S4267 (statement of Sen. Kyl) ("It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted.").

[133] See *United States v. Guevara-Toloso, 2005 U.S. Dist. LEXIS 9762 (E.D.N.Y. 2005)* (noting that ***CVRA*** requires notice to victims of the crime charged against the defendant but not notice to victims of any previous crimes the defendant may have committed).

Second, prosecutors and their agents continue dealing with victims throughout the course of a prosecution. They work with victims in investigating the crime, identifying potential defendants, preparing the indictment, and presenting evidence to the grand jury and at trial. Because of this working relationship, prosecutors are best situated to provide notice in most cases. Third, most crime victims lack legal counsel and are unfamiliar with federal criminal proceedings. They may need assistance from someone familiar with the process to understand what is happening. United States Attorneys' offices, including the victim-witness components in those offices, are well situated to provide that assistance. As the President's **[*862]** Task Force of Victims of Crime concluded, the prosecutor is "in the best position to explain to victims the legal significance of various motions and proceedings." [134] For all these reasons, prosecutors should notify victims of their rights and of upcoming hearings. [135] Most states that have addressed the issue follow this approach. [136]

The Justice Department appears to agree that it should notify victims. In the 2000 Attorney General Guidelines for Victim and Witness Assistance, the Department required prosecutors and their **[*863]** agents to provide notice to crime victims. In particular, the Guidelines currently obligate prosecutors to provide victims with "the earliest possible notice" of:

(a) The release or detention status of an offender or suspected offender … .

(b) The filing of charges against a suspected offender, or the proposed dismissal of all charges … .

(c) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim or witness is either required to attend or entitled to attend … .

(d) The acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial … .

(e) If the offender is convicted, the date set for sentencing, the sentence imposed … . [137]

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[134] President's Task Force on Victims of Crime, Final Report 64 (1982).

[135] But cf. *United States v. Turner, 367 F. Supp. 2d 319, 328 (E.D.N.Y. 2005)* (concluding that, in the absence of a national rule requiring prosecutors to provide notice to victims, the court would direct the prosecutor to provide the name and contact information of each victim so that the court can ensure that notice is properly given).

[136] See, e.g., *Ala. Code 15-23-62(8)* (2000) (requiring law enforcement officers to give victims initial description of their rights and "the name and telephone number of the office of the prosecuting attorney to contact for further information"); *Ariz. Rev. Stat. 13-4409* (2001) (requiring prosecutor to provide notice to victim of criminal proceedings; *Conn. Gen. Stat. Ann. 51-286e* (2000) (requiring prosecutor to notify victim of any judicial proceedings related to the case); *Del. Code Ann. tit. 11, 9411* (2001) (requiring Attorney General to provide information to victim including "notice of the scheduling of court proceedings and changes including trial date, case review and sentencing hearings"); *Ga. Code Ann. 17-17-8(b)* (2004) (requiring prosecutor where possible to give victim "prompt advance notification of any scheduled court proceedings"); *Ky. Rev. Stat. Ann. 421.500.5* (LexisNexis 1992) (requiring prosecutor to provide victim "prompt notification, if possible, of judicial proceedings relating to the case"); *Me. Rev. Stat. Ann. tit. 15, 6101* (2003) (requiring prosecutor to provide victims of certain crimes notice of any plea agreement and of trial date); *Mass. Gen. Laws Ann. ch. 258B, 3* (West 2004) (requiring prosecutor to give victims notice of various rights); *Mich. Comp. Laws Ann. 780.755(1)* (West 1998) (requiring prosecutor to give victims notice of court proceedings); *Minn. Stat. Ann. 611A.03* (West 2003) (requiring prosecutor to give victim notice of plea agreement and sentencing hearing); *N.M. Stat. Ann. 31-26-9(B)* (LexisNexis 2004) (requiring prosecutor to provide victim with notice of scheduled court proceedings); N.Y. [Executive] Law. 646a (McKinney 2005) (requiring prosecutor to provide notice of court proceedings); *S.D. Codified Laws 23A-28C-1* (2004) (requiring prosecutor to notify victim of certain hearings); *Tenn. Code Ann. 40-38-103* (2003) (requiring prosecutor to notify victim of "times, dates, and locations of all pertinent stages in the proceedings"); *Tex. Code Crim. Proc. Ann. art. 56.08(b)* (Vernon 2004) (requiring prosecutor to give victim notice of court proceedings); *Utah Code Ann. 77-38-3* (2004) (requiring prosecutor to give victim notice of "important criminal justice hearings"); *Wis. Stat. Ann. 972.14(2m)* (West 1998) ("Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing."); *Wyo. Stat. Ann. 1-40-204(b)(i)* (2004) (requiring prosecutor to inform victim about all hearings). But see *Ohio Rev. Code Ann. 2930.06(C)* (2005) (requiring court to give notice to victim of court proceedings).

To avoid creating only significant new responsibilities for prosecutors and their agents, the proposed new Rule 10.1 is lifted essentially verbatim from the 2000 Attorney General Guidelines for Victim and Witness Assistance. The 2005 revisions to the Guidelines continue essentially the same requirements. [138]

The drafters of the ***CVRA*** also appear to believe that the notification obligations will fall primarily on prosecutors' offices, as the ***CVRA*** authorizes an appropriation of $ 22,000,000 over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems. [139] **[*864]** Presumably, those enhanced new notification systems can be used to keep victims apprised of court proceedings. Moreover, the ***CVRA*** directs that the Department of Justice and its investigative agencies "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." [140]

Proposed new Rule 10.1 adds only two new obligations beyond those found in the 2000 Attorney General Guidelines: (1) notice to victims of their right to make a statement regarding any proposed plea, and (2) notice to victims of their right to attend public proceedings. Both of these obligations are currently found in the 2005 Guidelines. [141]

One last issue deserves brief discussion: Is it proper for the Judiciary, through the rule-making process, to command another branch of government to take certain actions? [142] The starting point for analyzing this question is the congressional command in the ***CVRA*** that the executive branch must protect victims' rights. [143] Consequently, implementing these rights through rule changes presents no question of the courts inventing new rights or exercising some kind of "supervisory" power over federal agents. [144] Instead, the implementation is simply enforcing congressionally created rights through the Judiciary's congressionally authorized rulemaking authority - an uncontroversial exercise of judicial power. [145] Moreover, in the ***CVRA***, Congress commanded the courts to "ensure that the crime victim is afforded the rights described [in the ***CVRA***]." [146] Rule changes needed to implement the ***CVRA*** thus rest **[*865]** on this statutory authority as well. Additionally, this Article's proposals affecting prosecutors are closely connected to court proceedings; they deal with such things as prosecutors notifying victims of hearings and conferring with victims in anticipation thereof. It is difficult to see new separation of powers concerns arising in such contexts so closely connected to the courtroom.

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[137] See 2000 A.G. Guidelines, supra note 38; see also U.S. Dept. of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 82 (1998) ("Prosecutors' offices should notify victims in a timely manner" of all significant hearings.).

[138] See 2005 A.G. Guidelines, supra note 38, at 27-29 (providing for notice to victims, although relying on the department's Victim Notification Systems (VNS) to do this).

[139] See ***118 Stat. 2260, 2264 (2004);*** see also 150 Cong. Rec. S4267 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("We authorized an appropriation of funds to assure … that moneys would be made available to enhance the victim notification system, managed by the Department of Justice's Office for Victims of Crime, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important statements of development) (emphasis added). But cf. id. (discussing court notification of attorneys of record and concluding "it is a relatively simple matter to add another name and telephone number or address to that list").

[140] *18 U.S.C.A. 3771*(c)(1) (West 2004 & Supp. 2005) (emphasis added).

[141] See 2005 A.G. Guidelines, supra note 38, at 27 (prosecutors to notify victims of all their rights under the ***CVRA***).

[142] Victims cannot rely on the provisions of the Attorney General Guidelines to protect their rights because the Guidelines themselves state that they "are not intended to … and may not be relied upon to create any rights … enforceable at law by any person in a matter civil or criminal." 2005 A.G. Guidelines, supra note 38, at 27.

[143] *18 U.S.C.A. 3771*(c)(1).

[144] Cf. Sarah Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, *84 Colum. L. Rev. 1433 (1984)* (discussing more problematic applications of judicial power).

[145] See *id. at 1476-77; 28 U.S.C. 2071,* 2072 (establishing court rule-making power).

[146] *18 U.S.C. 3771*(b) (emphasis added).

Furthermore, the Federal Rules of Criminal Procedure already direct executive branch actions less directly connected to court hearings. For instance, Rule 16 directs that prosecutors must turn over various discoverable items to the defendant. [147] Rule 41 directs federal agents serving a warrant to leave a copy for the person whose premises are searched. [148] And, most controversially, Rule 5 directs that federal agents making an arrest "must take the defendant without unnecessary delay" before a judicial officer. [149] The kinds of rule changes discussed in this Article are far less invasive than these commands. Finally, it should be remembered that federal prosecutors serve as "officers of the court." [150] In that capacity, the court can be reasonably expected to facilitate victims' involvement in the criminal justice process. [151] For all of these reasons, this proposed rule breaks no new ground in directing prosecutors to notify victims of courtroom proceedings.

Rule 11(a)(3) - Victims' Views on Nolo Contendere Pleas

The Proposal:

Rule 11's procedures on pleas should be revised to allow victims to express their views on any plea of nolo contendere before the court decides whether to accept it as follows:
[*866]

(a)(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.

The Rationale:

As discussed at greater length in the immediately following sections, the ***CVRA*** gives victims the right to be heard regarding any plea, presumably including any nolo contendere plea. It is a natural corollary that the court should consider the victim's views before accepting any such plea.

Rule 11(b)(4) - Victims' Right To Be Heard on Pleas

The Proposal:

The court should address any victim present in court when taking a plea in order to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea as follows:

(4)[cfn]Victims' Views. Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.

The Rationale:

The ***CVRA*** gives victims the right "to be reasonably heard at any public proceeding in the district court involving … [a] plea." [152] Many states afford victims similar rights. [153] The rationale for a **[*867]** victim's right to be heard regarding a plea is to

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[147] *Fed. R. Crim. P. 16(a)(1)*.

[148] Id. at 41(f)(3).

[149] Id. at 5(a)(1). See generally, Office of Legal Policy, Report to the Att'y Gen. on the Judiciary's Use of Supervisory Power To Control Law Enforcement Action (Dec. 15, 1986), reprinted in 22 Mich. J.L. & Reform 773 (1989).

[150] See *United States v. Sells Eng., Inc., 463 U.S. 418, 466* (Burger, C.J., dissenting).

[151] See, e.g., *State v. Casey, 44 P.3d 756 (Utah 2002),* discussed infra notes 163-66 and accompanying text.

[152] *18 U.S.C.A. 3771*(a)(4) (West 2004 & Supp. 2005); see *In re Kari Ann Jacobsen, 2005 U.S. App. LEXIS 13990 (D.C. Cir. 2005)* (noting victim's right to be heard on pleas).

provide the judge with as much information as possible. The court is under no obligation to accept a plea proposed by the parties. [154] After hearing from the victim about the plea, the court can determine what weight to give to the victim's views. [155]

To implement the victim's right to be heard regarding a plea, the proposed rule change requires the court to directly address any victim present in court. This is consistent with the ***CVRA***'s legislative history that explains that "this provision is intended to allow crime victims to directly address the court in person." [156] The language of the proposed rule is lifted from an earlier paragraph in Rule 11, which requires the court to "address the defendant personally in open court" "before accepting a plea of guilty." [157] Victims should be treated even-handedly. It may be important for the judge to address victims directly because many victims will lack the assistance of counsel. As novices in legal proceedings, victims may be uncertain about exactly when in the process they should present their views. By addressing victims, the court will eliminate that uncertainty and ensure that the victim's right to be heard is vindicated.

[*868]

Rule 11(c)(1) - Prosecution To Consider Victims' Views on Pleas

The Proposal:

The prosecution should be required to consider the victims' views in developing any proposed plea arrangement as follows:

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will … .

The Rationale:

The proposed change requires prosecutors to make reasonable efforts to notify victims about possible plea bargains and to consider the victim's views regarding those pleas. This requirement is taken essentially verbatim from the Attorney General Guidelines for Victim and Witness Assistance, which direct prosecutors to "make reasonable efforts to notify identified victims

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[153] See, e.g., Conn. Const. art. 1, 8 (giving victim right to be heard and to object to plea agreement); Mo. Const. art. 1, 32 (giving victim right to be heard at plea hearing); Utah Const. art. I, 28(1)(b) (giving victim the "right to be heard at important criminal justice hearings related to the victim"); *Ala. Code 15-23-71* (2000) (giving victim right to be present at plea hearing and requiring prosecutor to confer with victim about plea); *Ariz. Rev. Stat. 13-4423* (2001) (giving victim right to be present and heard at plea hearing and requiring prosecutor to confer with victim about plea); *Minn. Stat. Ann. 611A.03* (West 2003) (giving victim right to be heard at plea hearing); *Miss. Code Ann. 99-43-33* (2000) (giving victim right to make statement at plea hearing); *N.H. Rev. Stat. 21-M:8-k* (2000) (giving victim right to be heard at plea hearing); R.I. Stat. 12-28-4.1 (2000) (giving victim right to make statement at plea hearing). See generally Beloof, Cassell & Twist, supra note 15, at 476-94 (discussing victims and pleas); Sarah N. Welling, Victim Participation in Plea Bargains, 65 Wash. U. L.Q. 301 (1987).

[154] See, e.g., *United States v. Bean, 564 F.2d 700 (5th Cir. 1977).*

[155] But cf. George P. Fletcher, With Justice for Some: Victims' Rights in Criminal Trials 252, 257-58 (1995) (proposing that victims have a veto over any plea); Bennett L. Gershman, Crimes Against Victims: The Prosecutor's Duty of Neutrality, 9 Lewis & Clark L. Rev. (forthcoming 2005) (discussing situations in which victims have effectively been given a veto over pleas); Karen L. Kennard, Comment, The Victim's Veto: A Way To Increase Victim Impact on Criminal Case Dispositions, *77 Cal. L. Rev. 417, 437 (1989)* (advocating that victims be given a veto over any plea).

[156] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[157] *Fed. R. Crim. P. 11(b)(2)*.

HOUSE_OVERSIGHT_017733

of, and consider victims' views about, prospective plea negotiations." [158] Twenty-nine states already require prosecutors to "consult with" or "obtain the views of" victims at the plea agreement stage. [159]

The proposed rule helps to implement not only a victim's right to be heard at plea proceedings but also the right to "confer with the attorney for the Government." [160] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the **[*869]** right to confer with the Government concerning any critical stage or disposition of the case." [161] Because the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Reflecting that fact, the rules should follow the approach taken by the majority of states, directing prosecutors to consult with victims about pleas.

Rule 11(c)(2) - Court To Be Advised of Victim Objections to Plea

The Proposal:

Prosecutors (and victims' attorneys) should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement.

The Rationale:

When an attorney for the victim or for the government is aware that a victim objects to a plea, that information should be relayed to the court. In those rare cases where the victim has an attorney, the attorney will obviously raise the victim's objection. The proposed rule change clarifies the prosecutor's corresponding and equal obligation to communicate this information to the court.

The ***CVRA*** appears to obligate prosecutors to relay a victim's objection to the court, commanding them to use their "best efforts" to enforce victims' rights. [162] Part of those "best efforts" would seem to be conveying objections to the court. Victims are often untrained in the law and unexpectedly thrust into criminal proceedings; they may well believe that prosecutors automatically relay to the court **[*870]** their objections to the plea. The proposed rule avoids such confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is aware of an objection.

This approach is consistent with the instructive case of State v. Casey, [163] which considered whether a victim's objection to a plea made to a prosecutor was sufficient to trigger the victim's right to be heard under the Utah Constitution. [164] In Casey, the victim told the prosecutor that she opposed a plea arrangement. The prosecutor refused to convey the victim's concern to the

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[158] 2005 A.G. Guidelines, supra note 38, at 30 (defining what can be considered in determining whether notice is reasonable in a particular case); see also Office for Victims of Crime, supra note 137, at 75 ("Prosecutors should make every effort … to consult with the victim on the terms of any negotiated plea … .").

[159] Office for Victims of Crime, supra note 137, at 75.

[160] *18 U.S.C.A. 3771*(a)(5) (West 2004 & Supp. 2005).

[161] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[162] *18 U.S.C.A. 3771*(c).

[163] *44 P.3d 756 (Utah 2002).* I represented the victim in this case.

[164] See generally Nicole G. Farrell, Recent Case Development, *2003 Utah L. Rev. 716.*

court, and the trial judge accepted the plea. The victim then obtained legal counsel and appealed to the Utah Supreme Court, urging that under the Utah Victims' Rights ***Amendment***, her right to be heard regarding a plea had been violated. The State responded that the victim was obligated to ask the trial court directly to be heard rather than relying on the prosecutor to pass that information along. In rejecting the State's argument, the Utah Supreme Court explained that prosecutors, no less than other actors in the criminal justice system, were required to assist victims throughout the process. [165] More important for present purposes, the court also concluded that prosecutors had ethical obligations as officers of the court to convey that information to the judge:

Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities… . The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest … in a criminal prosecution is not that it shall win … but that justice shall be done. [166]

Applying the reasoning of Casey to analogous rights in the ***CVRA***, federal prosecutors must, as officers of the court, convey a **[*871]** victim's request to be heard regarding a plea. Indeed, the prosecutor should convey not only the request to be heard but also the fact that the victim objects to the plea. In deciding whether to accept a plea, the court must consider the public interest. [167] As the Tenth Circuit has explained, ""Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.'" [168] When the prosecutor is aware of an objection from a keenly interested member of the public - the victim - the court should not be left in the dark about it.

An alternative way of drafting the rule is to require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it. [169] For example, Oregon requires the court to ask the prosecutor whether the victim has been consulted about a plea and, if so, what the victim's view is:

Before the judge accepts a plea of guilty or no contest, the judge shall ask the district attorney if the victim requested to be notified and consulted regarding plea discussions. If the victim has made such a request, the judge shall ask the district attorney if the victim agrees or disagrees with the plea discussions and agreement and the victim's reasons for agreement or disagreement. [170]

South Dakota law contains a similar requirement that prosecutors disclose "any comments" by the victim about the plea. [171] Texas law requires the court to ask the prosecutor whether a victim impact statement has been submitted; [172] if so, the court

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[165] *Casey, 44 P.3d at 763.*

[166] *Id. at 764* (internal quotations and citations omitted).

[167] See, e.g., *United States v. Bean, 564 F.2d 700 (5th Cir. 1977).*

[168] *United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985)* (emphasis added) (quoting *United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983)).*

[169] See Office for Victims of Crime, supra note 137, at 108 ("Judges should facilitate the input of crime victims into plea agreements … and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim.").

[170] *Or. Rev. Stat. 135.406(1)(b)* (2003).

[171] *S.D. Codified Laws 23A-7-9* (2004) ("The prosecuting attorney shall disclose on the record any comments on the plea agreement made by the victim, or his designee, of the defendant's crime to the prosecuting attorney.").

[172] *Tex. Code Crim. Proc. Ann. art. 26.13(e)* (Vernon Supp. 2004) ("Before accepting a plea of guilty or a plea of nolo contendere, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.").

must review that **[*872]** statement. [173] Finally, before an Arizona court accepts a plea, the prosecutor must advise the court that reasonable efforts were made to confer with the victim about the plea and the victim's view regarding it. [174]

The rule proposed here is narrower than these state formulations: it requires only that a prosecutor confer with the victim about the plea and inform the court if the victim objects. For many significant categories of federal cases (e.g., typical drug trafficking offenses, felons in possession of a firearm, etc.), there will be no victim, much less a victim objection. In such cases, to require some sort of victim inquiry by the court or victim certification by the prosecutor would unnecessarily waste time. The proposed rule requires only that the prosecutor report a victim's objection - in which case the court will presumably want to more carefully consider whether to accept a plea.

Rule 12.1 - Victim Addresses and Phone Numbers Not Disclosed for Alibi Purposes

The Proposal:

The Government currently must disclose the address and telephone numbers of any witnesses, including the victim, that it plans to use to disprove an alibi. This rule should be changed to protect the victim's privacy, excluding their information from this requirement.

(b) Disclosing Government Witnesses.

(1) Disclosure. If the defendant serves a Rule 12.1(a)(2) notice [regarding intent to present an alibi defense], an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name, address, and telephone number of each witness and the address and telephone number of each witness (other than a victim) that the government intends **[*873]** to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense

… .

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address and telephone number of each additional witness (other than a victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

In addition, a similar change should be made to Rule 12.3 regarding the addresses and telephone numbers of victims who will be used to disprove a public-authority defense.

The Rationale:

This proposed change implements the victim's right to be "reasonably protected from the accused." [175] The victim cannot be reasonably protected if the defendant, without good reason, is given the victim's address and telephone number. The proposed rule strikes the current requirement that the prosecutor must automatically give the defendant the victim's address and telephone

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[173] See id.

[174] *Ariz. Rev. Stat. Ann. 13-4423(b)(1)* (2001).

[175] *18 U.S.C.A. 3771*(a)(1) (West 2004 & Supp. 2005).

number even without any showing of need. Nothing in the rule, however, would bar the defendant from requesting that information by filing an appropriate motion. The court could then determine whether any such motion had merit. [176]

[*874]

Rule 15 - Victims' Right To Attend Pre-Trial Depositions

The Proposal:

Rule 15 should allow victims to attend any public deposition in a case as follows:

(i) Victims Can Attend. A Victim can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.

The Rationale:

Victims have the right "not to be excluded from any … public court proceeding," except in rare cases where their testimony will be materially affected. [177] Depositions authorized by Rule 15 are for the purpose of preserving evidence for trial, [178] and thus are effectively an extension of the trial. Victims accordingly have the right to attend such proceedings, if public, under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change directly states that conclusion.

Because victims can be excluded from the trial in certain rare situations where their testimony would be materially affected, [179] they can likewise be excluded from a deposition in those situations. The proposed rule simply applies the limitations on attending trial to the deposition setting by providing that the "same conditions" apply to the victim's attendance at the deposition.

[*875]

Rule 17 - Victims' Right to Notice of Subpoena of Confidential Information

The Proposal:

Rule 17 regarding subpoenas should be modified to give victims notice before personal or confidential information is subpoenaed and to allow victims to file a motion to quash such a subpoena as follows:

(h)(2) Victim Information. After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

The Rationale:

The existing rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the victim's knowledge. This issue arose recently in the Utah state

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[176] Cf. *United States v. Wills, 88 F.3d 704, 709-10 (9th Cir. 1996)* (allowing delayed disclosure of alibi witness because witness feared for safety and defendant had violent history and allowing ex parte hearing because of need to keep identity of witness from the defendant).

[177] *18 U.S.C.A. 3771*(a)(3).

[178] See, e.g., *United States v. Edwards, 69 F.3d 419, 437 (10th Cir. 1995).*

[179] *18 U.S.C.A. 3771*(a)(3), discussed infra notes 276-308 and accompanying text.

criminal proceedings involving the kidnapping of Elizabeth Smart. Elizabeth was kidnapped from her home in Salt Lake City, Utah. She was found nearly nine months later with a local transient and his wife, who had taken Elizabeth at knifepoint. [180] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school - class and teacher lists, report cards, and disciplinary and attendance records - and medical records from her hospital. [181] While the hospital refused to turn over the requested records, the school willingly turned over the requested records without notice to the Smart family. Elizabeth's father learned about the subpoena only after her school records had already been turned over to defense counsel. The Smart family **[*876]** attorney then filed a motion to return the records to the school. Prosecutors in the case have objected to the fact that they were not given an opportunity to file a motion to quash. [182] The matter is still under review in state court.

The problem that occurred in the Smart case under the Utah rules could also occur under the federal rules. [183] The federal rules currently allow the witness to whom the subpoena is issued to object, [184] but there is no provision for notifying the victim when personal or confidential information has been subpoenaed from another witness.

Serving such subpoenas without notice to the victim violates the provisions of the ***CVRA*** guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" and "with fairness." [185] Allowing subpoenas to go directly to third-party custodians of records can fail to protect privacy if the custodian is disinterested or disinclined to protect the victim's privacy. Such a scenario is not far-fetched; a third party who is subpoenaed will often have no interest in incurring legal fees to protect a victim's rights. Even if interested, third parties may not fully understand the sensitive nature of certain victim information. Victims may also have important statutory rights to protect. In the Elizabeth Smart case, for example, the school may have violated the Family Educational Rights and Privacy Act by turning over private information about Elizabeth. [186]

Subpoenas served without notice to victims may also raise constitutional concerns. [187] It is well settled that a right to privacy is implicitly incorporated within the protections guaranteed under the **[*877]** United States Constitution. The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." [188] Supreme Court precedent establishes two lines of privacy interests: (1) the "individual interest in avoiding disclosure of personal matters" and (2) "the interest in independence in making certain kinds of important decisions." [189] In essence, the right to privacy includes an individual's interest in making certain decisions that fundamentally affect his or her person "free from unwarranted governmental intrusion." [190] In light of interests such as these, several courts have held that crime victims' records - such as rape crisis counseling records - are not subject to subpoena. [191]

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[180] See generally Ed Smart & Lois Smart with Laura Morton, Bringing Elizabeth Home: A Journey of Faith and Hope (2003).

[181] Stephen Hunt, Defense Blasted for Obtaining Smart's School Records, Salt Lake Trib., Jan. 14, 2005, at B2.

[182] Pat Reavy, Quash Smart Subpoenas, DA Says, Deseret Morning News, Feb. 1, 2005, at B3.

[183] See Letter from Gregory G. Skordas, attorney for Elizabeth Smart, to Judge Susan Bucklew (May 23, 2005) (on file with author) (proposing changes to the federal rules to avoid recurrence of this problem in federal court).

[184] *Fed. R. Crim. P. 17(c)*.

[185] *18 U.S.C.A. 3771*(a)(8).

[186] Pat Reavy, Elizabeth Wants Records Returned, Deseret Morning News, Jan. 15, 2005, at B3; see *20 U.S.C. 1232g* (2000) (establishing rights of privacy in educational records).

[187] See generally Wendy J. Murphy, Using the Federal Courts To Make State Courts Respect Victims' Rights, 9 Lewis & Clark L. Rev. (forthcoming 2005) (discussing federal constitutional rights of privacy for victims' confidential records).

[188] *Roe v. Wade, 410 U.S. 113, 152 (1973).*

[189] *Whalen v. Roe, 429 U.S. 589, 599-600 (1977).*

[190] *Eisenstadt v. Baird, 405 U.S. 438, 453 (1972);* see also *Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).*

The proposed new rule protects victims' statutory and potential constitutional interests in two ways. First, the court is required to make a preliminary determination that the subpoena seeks information relevant at trial and that compliance appears to be reasonable. This is consistent with the trial court's existing power to quash unreasonable subpoenas, including subpoenas directed at crime victims. [192] Second, if the court makes a preliminary determination that the subpoena is appropriate, the victim would then receive notice of the subpoena. To avoid harassment, the notice would be provided either through the victim's own attorney or, more commonly, through the prosecutor.

The proposed rule makes no substantive change in the right of the party to obtain appropriate information through a subpoena. Instead, it merely changes procedures to ensure victims are treated fairly by having the opportunity to file a motion to quash where such **[*878]** a motion is appropriate. The court is then authorized to grant the victim's motion to quash under the same standards that already apply to other motions to quash - where compliance would be "unreasonable or oppressive." [193]

The proposed change does not interfere with the legitimate interests of the government or defendants. The change will not hamper government investigations because it applies only to subpoenas issued after indictment. Before indictment, a victim's privacy is protected through grand jury secrecy. After indictment, the only legitimate purpose for a subpoena by either the government or the defendant is to obtain testimony or evidence for trial or similar court hearing. Rule 17 does not permit a subpoena for discovery purposes, [194] although upon a proper showing a party can obtain pre-trial access to materials. [195] Therefore, when challenged by a victim on a motion to quash, the party seeking the evidence will prevail upon a proper showing that the subpoena is appropriate. The only change made by the rule, then, is to require preliminary screening by the court when confidential information is involved and give the victim the opportunity for court review in cases where legitimate interests are at stake. Constitutional interests in privacy and the victim's right to be treated "with fairness" require nothing less.

Rule 18 - Victims' Interests Considered in Setting Place of Prosecution

The Proposal:

Rule 18 should be amended to require the court to consider the convenience of victims in setting the place of prosecution as follows:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.
[*879]

The Rationale:

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[191] See, e.g., *State ex rel. Romley v. Superior Courts, 836 P.2d 445, 451-52 (Ariz. Ct. App. 1992)* (crime victim had the right to deny defendant access to medical records); *Commonwealth v. Wilson, 602 A.2d 1290, 1296-97 (Pa. 1992).* See generally Tera Jckowski Peterson, Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah, *2001 Utah L. Rev. 695;* Anna Y. Joo, Note, Broadening the Scope of Counselor-Patient Privilege To Protect the Privacy of the Sexual Assault Survivor, 32 Harv. J. on Legis. 255 (1995).

[192] See, e.g., *Amsler v. United States, 391 F.2d 37, 51 (9th Cir. 1967)* (upholding trial court's decision to quash subpoena directed to kidnapping victim's father for lack of materiality).

[193] See *Fed. R. Crim. P. 17(c)(2)*.

[194] See generally *United States v. Nixon, 418 U.S. 683, 689 (1974).*

[195] See *id. at 699.*

This change helps to implement a victim's right under the ***CVRA*** to be treated "with fairness." [196] The rule change is modest. Rule 18 already requires the court to consider the convenience of the "witnesses" in a case. In many cases, of course, the victim will be a witness. But for clarity in those cases, and to account for cases in which the victim will not be a witness, the rule should be amended to refer specifically to victims.

Rule 20 - Victims' Views Considered Regarding Consensual Transfer

The Proposal:

Rule 20 should be amended to allow the court to consider the victims' views in any decision to transfer a case as follows:

(a) Consent to Transfer. A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns.

A similar change should be made to Rule 20(d) regarding transfer of juvenile proceedings.

[*880]

The Rationale:

As with the previous proposal, this change implements the victim's right under the ***CVRA*** to be "treated with fairness." [197] The procedure for transferring a case for a plea is not constitutionally required, but rather is designed for the convenience of the defendant and the government. [198] In considering whether such administrative reasons justify a transfer, the concerns of the victim appropriately enter into the balance. For reasons similar to those discussed above in connection with changes regarding plea procedures, the prosecution would be directed to confer with the victim and to advise the court of any objection to the transfer. [199]

Rule 21 - Victims' Views Considered Regarding Transfer for Prejudice

The Proposal:

Rule 21 should be amended as follows to require consideration of the victim's interest in whether a case should be transferred:

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.

The Rationale:

Rule 21 authorizes the trial judge to transfer a case to avoid prejudice or for the convenience of the parties. The proposed rule would require that the court consider the victim's concerns in making any such transfer decision. Such consideration would seem to be part and parcel of protecting the victim's right to be "treated with fairness." In addition, the vicinage provision of

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[196] *18 U.S.C.A. 3771*(a)(8) (West 2004 & Supp. 2005).

[197] Id. 3771(a)(8).

[198] See generally Wright, Federal Practice and Procedure 321, at 357-58.

[199] See supra notes 158-174 and accompanying text.

Article III and the public's First ***Amendment*** right of access to trials give constitutional dimensions to the victim's interest in transfer decisions.

[*881] Victims may have compelling interests in observing the trial in their local community. [200] Traveling to a remote location to watch the trial may be financially difficult for many victims and impossible for indigent victims. Moreover, forcing victims to travel to distant communities alone may deprive them of the accompaniment and support of family and friends, which may be especially important when observing emotionally charged court proceedings.

Defendants, too, have the right to have cases tried locally. Under the ***Sixth Amendment***, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … ." [201] This right might be viewed as the defendant's to assert or waive as circumstances dictate. For federal cases, however, the vicinage right is not exclusively placed in the hands of the defendant. Instead, Article III provides that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes have been committed." [202]

This difference in language supports the reading that the federal provision is a structural guarantee designed to protect broader interests than the defendant's alone. [203] Moreover, the provision provides for trial in the state where the crime was committed. In most cases, this state would be where the victim resided; whether the defendant also resided in that state would be incidental.

An understanding of the Article III provision as protecting the community's interest is bolstered by the Supreme Court's decisions on right of public access to trials. In cases such as Richmond Newspapers, Inc. v. Virginia, [204] the Court has held that a guarantee of the public's right to attend trials is implicit in the First ***Amendment***. Compelling victims' interests underlie this guarantee. As the Court has explained, "the presence of interested spectators **[*882]** may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." [205] In addition, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct." [206] As Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly … have an interest in observing the course of a prosecution." [207] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution." [208] To be sure, transferring a trial to a distant city may not flatly violate the public right of access to a trial, but it can surely burden the rights of the public, including the victim, which suggests that victims ought to be heard before any such decision is made.

The Article III vicinage provision and the public right of access to trials provide constitutional underpinnings for construing the victim's rights under the ***CVRA*** to include a right to be heard on transfer proceedings. In addition, Congress has mandated that

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[200] See generally Beloof, Cassell & Twist, supra note 15, 392-99 (reviewing case law on the victim's interest in venue decisions).

[201] ***U.S. Const. amend. VI*** (emphasis added).

[202] Id. art. III, 2, cl. 3 (emphasis added).

[203] See Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, *75 N.Y.U. L. Rev. 1658, 1687 (2000);* see also Drew L. Kirshen, Vicinage, 29 Okla. L. Rev. 803 (1976).

[204] *448 U.S. 555 (1980).*

[205] *Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)* (internal citation omitted).

[206] *Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984).*

[207] *Gannett Co., 443 U.S. at 428* (Blackmun, J., concurring in part and dissenting in part).

[208] *Richmond Newspapers, 448 U.S. at 571.*

victims be treated with fairness. This is a broad provision intended to be broadly construed and to give victims a right to due process. As Senator Kyl has stated,

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process. [209]

[*883] Clearly, Congress intended to afford crime victims a broad right to due process in criminal proceedings. Due process, of course, uncontroversially includes a right to be heard. [210] Thus, victims should be heard before the court makes a transfer decision.

Concluding that victims have a right to be heard on transfer decision does not mean, of course, that they will dictate the transfer decision. In some cases, the defendant will be able to establish sufficiently pervasive prejudice in a particular community to entitle him to a change of venue to protect his constitutional rights. [211] But the limited point here is that victims may provide an important perspective that the judge ought to consider in reaching a decision. Moreover, even if the judge decides to transfer a case, the victims may have valuable information for the judge on where to transfer the case to (e.g., to an adjacent state rather than a distant one).

An illustration of the general approach of the proposed rule comes from State v. Timmendequas, [212] a capital case decided by the New Jersey Supreme Court. In Timmendequas, the trial judge imported a jury from a distant community rather than force the family of a murdered young girl to travel to another district. Construing New Jersey state law provisions similar to the ***CVRA***'s, the New Jersey Supreme Court explained that the trial judge properly considered the views of the victim's family:

Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That ***amendment*** marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system.
[*884]

The purpose of the Victim's Rights ***Amendment*** was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." One of the enumerated rights guaranteed for victims is "to have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible."

… .

… The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into

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[209] 150 Cong. Rec. S10,910-11 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphases added).

[210] *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)* (acknowledging that "the fundamental requisite of due process of law is the opportunity to be heard" (quoting *Grannis v. Ordean, 234 U.S. 385, 394 (1914))).*

[211] See, e.g., *Irvin v. Dowd, 366 U.S. 717 (1961)* (holding that prisoner should have been granted change of venue where pre-trial publicity caused prejudice). But cf. Fletcher, supra note 155, at 252 (calling for abolition of a defendant's right to change venue because it "is, in effect, to accord the defense a whole peremptory challenge against the entire community").

[212] *737 A.2d 55 (N.J. 1999).*

account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision. [213]

Just as the New Jersey courts have recognized that victims' interests should be considered in transfer decisions, the federal courts should do the same. Therefore, Rule 21 should be amended to allow victims to provide information to the judge on transfer decisions.

Rule 23 - Victims' Views Considered Regarding Non-Jury Trial

The Proposal:

The court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves after considering the views of any victims.
[*885]

The Rationale:

In the federal courts the "preferred" trial method is a jury trial. [214] As Justice Blackmun has explained, the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors - and in being educated about "the manner in which criminal justice is administered." [215] Nonetheless, the Supreme Court has concluded that defendants can waive their right to a jury trial. [216] To help protect the general public interest in trial by jury, Rule 23 requires not only prosecutor approval [217] but also judicial approval before proceeding by way of bench trial. This approval requires careful weighing of the competing concerns. The Supreme Court has instructed that

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[213] *Id. at 76* (internal citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor.

[214] See *Singer v. United States, 380 U.S. 24, 35 (1965)* ("Trial by jury has been established by the Constitution as the "normal and preferable mode of disposing of issues of fact in criminal cases.'" (citation omitted)). See generally Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, *152 U. Pa. L. Rev. 33, 68 (2003).*

[215] *Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979)* (Blackmun, J., dissenting in part).

[216] See *Patton v. United States, 281 U.S. 276 (1930).* But cf. Akhil Reed Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131, 1196-98 (1991)* (mounting a strong argument against Patton and noting that before 1930 court decisions had held jury trial could not be waived).

[217] *Fed. R. Crim. P. 23(a)(2)*. But cf. Adam H. Kurland, Providing a Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call To Amend *Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309 (1993) (suggesting that prosecutorial consent should be eliminated by the legislature). See generally ABA Standards for Criminal Justice 15-1.2, cmt. at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against).

the duty of the trial court [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. [218]

This is a "serious and weighty responsibility." [219]

[*886] To discharge that serious and weighty responsibility, the trial court should receive as much information as possible. The victim is often well situated to provide information about how the public will view a non-jury trial. The proposed rule change takes the modest step of requiring the court to hear the victim before approving any non-jury trial, a step that is consistent with the ***CVRA***'s command that victims be treated with fairness.

Importantly, this change would not interfere with defendants' rights. The Supreme Court has squarely held that the defendant lacks any constitutional right to unilaterally elect a bench trial. [220] Of course, in some circumstances, despite a victim's objection, a non-jury trial nonetheless will be appropriate. Moreover, in extreme cases, the defendant may have a right to a non-jury trial where pretrial publicity has pervasively tainted the jury pool. [221] Nothing in the proposed rule change would interfere with a court's right to approve a bench trial in such circumstances, so long as the court considers the victim's perspective as part of the approval process.

Rule 32(a) - Deleting Old Definition of "Victim"

The Proposal:

The definition of "victim" currently contained in Rule 32 should be stricken as follows:

Rule 32. Sentencing and Judgment

(a) Definitions. The following definitions apply under this rule:

(1) "Crime of violence or sexual abuse" means:

(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or

(B) a crime under *18 U.S.C. 2241*-2248 or 2251-2257.
[*887]

(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

The Rationale:

The old definition of victim in Rule 32 is now too narrow, as it is limited to crimes of violence or sexual abuse. The ***CVRA***, in contrast, includes all victims within its protections. In the proposed new rules, "victim" would be defined in Rule 1. [222] Accordingly, the narrower definition found here can simply be eliminated. The Advisory Committee on Criminal Rules is well

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[218] *Patton, 281 U.S. at 312-13.*

[219] *United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985)* (internal quotation omitted).

[220] *Singer v. United States, 380 U.S. 24, 36 (1965)* (finding that waiver of jury trial may be conditioned on consent of prosecutor); cf. Kurland, supra note 217, at 340-46 (urging that the rules be amended to create such a right, but not considering in any way the victim's interests involved).

[221] See *Singer, 380 U.S. at 37-38* (leaving this question open).

[222] See supra notes 120-27 and accompanying text.

HOUSE_OVERSIGHT_017744

aware of this issue, having withdrawn a previous proposal to expand Rule 32 to include all victims in the wake of the ***CVRA***. [223]

Rule 32(c)(1)(B) - Presentence Report Considering Restitution in All Cases

The Proposal:

Rule 32(c)(1)(B) should be amended to require that the presentence report contain restitution information in all cases as follows:

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) *18 U.S.C. 3593*(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under *18 U.S.C. 3553,* and the court explains its finding on the record.
[*888]

(B) Restitution. If the law requires permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

The Rationale:

As currently written, the rule directs that a presentence report contain information about restitution only when the law "requires" restitution. The proposed ***amendment*** directs that all presentence reports contain appropriate restitution information whenever the law "permits" restitution. If the law permits restitution, the court ought to receive information sufficient to allow it to determine whether to order such restitution. Only with such knowledge can the court appropriately exercise its discretion.

In most cases, restitution is covered by one of two federal statutes: the Mandatory Victims Restitution Act of 1996 (MVRA), [224] and its predecessor, the Victim and Witness Protection Act of 1982 (VWPA). [225] For all crimes of violence and certain crimes against property, the MVRA firmly directs that "notwithstanding any other provision of law, when sentencing a defendant convicted of [certain offenses such as crimes of violence] … the court shall order … that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." [226] For other crimes, the earlier VWPA controls. It permits the court to order restitution in its discretion after considering various relevant factors. [227]

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[223] See Letter from Ed Carnes, Chair of the Advisory Comm. on Federal Rules of Criminal Procedure, to Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (May 18, 2004) (on file with the author) (noting that proposed expansion of Rule 32 should be withdrawn if the ***CVRA*** was passed).

[224] *18 U.S.C. 3663A,* 3664 (2000).

[225] Id. 3663, 3664. See generally *United States v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004)* (discussing different statutes), rev'd on other grounds, *United States v. Serawop, 410 F.3d 656 (10th Cir. 2005).*

[226] *18 U.S.C. 3663A*(a)(1) (emphasis added); see *United States v. Monts, 311 F.3d 993, 1001 (10th Cir. 2002)* (holding that restitution under the MVRA is mandatory).

[227] *18 U.S.C. 3663A*(a)(3); see *United States v. Fountain, 768 F.2d 790, 801 (7th Cir. 1985)* (holding that restitution under the VWPA is discretionary).

In its current form, Rule 32(c)(1)(B) suggests that the probation officer is required to include restitution information only in a case covered by the MVRA because only then is restitution (in the language of the current rule) "required." [228] No sound reason exists **[*889]** for such a limitation, particularly after the enactment of the ***CVRA***. The ***CVRA*** guarantees that victims have "the right to full and timely restitution as provided in law." [229] Even when the court is proceeding under the discretionary VWPA, without appropriate information in the presentence report, the court cannot determine whether to exercise its discretion to award restitution. Therefore, the rule should be changed to require that the presentence report contain restitution information, from which the court can determine whether to make a restitution award.

(New) Rule 32(c)(3) - Probation Officer To Seek Out Victim Information

The Proposal:

The probation officer preparing a presentence report should be directed to determine whether a victim wishes to provide information for the report as follows:

(3) Victim Information. The probation officer must determine whether any victim wishes to provide information for the presentence report.

The Rationale:

Under the ***CVRA***, the victim has "the right to be reasonably heard at any public proceeding in the district court involving … sentencing … ." [230] This right clearly encompasses the victim's right to allocate, or make an oral statement at sentencing, as discussed below in connection with Rule 32(i). [231] However, the right to be "reasonably heard" also appears to include the opportunity to provide information to the probation office during preparation of the presentence report.

As Senator Kyl explained, the victim's right to be heard at sentencing should be broadly construed:
[*890]

[The ***CVRA***] provides victims the right to reasonably be heard at any public proceeding involving … sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so … . When a victim invokes this right during … sentencing proceedings, it is intended that … he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations … .

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means. [232]

In light of this legislative history, victims undoubtedly have a right to make an in-court statement at sentencing as part of their right "to be heard." But they also have the right to communicate in other ways with the court. At sentencing, an obvious

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[228] *Fed. R. Crim. P. 32(c)(1)(B)*.

[229] *18 U.S.C.A. 3771*(a)(6) (West 2004 & Supp. 2005).

[230] *18 U.S.C.A. 3771*(a)(4).

[231] See infra notes 273-75 and accompanying text.

[232] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphases added); see also id. (statement of Sen. Feinstein).

alternative way is via the probation officer. If there is any doubt about whether the right "to be heard" covers communications to the probation officer, the right "to be treated with fairness" comfortably covers such a requirement.

The proposed rule requires that the probation office affirmatively seek out the victim. It is unlikely that a probation officer could properly prepare a thorough presentence report without obtaining the victim's views. Indeed, the rules already require the officer to include victim information in the report. [233] Because there is no way **[*891]** to know in advance whether the victim will have relevant information for the report, the probation officer should be required to investigate that possibility. Of course, nothing in the proposed rule change would require the probation officer to include irrelevant or argumentative information in the report.

Rule 32(d)(2)(B) - Presentence Report To Contain Victim Information

The Proposal:

Rule 32(d)(2)(B) should be amended to refer directly to victims in describing the content of the presentence report and to conform to the style used for information about defendants as follows:

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed any victim of the crime …

The Rationale:

As discussed at the outset of this article, [234] Rule 32(d)(2)(B) typifies the victim's absence from the current federal rules by failing to use the word "victim" in describing what information belongs in a presentence report. In addition, the rule should be amended to conform to the style used in describing the presentence report's information about the defendant. The rule dealing with the **[*892]** defendant's background [235] contains no requirement that information be "verified" or stated in a "non-argumentative style." As a matter of even-handedness, no such requirement should be listed for victim information. Of course, well-trained federal probation officers will no doubt attempt to verify all information in the presentence report and phrase all of the report in a non-argumentative style. The peculiarity in the current rule is that, among the numerous subjects covered by the rules, the verification and non-argumentative style requirements apply to victim information alone.

Rule 32(e) - Prosecutor To Disclose Presentence Report to Victim

The Proposal:

The prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:

(e) Disclosing the Report and Recommendation.

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[233] See supra notes 10-13 and accompanying text (discussing Rule 32(d)(2)(B)).

[234] See supra notes 10-13 and accompanying text.

[235] *Fed. R. Crim. P. 32(d)(2)(A)*.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

The Rationale:

The presentence report plays a critical role in the federal sentencing process. The report contains information about the crime, the background of the defendant, the impact of the crime on the victim, and other matters relevant to sentencing. Most important, the report also contains a calculation under the Federal **[*893]** Sentencing Guidelines specifying a range for any recommended prison sentence (e.g., forty-six to fifty-seven months). While judges need not slavishly impose a sentence within this range, [236] most trial judges give significant weight to the Guidelines calculation, [237] and appellate courts have discouraged straying too far from the Guidelines without good reason. [238]

The ***CVRA*** entitles victims to be heard on disputed Guidelines issues and, as a corollary, entitles them to the right to review parts of the presentence report relevant to those issues. The ***CVRA*** gives victims "the right to be reasonably heard at any public proceeding in the district court involving … sentencing … ." [239] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court. [240] The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one - to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" is best understood as giving the victim the opportunity to speak about disputed issues regarding the Sentencing Guidelines calculation. As Senator Kyl explained, the right to be heard includes the right to make sentencing recommendations:

When a victim invokes this right [to be heard] during … sentencing proceedings, it is intended that the [sic] he or she be allowed to provide all three types of victim impact [information]: the character of the victim, **[*894]** the impact of the crime on the victim, the victim's family and the community, and sentencing recommendations. [241]

A "sentencing recommendation" will often directly implicate Guidelines issues. For example, if the victim wishes to recommend a hundred-month sentence when the maximum guideline range is only fifty-seven months, that sentencing recommendation is essentially meaningless unless a victim can provide a basis for recalculating the Guidelines or departing or varying from them. [242]

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[236] See *United States v. Booker, 125 S. Ct. 738 (2005).*

[237] See, e.g., *United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005)* (giving "heavy weight" to Guidelines recommendation).

[238] See, e.g., *United States v. Dalton, 404 F.3d 1029 (8th Cir. 2005); United States v. Rogers, 400 F.3d 640 (8th Cir. 2005).*

[239] *18 U.S.C.A. 3771*(a)(4) (West 2004 & Supp. 2005).

[240] See generally Beloof, Cassell & Twist, supra note 15, at 625-67 (discussing victim impact statements); Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights ***Amendment***, *1994 Utah L. Rev. 1373, 1395-96;* cf. Dan Narled, State, Be Not Proud: A Retroactive Defense of the Commutation of Death Row and the Abolition of the Death Penalty, *40 Harv. C.R.-C.L. L. Rev. 407 (2005).*

[241] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). See generally Beloof, Cassell & Twist, supra note 15, at ch. 10 (discussing three types of victim impact information).

[242] See *United States v. Wilson, 355 F. Supp. 2d 1269, 1272-73 (D. Utah 2005)* (discussing departures and variances from the Guidelines).

Because a victim has the right to be heard on a Guidelines issue, a victim also has the right to see the document which contains the Guidelines calculations - the presentence report. [243] Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated: "The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the … sentencing of the accused." [244] It is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence and reviewing the document that underlies those calculations.

An independent basis for victims reviewing presentence reports is within the victim's broad right under the ***CVRA*** to be "treated with fairness." [245] This right easily encompasses a right of access to relevant parts of the presentence report. The victim's right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed, "Of course, fairness includes the notion of due process … . **[*895]** This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process." [246] Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. The Supreme Court has explained that "it is … fundamental that the right to … an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.'" [247] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows: the recommended Guidelines range and how that range was derived. Congress plainly intended to pass a law establishing "fair play for crime victims, meaningful participation of crime victims in the justice system, [and] protection against a government that would take from a crime victim the dignity of due process." [248] In federal sentencing today, meaningful participation means participation regarding Guidelines issues.

It is interesting that the federal law allowing appointment of a guardian ad litem for juvenile victims appears to allow for access to the presentence report. The law guarantees that, upon appointment, a guardian ad litem "may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child." [249] In a recent federal "shaken baby" case in Arizona, a guardian for the child victim received access to the presentence report under this provision. [250] The guardian in that case found it exceedingly difficult to formulate an appropriate sentencing recommendation without access to the presentence report. After successfully gaining access to the report, she found a need to change her original recommendation. She later reported that "but for the **[*896]** disclosure, I would have ended up making a mis-informed recommendation." [251]

A victim's right to review the presentence report is also important to ensure proper restitution. Federal law guarantees most victims of serious crimes the right to restitution. [252] Reinforcing those laws, the ***CVRA*** guarantees that victims have "the right

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[243] Magistrate Judge Orenstein of the Eastern District of New York, who has written many thoughtful opinions on the ***CVRA***, has taken a contrary position. See Report and Recommendation, United States v. Ingrassis, No. CR 04-0455 at 31 (E.D.N.Y. Sept. 7, 2005) ("In the absence of any change to applicable rules or the Guidelines, the court is under no legal obligation to ensure such disclosure" of the presentence report.). For the reasons explained here, I think he takes too narrow a view of the victim's rights at sentencing.

[244] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

[245] *18 U.S.C.A. 3771*(a)(8) (West 2004 & Supp. 2005).

[246] 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

[247] *Fuentes v. Shevin, 407 U.S. 67, 80 (1972)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).*

[248] 150 Cong. Rec. S4264 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

[249] See *18 U.S.C. 3509*(h)(2) (2000).

[250] See United States v. James, No. CR-04-0651-PCT-JAT (D. Ariz. 2005).

[251] E-mail from Keli Luther, Arizona Voice for Victims, to Paul G. Cassell (June 20, 2005) (on file with author).

[252] See *18 U.S.C. 3663A* (Mandatory Victims Restitution Act); see also id. 3663 (Victim Witness Protection Act).

HOUSE_OVERSIGHT_017749

to full and timely restitution as provided in law." [253] As a practical matter, many of the calculations supporting a restitution award will rest on information in the presentence report. While the restitution statutes have their own detailed procedural provisions, [254] the presentence report is clearly a central part of the restitution process. If a presentence report fails to accurately recount restitution figures, crime victims may be short-changed. For all these reasons, the ***CVRA*** should be understood as giving victims the right to review relevant parts of the presentence report and to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing issues. Many states follow a similar approach and give victims access to the presentence report. [255]

In February 2005, I testified before the Sentencing Commission to recommend a change in the U.S. Sentencing Commission Guidelines Manual along the lines of the proposals contained in this **[*897]** Article. [256] In particular, I suggested that the Commission change its current rule, which allows only the parties to see the presentence report. [257] The Practitioners' Advisory Group to the Sentencing Commission later disputed my proposal. In a letter to the Commission, [258] they argued that "nothing in the ***CVRA*** or its legislative history states that crime victims should be permitted to review portions of the presentence report, dispute guidelines calculations, raise grounds for departure, or, as such rights would seem to imply, appeal a sentence on factual or legal grounds." [259] The Practitioners' Group also cited the drafting history of the proposed constitutional ***amendment*** protecting victims' rights, which they thought was limited to giving a victim merely the right to "allocute" at sentencing - that is, merely to provide victim impact information. [260]

The Practitioners' Group's arguments are flawed for several reasons. First, the Group too narrowly views the relevant legislative history of the ***CVRA***. As explained above, Congress intended for victims to have broad rights in the sentencing process, including rights to be reasonably heard in a meaningful manner. [261] It is not reasonable to deprive victims of the critical information in the presentence report. Second, the Practioners' Group inaccurately describes the relevant history of the Victims' Rights ***Amendment***. It is true that the proposed constitutional ***amendment*** contained a right to be "reasonably heard," just as the ***CVRA*** does. However, the Practitioner's Group fails to recognize that the legislative history of the ***amendment*** suggests that

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[253] *18 U.S.C.A. 3771*(a)(6) (West 2004 & Supp. 2005).

[254] *18 U.S.C. 3664.*

[255] *Ala. Code 15-23-73* (1975) ("victim shall have the right to review a copy of the pre-sentence investigative report, subject to the applicable federal or state confidentiality laws"); *Alaska Stat. 12.55.023* (2004) (giving victim right to look at portions of sentencing report); Ariz. Const. art. 2, 2.1 (giving victim right to review presentence report when available to the defendant); *Ariz. Rev. Stat. Ann. 13-4425* (2004) (giving victim right to review presentence report "except those parts excised by the court or made confidential by law"); *Fla. Stat. Ann. 960.001* (2000) (giving victim right to review presentence report); *Idaho Code 19-5306* (2004) (giving victim right to review presentence report); Ind. Stat. Ann. 35-40-5-6(b) (2004) (giving victim right to read and "respond to" material contained in the presentence report); La. Const. art. 1, 25 (giving victim "right to review and comment upon the presentence report"); *Mont. Code Ann. 46-18-113* (2005) (giving prosecutor discretion to disclose contents of presentence report to victim); *Or. Rev. Stat. Ann. 137.077* (2003) (presentence report may be made available to victim); see also *Colo. Rev. Stat. 24-72-304(5)* (2005) (giving prosecutor discretion to allow victim or victim's family to see presentence report).

[256] See The Effect of United States v. Booker on the Federal Sentencing Guidelines: Hearing Before the U.S. Sentencing Comm'n (Feb. 15, 2005) (statement of Paul G. Cassell, United States Judge for the District of Utah), available at *http://www.ussc.gov/hearings/* 02 15 05/cassell testimony.pdf.

[257] U.S. Sentencing Comm'n, 1 Federal Sentencing Guidelines 6A1.2 (West 2004).

[258] Letter from Amy Baron-Evans & Mark Flanagan to Hon. Ricardo H. Hinojosa (Feb. 28, 2005), available at *http://sentencing.typepad.com/sentencing* law and policy/ files/pag letter.doc.

[259] Id. at 2.

[260] Id.

Congress was taking an expansive view of the victim's right to be heard at sentencing, including a view that **[*898]** would embrace a victim's right to make a specific sentencing recommendation. [262]

Most important, the Practitioners' Group's letter fails to consider the impact of denying the victim access to the presentence report on the victim's right to fairness. Presumably the Group, comprised primarily of defense attorneys, would be outraged if defendants were sentenced without receiving notice about relevant parts of the presentence report, because of the defendant's due process rights. But victims now also have due process rights during sentencing, which make it clear that they should receive the same information.

The Practitioners' Group raises one concern that can be readily dispelled. The Group wonders whether a victim's right to be heard on Guidelines issues implies a general right to appeal a sentence. It would not. The ***CVRA*** contains its own specific remedial provision, which permits victims to appeal only denials of their rights. [263] It specifically allows a victim to file a motion "to re-open … a sentence" only for violations of the victim's "right to be heard." [264] Moreover, while victims possess due process protections, due process does not guarantee a right to an appeal. [265] Finally, the Sentencing Reform Act spells out the limited rights of appeal on Guidelines issues available to only the government and the defense. [266] For all these reasons, victims have the right to review relevant parts of the **[*899]** presentence report and to be heard on Guidelines issues in the trial court, but if the court properly hears them on the Guidelines issues, victims would not have the right to appeal the sentence the court ultimately imposes.

Because victims have a right of access to the presentence report, the question arises of how to provide that access. Nothing in current law precludes releasing presentence reports to victims. While *18 U.S.C. 3552* requires disclosure to government and defense counsel, it does not forbid further dissemination. Several federal courts have held that circulation of reports to third parties is proper on a showing of particularized need approved by the court. [267] Some courts' local rules also allow additional distribution with court approval. [268] Victims always have a particularized need for access to the Guidelines calculations and

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[261] See supra notes 239-44 and accompanying text.

[262] The Group cites a 2000 Senate Judiciary Committee Report regarding the Victims' Rights ***Amendment***, which referenced a Tenth Circuit decision restricting the right of victims to present a sentencing recommendation. See Letter from Amy Baron-Evans, supra note 258 (citing S. Rep. No. 106-254, at 12 (2000) (discussing *Robinson v. Maynard, 943 F.2d 1216 (10th Cir. 1991)).* By 2003, however, the same passage in the Senate Judiciary Committee Report was changed to remove the citation to that case and instead to cite a leading proponent of expansive rights for victims to give judges specific sentencing recommendations:

Victim impact statements concerning the character of the victim and the impact of the crime remain constitutional. See Douglas E. Beloof, Constitutional Implications of Crime Victims as Participants, *88 Cornell L. Rev. 282 (2003).* The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence.

S. Rep. No. 108-191, at 38 (2003). It is hard to see anything in this history suggesting that Congress wanted victims to be deprived of the chance to review presentence reports.

[263] *18 U.S.C.A. 3771*(d)(5) (West 2004 & Supp. 2005). See generally *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 561-64 (2d Cir. 2005)* (discussing appeals under ***CVRA***).

[264] *18 U.S.C.A. 3771*(d)(5).

[265] See *McKane v. Durston, 153 U.S. 684 (1894).*

[266] *18 U.S.C. 3742* (2000).

[267] See, e.g., *United States v. Corbitt, 879 F.2d 224, 238 (7th Cir. 1989)* (compelling, particularized need standard); *United States v. Schlette, 842 F.2d 1574, 1579 (9th Cir. 1988)* (interests of justice standard); *United States v. Charmer Indus., Inc., 711 F.2d 1164, 1174 (2d Cir. 1983)* (compelling need standard).

[268] See, e.g., D. Utah Crim. Local R. 32-1(c) (presentence reports not released without order of the court).

related parts of the presentence report; without such access they are unable to effectively make their sentencing recommendation.

In view of that legal landscape, there are three ways in which the Federal Rules of Criminal Procedure might deal with disclosure of the presentence reports to victims:

(1) Complete Disclosure. The rules could direct full disclosure of the presentence report to the victim. While no statute bars this approach, legitimate policy objections might be raised. Some reports may contain sensitive private information about the defendant such as results of psychiatric examinations, prior history of drug use, or childhood sexual abuse. Some reports may also reveal confidential law enforcement information that should not be widely circulated. Victims may not always need access to these parts of the report. While a number of states give victims unfettered right to access the presentence report, [269] a more limited approach seems appropriate in the federal system.

[*900] (2) Selective Disclosure. The rules could direct that the probation office redact any presentence report to remove confidential information and then provide the redacted report to the victim. This approach, too, is problematic; it would require considerable work by busy probation officers to prepare an additional document - a redacted report - presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential.

(3) Disclosure through Prosecutors. The simplest solution to the competing concerns is to disclose the report to victims through an intermediary: the prosecutor. The prosecutor would serve as the filter for confidential information and assist the victim by highlighting critical parts of the report. Opponents might object that this approach would burden prosecutors, who are no less busy than probation officers. But the ***CVRA*** already gives victims the right to "confer" with prosecutors, [270] and presumably they will confer regarding the important topic of sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements. The ***CVRA*** also authorizes increased funding of $ 22 million for the Victim-Witness Assistance Programs in U.S. Attorney's Offices, presumably enabling those offices to expand their victim services. [271]

It might be burdensome to require that prosecutors disclose presentence reports to victims in all cases, even when they are not interested in such disclosure. Accordingly, disclosure of the report should be required only upon request of a victim.

For all those reasons, the Commission should amend the rules to give requesting victims access to presentence reports through the prosecutor. In addition, some of the aspects of preparing and disclosing presentence reports are covered in Chapter 6.A of the United States Sentencing Guidelines Manual. [272] The Manual falls within the jurisdiction of the U.S. Sentencing Commission. Accordingly, the Advisory Committee on Criminal Rules should **[*901]** coordinate with the Commission to ensure that any changes in the Criminal Rules are consistent with the provisions of the Manual.

Rule 32(f), (h), (i) - Victim Opportunity To Object to Presentence Report

The Proposal:

Rule 32(f), (h), and (i) should be amended to allow the victim to object to the presentence report as follows:

(f) Objecting to the Report.

(1) Time To Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

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[269] See supra note 255.

[270] *18 U.S.C.A. 3771*(a)(5) (West 2004 & Supp. 2005).

[271] See ***118 Stat. 2260, 2264 (2004).***

[272] See supra note 257 and accompanying text.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

… .

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.
[*902]

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of - or summarize in camera - any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party or any victim to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must - for any disputed portion of the presentence report or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The Rationale:

For the reasons explained in the preceding section, the victim's right to be "reasonably heard" at a sentencing hearing encompasses the right to be heard on Sentencing Guidelines issues. Congress **[*903]** intended that the victim become a participant in the process with rights "independent of the Government or the defendant." [273] Those independent rights include

[273] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

the opportunity to make "sentencing recommendations." [274] Given that matters in the presentence report may often determine what effect a sentencing recommendation will have, the victim's right presumably extends to participating in the process that determines the Guideline range.

The changes in Rule 32 noted above simply incorporate the victim in the Guidelines process. Changing the rule in this fashion would also clarify the appropriate sequencing of sentencing hearings. Rule 32(i) already allows the victim to submit "any information" about the sentencing. [275] Yet if the experience in my court is any guide, the victim's allocution frequently occurs only after the court has decided all the issues surrounding the presentence report. For the victim's right to provide information to the court to truly have meaning, the victim's information must be presented early enough to potentially affect critical sentencing issues, including issues about Guidelines calculations.

As with the changes discussed in the previous section, changes in the Sentencing Guidelines Manual are also required here. The Advisory Committee also should coordinate with the Sentencing Commission to ensure that its actions are consistent.

Rule 32(i)(4) - Conforming ***Amendment*** to Victims' Right To Be Heard

The Proposal:

Rule 32(i)(4) should be amended to conform the definition of victim to that found in the ***CVRA*** as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is **[*904]** present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

The Rationale:

As noted earlier, [276] Rule 32 currently contains a definition of "victim" that is narrower than the ***CVRA***'s definition. The simplest fix is simply to strike the definition of victim and victim's representative here and include an appropriate definition in Rule 1.

(New) Rule 43.1 - Victim's Right To Attend Trials

The Proposal:

A new rule implementing the victim's right to be present at trials and other proceedings should be added as follows:

Rule 43.1 Victim's Presence

(a) Victim's Right To Attend. A victim has the right to attend any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. Before making any determination to exclude a victim, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision to exclude a victim shall be clearly stated on the record.

(b) Proceeding With and Without Notice. The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing)

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[274] Id.

[275] *Fed. R. Crim. P. 32(i)(4)(B)*.

[276] See discussion supra notes 120-27, 220-23 and accompanying text discussing Rules 1 and 32(a).

[*905] without proper notice to a victim only if doing so is in the interest of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court ensures that notice will be properly provided to that victim for all subsequent public proceedings.

(c) Numerous Victims. If the court finds that the number of victims makes it impracticable to accord all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.

(d) Right To Be Heard on Victims' Issues. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.

The Rationale:

The rules should reflect the ***CVRA***'s command that victims have the right to attend public proceedings in all but the most unusual circumstances. The ***CVRA*** guarantees victims the right to attend a proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." [277] This is a fundamental right for victims. A crime is often a very significant event in the life of a victim, and the trial, too, may be extremely important. Victims deserve to see in person whether justice is being done and should be exempted from the rule requiring trial witnesses to sit outside the courtroom. [278] The ***CVRA*** adopts this approach by

allowing crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the **[*906]** government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pretrial, trial, or post-trial proceedings. [279]

Most states have also adopted language affirming a victim's right to attend court proceedings, including the trial. [280]

One way of addressing the victim's right to attend would be to leave the matter to the Federal Rules of Evidence. *Federal Rule of Evidence 615* - the so-called "rule on witnesses" - requires exclusion of witnesses with certain exceptions, including the fourth exception for "a person authorized by statute to be present." [281] This exception was added to cover crime victims, [282]

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[277] *18 U.S.C.A. 3771*(a)(3) (West 2004 & Supp. 2005).

[278] See generally President's Task Force on Victims of Crime, Final Report 80 (1982) (urging that victims be able to attend trial); Douglas E. Beloof & Paul G. Cassell, The Victim's Right To Attend the Trial: The Reascendant National Consensus, *9 Lewis & Clark L. Rev. 481 (2005)* (developing this argument at length).

[279] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[280] See, e.g., Ariz. Const. art. II, 2.1(A) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right: … to be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present."); Colo. Const. art. II, 16a ("Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process." (emphasis added)); Idaho Const. art. I, 22 ("A crime victim, as defined by statute, has the following rights: … (4) to be present at all criminal justice proceedings … .") (emphasis added); La. Const. art. I, 25 ("As defined by law, a victim of crime shall have the right to … be present … during all critical stages of preconviction … proceedings … ." (emphasis added)); Mich. Const. art. I, 24 ("Crime victims … shall have the following rights … The right to attend trial and all other court proceedings the accused has the right to attend." (emphasis added)); Miss. Const. Ann. art. III, 26A (2000) ("Victims of crime … shall have the right … to be present … when authorized by law, during public hearings." (emphasis added)); Mo. Const. art. I, 32 ("Crime victims, as defined by law, shall have the following rights … (1) the right to be present at all criminal justice proceedings at which the defendant has such right … ." (emphasis added)); *Miss. Code Ann. 99-43-21* (2000) ("The victim has the right to be present throughout all criminal proceedings as defined in Section 99-43-1." (emphasis added)). See generally Beloof & Cassell, supra note 278, (collecting all state statutes and rules pertaining to the victim's right to attend).

[281] *Fed. R. Evid. 615(4)*.

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who had a right to attend trials subject to certain conditions even before the passage of the ***CVRA***. [283] Without the explicit listing of this exception, some trial courts simply overlooked the victim's right to attend - most notoriously in the Oklahoma City bombing trial. [284]

[*907] Merely relying on Rule 615 to protect the victim's right to attend proceedings, however, would be inadequate. First, the defendant's right to attend proceedings is deemed sufficiently important to merit treatment in a specific rule in the Federal Rules of Criminal Procedure - Rule 43. This proposed victim's rule, Rule 43.1, would even-handedly mirror that treatment for victims.

Second, *Federal Rule of Evidence 615* does not comprehensively address the victim's right to attend proceedings. For starters, it would seem that the Advisory Committee Notes in the Federal Rules of Evidence now need a revision to reference the ***CVRA***. Otherwise, judges, prosecutors, and defense counsel might simply be unaware that a victim is now "authorized by statute" - the ***CVRA*** - to be present. [285] Even if legal professionals realize the ***CVRA***'s ramifications, most crime victims are not lawyers and lack experience in the criminal justice system. Therefore, their rights need to be laid out in the most direct manner possible by listing their right to attend any public court proceeding in the criminal rules.

Finally, providing the details of the victim's right to attend is important for practical reasons. The ***CVRA*** qualifies the victim's right to attend by requiring exclusion in those rare cases when the victim's testimony "would be materially altered if the victim heard other testimony at that proceeding." [286] The ***CVRA***, however, contains additional procedural requirements that judges must follow before excluding a victim in such situations: "Before making a determination … [to exclude a victim], the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." [287] Presumably, these reasonable alternatives include having the victim testify first and then watching all the following witnesses testify, [288] something judges are authorized to require. [289] The Act also requires that "the reasons for any decision denying relief under this chapter shall be clearly stated on **[*908]** the record." [290] These procedural requirements are new and potentially complex. Moreover, issues surrounding victim attendance at criminal proceedings are likely to occur frequently. Victims can appeal any exclusion order, and appellate courts must take up those appeals expeditiously. [291] Accordingly, it is important that lawyers, judges, and victims have the new rule and its procedural requirements at their fingertips, rather than being forced to dig it out through some cross-reference to the United States Code. For all these reasons, subsection (a) of the proposed rule simply tracks verbatim the substantive and procedural requirements of the ***CVRA***.

Proposed Rule 43.1(a) also limits the victim's right to attend "public" proceedings. It is clear that the ***CVRA*** intended to make no change in the circumstances in which proceedings could be closed to the public. As Senators Kyl and Feinstein explained in a colloquy regarding the law: "The Government or the defendant can request, and the court can order, judicial proceedings to

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[282] See *Fed. R. Evid. 615*, Adv. Comm. Notes, 1998 ***Amendments***.

[283] See *42 U.S.C. 10606* (1990) (replaced by the ***CVRA***).

[284] See supra notes 35-58 and accompanying text; Beloof & Cassell, supra note 278, at 514-17.

[285] The current Advisory Committee Notes reference the old Victims Rights Act, which contains a narrower formulation of the victim's right to attend than found in the ***CVRA***. See Beloof & Cassell, supra note 278, at 514-19.

[286] *18 U.S.C.A. 3771*(a)(3) (West 2004 & Supp. 2005).

[287] Id. 3771(b).

[288] See Beloof & Cassell, supra note 278, at 540-43 (discussing this approach).

[289] See *Fed. R. Evid. 611(a)* (judge controls "order" of evidence).

[290] *18 U.S.C.A. 3771*(b).

[291] Id. 3771(d)(3).

be closed under existing laws. This provision [of the ***CVRA***] is not intended to alter those laws or their procedures in any way . . . ." [292]

Proposed Rule 43.1(b) turns to the potentially complex subject of whether the court may go forward with a proceeding when the victim is not present. Of course, if the victim has been properly notified but has elected not to attend the proceeding, no problem arises. The difficult issue is what to do when the victim is absent because of lack of notice of the proceeding. It could be argued that the court has no choice but to reschedule such a proceeding, just as it would be required to reschedule a proceeding when the defendant had not received notice. The ***CVRA*** mandates that courts "shall ensure" that crime victims are accorded their rights, [293] and one of the rights is notice for court proceedings. [294] If the victim has not received notice of a proceeding, then going forward with the proceeding arguably violates the victim's rights under the ***CVRA***. As Senator Kyl explained:

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It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself. [295]

Proposed Rule 43.1(b) stakes out a position more limited than an absolute requirement of proper victim notification. Except for trials and sentencings (which are discussed below), proposed Rule 43.1(b) would allow the court to move forward with a proceeding without notice to the victim provided that three conditions are met: (1) doing so is in the interests of justice, (2) the court provides prompt notice to the victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and (3) the court ensures that notice will be properly provided to the victim for all subsequent public proceedings.

Each of these three conditions serves an important purpose. To begin with, the court should not go forward unless the interests of justice are served - the first requirement. The court should also notify the victim of the opportunity to seek reconsideration of the court's action if a victim's right is affected - the second requirement. For example, if the court holds a bail hearing without proper notice to the victim and decides to release a defendant, the victim should be advised of this fact and of the right to ask the court to reconsider that bail decision. (The ***CVRA***, as noted earlier, gives victims the right to provide information regarding bail decisions. [296]) Finally, if the court is moving forward without proper notice to a victim at a particular proceeding, it seems only fair that the problem be solved for future proceedings - the third requirement.

For two important proceedings - trial and sentencing - the proposed rule would bar a court from moving forward without proper notice to the victim. This is consistent with the ***CVRA***'s directive that "in any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights [in the ***CVRA***]." [297] If the victim has not been notified of a **[*910]** trial or sentencing, the only way the court can "ensure" that the victim's right is protected is to delay the trial or sentencing until the victim receives notice. This is entirely appropriate; a victim of a crime deserves the opportunity to see the trial of her victimizer and to speak at sentencing. A modest delay in these proceedings is a small price to pay for respecting the victim's rights. Moreover, neither a trial nor a sentencing can be repeated. Double jeopardy principles may well

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[292] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (colloquy between Sen. Kyl and Sen. Feinstein) (explaining that "in this regard, it is not our intent to alter *28 C.F.R. Sec. 50.9* in any respect").

[293] *18 U.S.C.A. 3771*(b).

[294] Id. 3771(a)(2).

[295] 150 Cong. Rec. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[296] See *18 U.S.C.A. 3771*(a)(4) (discussed at supra notes 104-10 and accompanying text).

[297] Id. 3771(b) (emphasis added).

forbid retrial even when a victim has received no notice, [298] and the ***CVRA*** itself bars a new trial remedy. [299] Sentencings would appear to be subject to limitations that might prevent a crime victim from obtaining a resentencing [300] - although the ***CVRA*** directly allows for re-sentencings in certain limited circumstances. [301]

While neither trial nor sentencing could proceed without proper notice to the victim, this restriction will affect only a small number of cases for a short period of time. Many federal cases lack a specifically identifiable victim (e.g., drug and immigration offenses) and thus are not covered by the ***CVRA***. In those cases with a victim, a significant percentage of victims may waive any right to receive notice. In cases where victims choose to receive notice, presumably the notice will be properly given the vast majority of the time. Even apart from notice requirements, most victims will be trial witnesses and therefore will have been notified of the trial by a subpoena. Victims will also often be aware of sentencings through the work of probation officers in preparing presentence reports. [302] In the tiny fraction of cases where notice has not been properly provided, notice will often be only a **[*911]** telephone call away. While the burdens of delaying a trial or sentencing are not trivial, Congress has determined that the victim's rights must take precedence. Proposed subsection (b) faithfully implements that determination.

Subsection (c) of the proposed rule deals with the victim's right to attend in situations involving multiple victims. Congress has recognized that in some cases, such as the Oklahoma City bombing case, it is impossible to afford all victims the opportunity to attend trials. Accordingly, the ***CVRA*** provides that where "the number of crime victims makes it impracticable" to protect rights for all victims, the court "shall fashion a reasonable procedure" to give effect to victims' interests. [303] Possible procedures include closed-circuit transmission of the proceedings to a ceremonial courtroom, auditorium, or other facility that can accommodate many people. To permit such transmission, an ***amendment*** to Rule 53 is proposed below. [304]

Subsection (d) gives victims a general right to be heard on issues "directly affecting" their rights. The ***CVRA*** specifically mandates that victims have the right to be heard with regard to release of the defendant, a plea, or a sentence. [305] The right to be heard at these hearings has been addressed elsewhere in these proposed rules, [306] but courts will sometimes consider other issues that directly affect victims' rights. For example, courts may consider whether to release the address and telephone number of the victim to the defendant. [307] It makes little sense for the court to decide this issue without hearing from the victim, particularly since the ***CVRA*** gives victims the right "to be reasonably protected from the accused." [308] Subsection (d)

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[298] See ***U.S. Const. amend. V***. See generally Beloof, The Third Wave of Crime Victims' Rights, supra note 16, at 303-04 (discussing double jeopardy barriers to remedying violations of victim's rights).

[299] *18 U.S.C.A. 3771*(d)(5).

[300] See *Fed. R. Crim. P. 35(c)* (correction of sentence allowed only for technical or other clear error). Whether denial of a victim's right constitutes "clear error" subject to correction presumably will need to be resolved in future cases. Cf. *United States v. Bedonie, 413 F.3d 1126 (10th Cir. 2005)* (remedying error in restitution award not permitted after imposition of sentence).

[301] *18 U.S.C.A. 3771*(d)(5) (authorizing a victim motion to "re-open a … sentence" if the victim's right to be heard was denied); see 150 Cong. Rec. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (discussing this provision). In light of these provisions, the Advisory Committee may need to consider redrafting Rule 35 to allow reopening of sentences imposed in violation of victims' rights.

[302] See supra notes 231-34 and accompanying text (discussing probation officers collecting victim information for presentence reports).

[303] *18 U.S.C.A. 3771*(d)(2).

[304] See infra notes 340-42 and accompanying text.

[305] *18 U.S.C.A. 3771*(a)(4) (discussed at supra notes 104, 230 and accompanying text).

[306] See supra note 296 and accompanying text (bail hearings); supra note 110 and accompanying text (plea hearings); supra note 275 and accompanying text (sentencing hearings).

[307] See supra notes 175-76 and accompanying text (discussing changes to Rule 12.1).

[308] *18 U.S.C.A. 3771*(a)(1).

would cover such situations by allowing victims who are present at a hearing to be heard on issues "directly" affecting their rights.

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Rule 44.1 - Discretionary Appointment of Counsel for Victim

The Proposal:

The court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising his or her rights.

The Rationale:

An argument could be made that the ***CVRA*** guarantees crime victims the right to appointed counsel. After all, the ***CVRA*** guarantees victims the right to be "treated with fairness" and fairness can be understood as embracing the assistance of counsel. [309] But on closer examination, it becomes clear that nothing in the ***CVRA*** directly mandates counsel for victims. As Senator Kyl explained, "This bill does not provide victims with a right to counsel but recognizes that a victim may enlist counsel on their own." [310]

While the ***CVRA*** does not require judges to appoint counsel for victims, nothing in it prevents judges from doing so in appropriate cases, particularly under prevailing case law demonstrating that federal courts have inherent authority to make such appointments. Because this authority may not be well known to judges (or to victims), the authority should be clearly laid out in the Federal Rules of Criminal Procedure.

A number of federal courts have recognized inherent judicial authority to appoint lawyers for indigent litigants in both civil and criminal cases. [311] While these cases do not directly involve **[*913]** appointment of counsel for crime victims, their principles

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[309] Cf. *Gideon v. Wainwright, 372 U.S. 335, 344 (1963)* (discussing "fairness" to the defendant as a reason for recognizing a right to appointed counsel).

[310] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[311] See, e.g., *Powell v. Alabama, 287 U.S. 45, 73 (1932)* (holding, in a capital case, that courts have the power to appoint counsel and that "attorneys are officers of the court, and are bound to render service when required by such an appointment"); *United States v. Bertoli, 994 F.2d 1002, 1015-18 (3d Cir. 1993)* (holding that the court has inherent power to order defendant's retained law firm to remain as standby counsel at a criminal trial when defendant elects to represent himself pro se); ***United States v. Accetturo, 842 F.2d 1408, 1412-16 (3d Cir. 1988)*** (holding that courts have inherent power to appoint counsel during a criminal trial proceeding but that the power does not extend to appointing lawyers licensed in other states); *United States v. Bowe, 698 F.2d 560, 566-67 (2d Cir. 1983)* (noting that a court has inherent authority to appoint counsel for an indigent witness who may incriminate herself during testimony in a criminal case); *Williamson v. Vardeman, 674 F.2d 1211, 1212-16 (8th Cir. 1982)* (upholding a state court judge's appointment of pro bono counsel in criminal case as constitutional although noting that forcing an attorney to advance his own funds may be unconstitutional); *Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir. 1973)* (noting that in civil rights cases, "representation of indigents upon court order has been a traditional obligation of the lawyer which he assumes when he becomes a member of the bar"); *Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965)* (holding, in a criminal case, that lawyers implicitly consent to be appointed by courts pro bono when accepting a license to practice law); *United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965)* (holding, in a criminal case, that there is "an obligation on the part of the legal profession to represent indigents upon court order, without compensation"). But cf. *Colbert v. Rickmon, 747 F. Supp. 518, 527 (W.D. Ark. 1990)* (holding that courts have no inherent power to order attorneys to represent indigent clients). See generally Jerry L. Anderson, Court-Appointed Counsel: The Constitutionality of Uncompensated Conscription, 3 Geo. J. Legal Ethics 503 (1989) (discussing the trend against requiring lawyers to take uncompensated court appointments); Bruce Andrew Green, Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance, 81 Colum. L. Rev. 366 (1981) (discussing the constitutionality of pro bono court appointments); Judy E.

clearly apply to victims. Illustrative of these decisions is the thoughtful analysis by the U.S. District Court for the District of Nebraska in Bothwell v. Republic Tobacco Co. [312] Bothwell presented four grounds for its holding that courts have inherent power to appoint attorneys to represent indigent litigants:

1) courts possess the inherent power to bring to their assistance those "instruments" necessary to ensure a "fair and just" adjudicative process in individual cases; 2) in many, if not most, cases, due to the adversarial nature of our system, lawyers are a necessary component in ensuring such a "fair and just" process; 3) to a significant degree, neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance; and 4) to that extent, such failure threatens the reliability of the results of the adversarial process. [313]

These grounds readily apply to appointing attorneys for indigent victims when important rights under the ***CVRA*** are at stake. Without **[*914]** an attorney to press her claims, a victim may be unable to obtain a "fair and just" adjudicative process. [314] Moreover, crime victim representation appears to be a prime example of a situation where "neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance." [315] No financial incentive will drive lawyers to represent victims in criminal cases. [316] And while pro bono representation for victims is expanding, [317] it still falls far short of the needs of victims in the federal system. The fourth and final requirement - that the failure of attorneys to represent the indigent client threatens the reliability of the system - is also present where rights under the ***CVRA*** are at stake. Neither the prosecutor nor the defendant has a personal stake in the victim's rights, and, frequently, they will have other priorities and interests that may even be adverse to the rights of the victim. [318] Accordingly, courts have inherent authority to appoint counsel to represent indigent victims and, indeed, may even be able to require **[*915]** counsel to serve without compensation. [319] The local rules of some federal courts already explicitly recognize this power. [320]

In addition to this inherent authority, federal courts appear to possess statutory authority to make such an appointment. Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent any person unable to afford counsel." [321] Moreover, at least one statute already directly authorizes federal courts to appoint counsel for child victims in

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Zelin, Court Appointment of Attorney To Represent, Without Compensation, Indigent in Civil Action, 52 A.L.R. 4th 1063 (1987 & Supp. 2004).

[312] *912 F. Supp. 1221 (D. Neb. 1995).*

[313] *Id. at 1229.*

[314] See generally John W. Gillis & Douglas Beloof, The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts, *33 McGeorge L. Rev. 689, 692 (2002).*

[315] *Bothwell, 912 F. Supp. at 1229.*

[316] See Gillis & Beloof, supra note 314, at 698-700.

[317] See infra note 324 and accompanying text (discussing funding in the ***CVRA*** for the National Crime Victims Law Institute and other legal clinics for victims).

[318] See Gillis & Beloof, supra note 314, at 692.

[319] See *Mallard v. U.S. Dist. Court, 490 U.S. 296, 307 & n.8 (1989)* (leaving open the question of whether federal courts possess the inherent authority to require counsel to provide legal services to the poor). Several lower courts have concluded that appointment without compensation is proper. See *Bothwell, 912 F. Supp. at 1230-34* (counsel have a duty to serve without compensation); *Family Division Trial Lawyers of the Superior Court-D.C. v. Moultrie, 725 F.2d 695, 705 (D.C. Cir. 1984)* (rejecting argument that pro bono appointment violates the Thirteenth ***Amendment*** because attorneys can take steps to avoid the pro bono appointments and holding that pro bono court appointments are not per se "takings," as accepting court ordered representation of indigents is a condition of receiving a law license, but excessive burden could present takings problem); *Williamson v. Vardeman, 674 F.2d 1211, 1211 (8th Cir. 1982)* (noting that pro bono service is a voluntary obligation undertaken by attorneys when they apply for a license to practice law); *Tyler v. Lark, 472 F.2d 1077, 1079-80 (8th Cir. 1973)* (no takings problem with appointment); *United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965)* (no taking problems with appointment). But see *State ex rel. Scott v. Roper, 688 S.W.2d 757, 759-70 (Mo. 1985)* (questioning power of courts to appoint counsel without providing compensation).

certain cases. Title 18 U.S.C. 3509 provides, "The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child." Congress, however, has not yet provided funding for this particular right. [322] Finally, in unusual circumstances where a crime victim may also face possible criminal charges of his or her own, the Criminal Justice Act would authorize appointment of and payment for defense counsel. [323]

Proposed Rule 44.1 would confirm the existing discretionary power of the courts to appoint volunteer counsel. The rule is purely discretionary (the court "may" appoint counsel) and is limited to **[*916]** situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims on a pro bono basis.

There is reason to expect that some attorneys will volunteer. Not only are many attorneys willing to undertake pro bono representation, but the ***CVRA*** itself authorizes millions of dollars in funding for victim representation around the country. The authorization includes support for the National Crime Victims Law Institute at the Northwestern School of Law at Lewis and Clark College to help establish eleven legal offices around the country representing crime victims. [324]

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority spelled out in the criminal rules to eliminate any lingering doubt. In addition, the ***CVRA*** obliges prosecutors to eliminate any lingering doubt in the event of any material conflict of interest between the prosecutor and the victim by "advising the crime victim that the crime victim can seek the advice of an attorney." [325] This requirement may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

For all these reasons, the rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

[*917]

Rule 46 - Victims' Right To Be Heard Regarding Defendant's Release from Custody

The Proposal:

Victims should be explicitly given the right to be heard regarding the defendant's release from custody as follows:

(k) Victims' Right To Be Heard. A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.

The Rationale:

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[320] See, e.g., D. Utah Civ. R. 83-1.1(b)(3) (1997) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.").

[321] ***28 U.S.C. 1915***(e)(1) (2000) (emphasis added).

[322] Memorandum from the Administrative Office of the United States Courts to the United States District Court Judges and the United States Magistrate Judges (March 19, 1991) (available from the Administrative Office).

[323] See 18 U.S.C. 3006A(a)(1).

[324] See 42 U.S.C. 10603(d) (2000); see also 150 Cong. Rec. S4266 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (noting appropriations for the National Crime Victims Law Institution "to provide grants and assistance to lawyers to help victims of crime in court" with funding sufficient to "provide for two new regional offices and nine specific clinics"). For more information on NCVLI, see http://www.ncvli.org.

[325] 18 U.S.C.A. 3771(c)(2) (West 2004 & Supp. 2005).

The ***CVRA*** guarantees victims the right "to be reasonably heard" at "any public proceeding … involving release." [326] A similar right already exists for victims of stalking offenses. [327] This proposed rule simply recognizes a victim's right "to be reasonably heard" and further directs the court to consider the victim's input. The victim's right to be heard would be meaningless if the court did not consider the victim's views. Moreover, existing law appears to recognize that the court should consider the victim's concerns. [328]

Rule 48 - Victims' Views on Dismissal To Be Considered

The Proposal:

The court should be required to consider the views of victims in deciding whether to grant a government motion to dismiss charges as follows:
[*918]

Rule 48. Dismissal

(a) By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.

The Rationale:

This proposed change would implement a victim's right to be "treated with fairness" and to be heard at any proceeding "involving release" of the defendant by requiring the court to consider the views of the victim before granting a government motion to dismiss a charge. The rule already requires leave of court before a dismissal can be approved. In determining whether to grant leave, the court should consider whether dismissal is "clearly contrary to manifest public interest." [329] Among the relevant factors in making this public interest determination is whether the prosecution's motion to dismiss is motivated by "animus towards the victim." [330] The proposed rule would simply require the court to consider the views of the victim in making this determination, leaving the weight to afford those views up to the court.

Rule 50 - Victims' Right to Proceedings Free from Unreasonable Delay

The Proposal:

A victim's right to proceedings free from unreasonable delay should be recognized as follows:

Rule 50. Prompt Disposition

(a) Scheduling Preference. Scheduling preference must be given to criminal proceedings as far as practicable.
[*919]

(b) Defendant's Right Against Delay. The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.

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[326] *18 U.S.C.A. 3771*(a)(4).

[327] *18 U.S.C. 2263.*

[328] See, e.g., *18 U.S.C. 3142*(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

[329] *United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975).*

[330] *In re Richards, 213 F.3d 773, 787 (3d Cir. 2000).*

(c) Victim's Right Against Delay. The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record.

The Rationale:

Under the ***CVRA***, a victim has a right "to proceedings free from unreasonable delay." [331] A number of states have similar provisions. [332]

[*920] The proposed rule would give effect to this right. Of course, in some situations, delay is reasonable. In others, however, the court should deny a motion to continue in order to wrap up the proceedings and possibly bring closure to a victim. As Senator Feinstein has explained,

This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the crime behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court. [333]

The proposed rule gives victims a right against unreasonable delay in subsection (c). To ensure that defendants' rights are reasonably protected, a new subsection (b) is added recognizing defendants' rights in the Speedy Trial Act. [334] The existing rule's direction to give scheduling preference to criminal cases would remain in subsection (a).

The proposal also gives victims the right to be heard on any continuance. This is consistent with the drafters' intent, as at least one court has already opined. [335] As Senator Kyl stated, "This provision [in the ***CVRA***] should be interpreted so that any

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[331] *18 U.S.C.A. 3771*(a)(7). Even before the adoption of the ***CVRA***, child victims had the right to a "speedy trial" in certain situations. *18 U.S.C. 3509*(j).

[332] See, e.g., *Ariz. Rev. Stat. 13-4435* (2001) ("In any criminal proceeding in which a continuance is requested, the court shall consider the victim's views and the victim's right to a speedy trial."); *Cal. Penal Code 1050(a)* (2005) (stating policy of the California legislation that "excessive continuances … cause substantial hardship to victims and other witnesses … . It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition … ."); *Del. Code Ann. tit. 11, 9423* (2001) ("In ruling on any motion or other request for a delay or continuance … the court shall consider and give weight to any adverse impact such delay or continuance might have on the well-being of any victim … ."); *730 Ill. Comp. Stat. Ann. 5/5-4-3.1(c)* (West 2005) ("Victim shall be notified of the date and time of hearing [on any motion for continuance] and shall be provided an opportunity to address the court on the impact the continuance may have on the victim's well-being."); *La. Rev. Stat. Ann. 46:1844* (1999) ("When ruling on a defense motion for continuance, the court shall consider the impact on the victim."); *Miss. Code Ann. 99-43-19* (2000) ("The court … should make every reasonable effort to consider whether granting [a] continuance shall be prejudicial to the victim."); *R.I. Gen. Laws 11-37-11.2* (2000) ("The court shall consider any adverse impact the delay or continuance may have on the well-being of the victim … ."); *Tenn. Code 40-38-116(a)* (2003) ("In any criminal proceeding in which a continuance is requested, the court shall consider the victim's views and the victim's right to a speedy trial. If the continuance is granted over the victim's objection, the court shall state on the record the reason for the continuance and the procedures that have been taken to avoid further delays."); *Wyo. Stat. Ann. 1-40-207* (2004) ("The court shall consider the victim's interest and circumstances when … granting or denying continuances.").

Some states limit speedy trial rights to child victims. See, e.g., *Ala. Code 15-25-6* (2000) ("In ruling on any motion … for … continuance … the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness."); *Del. Code Ann. tit. 11, 5133* (2001) (same); *Idaho Code Ann. 19-110* (2004) (same); ***Ky. Rev. Stat. Ann. 421.510*** (LexisNexis 1992) (same); N.Y. Penal Law 642-a (2005) (same); *N.D. Cent. Code 12.1-35-05* (2003) (same); *Wis. Stat. 971.105* (2005) (same). For general review of the victim's right to a speedy trial, see generally Beloof, Cassell & Twist, supra note 15, at 383-91; Cassell, Balancing the Scales of Justice, supra note 15, at 1406.

[333] 150 Cong. Rec. S4268-69 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

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decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay." [336]

[*921] The proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime, which noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance … be clearly stated on the record." [337] Several states have adopted similar provisions. [338]

Rule 51 - Claiming Error Regarding Victims' Rights

The Proposal:

The procedures for a victim to assert error should be spelled out in the rules as follows:

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party or a victim may preserve a claim of error by informing the court - when the court ruling or order is made or sought - of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by *Federal Rule of Evidence 103*.

The Rationale:

The ***CVRA*** authorizes victim appeals and includes procedures for expedited handling of those appeals. [339] The proposed rule would **[*922]** incorporate victims into the existing rule regarding preservation of errors.

Rule 53 - Closed-Circuit Transmission of Proceedings for Victims

The Proposal:

Closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

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[334] *18 U.S.C. 3161*-3174.

[335] *United States v. Turner, 367 F. Supp. 2d 319, 334 n.14 (E.D.N.Y. 2005)* (recognizing victim's "participatory right" with respect to delays in a criminal case).

[336] 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

[337] President's Task Force on Victims of Crime, Final Report 76 (1982).

[338] See, e.g., *Ariz. Rev. Stat. Ann. 13-4435(B)* (2001) (courts required to "state on the record the reason for [any] continuance"); *Utah Code Ann. 77-38-7(3)(b)* (2004) (court required to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

[339] See *18 U.S.C.A. 3771*(d)(3) (West 2004 & Supp. 2005).

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.

The Rationale:

The ***CVRA*** grants victims the right to attend trials, as noted previously in connection with proposed Rule 43.1. [340] At the same time, however, the ***CVRA*** recognizes that in situations with numerous victims, the court may have to craft "a reasonable procedure" to protect victims' rights. [341] One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a facility sufficiently large to accommodate all the victims. This was the procedure followed in the Oklahoma City bombing case. [342]

[*923] The proposed rule would authorize such transmission in appropriate cases. The language for the proposed rule comes from *42 U.S.C. 10608*(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles - as was the case with the Oklahoma City bombing trial. In light of the ***CVRA***'s mandate that the court must always craft "a reasonable procedure" to protect the rights of multiple victims, there is no compelling reason to tie the device to such geographical circumstances. The proposed rule authorizes courts to allow such transmissions in any appropriate case.

Rule 58 - Victims and Petty Offenses

The Proposal:

Courts should hear from victims regarding sentences in petty cases as follows:

Rule 58. Petty Offenses and Other Misdemeanors.

...

(3) Sentencing. The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court must also give victims an opportunity to be heard. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

The Rationale:

The ***CVRA*** gives a "victim" the right to be heard at sentencing. The ***CVRA*** defines "victim" as including anyone who is directly and proximately harmed by "a Federal offense." [343] The Act does not limit those offenses to felonies or misdemeanors. Accordingly, a victim has a right to be heard at sentencing for any petty offense, as would be reflected in the proposed rule.

[*924]

Conclusion

The ***CVRA*** commands that victims be made participants in the federal criminal process and thus requires significant changes to the Federal Rules of Criminal Procedure. This Article has provided one possible and comprehensive way to implement that congressional command with specific language and supporting analysis for each change. Undoubtedly there are other ways of

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[340] See supra notes 277-308 and accompanying text.

[341] *18 U.S.C.A. 3771*(d)(2).

[342] See Paul G. Cassell & Robert F. Hoyt, The Tale of Victims' Rights, Legal Times, Dec. 23, 1996, at 32; Jo Thomas, Trial to Be Shown in Oklahoma for Victims, N.Y. Times, Jan. 30, 1997, at A14.

[343] *18 U.S.C.A. 3771*(e).

implementing the ***CVRA***. However, since the Advisory Committee will be making many decisions about how to best change the rules, one concluding thought may be worth highlighting.

Congress will be paying close attention to how courts protect the rights of future victims. Indeed, the ***CVRA*** directs the Administrative Office for the U.S. Courts to report each year the number of times that victims have attempted to assert their rights and been denied the requested relief. [344] More generally, Congress views the new Act as an important step to protecting crime victims - a "new and bolder approach, than has ever been tried before in our Federal system." [345] Congress is eagerly awaiting the results of this approach. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress." [346] Victims' advocates, too, will be watching carefully. [347]

In light of this thorough and ongoing interest, the judiciary should not merely attempt a "quick fix" or minimalist approach to implementing the ***CVRA***, but should comprehensively protect crime victims' rights by changes in court rules. If Congress believes that the federal rules fail to faithfully reflect crime victims' concerns, it can directly amend the rules. But such direct ***amendments*** may not sufficiently attend to the needs of the judicial branch or others involved in the criminal justice process. It is in that spirit of eliminating any need for congressional intervention that this Article **[*925]** offers proposals to fully and faithfully implement the congressional directive that victims be integrated into the criminal justice process.

In the final analysis, whether the courts or Congress redraft the rules is less important than that the redrafting occur. As commanded in the ***CVRA***, crime victims are now participants in federal criminal cases. That new reality must be reflected throughout the Federal Rules of Criminal Procedure.

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[344] *18 U.S.C.A. 3771,* Historical and Statutory Notes (requiring the Administrative Office of the courts to file an annual report with Congress concerning the number of times a victim's right is asserted and denied by federal courts).

[345] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[346] Id. at S4271 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy).

[347] *United States v. Turner, 367 F. Supp. 2d 319, 337 (E.D.N.Y. 2005)* (noting that victims' advocates "will be watching to see how federal courts and prosecutors carry out the new law's mandate").

EXHIBIT 9

Alan Dershowitz says he's still advising Jeffrey Epstein

Alan Dershowitz still provides legal advice to serial pedophile Jeffrey Epstein, he confirmed to Axios.

What he's saying: "He has called me a couple of times about legal issues, because I'm still technically his lawyer," Dershowitz told me in a phone interview on Saturday. "But I haven't had any social, or any other kind of contact. ... You never stop being a person's lawyer."

Background: Dershowitz helped Epstein get a sweetheart plea deal from then-U.S. Attorney Alexander Acosta (now Donald Trump's labor secretary and a rumored long-shot contender for attorney general).

- A bombshell Miami Herald investigative series last week highlighted for the first time the extent of Epstein's alleged crimes and the soft treatment he received from federal prosecutors.
- The Palm Beach multimillionaire would "serve just 13 months in the county jail, but the deal — called a non-prosecution agreement — essentially shut down an ongoing FBI probe into whether there were more victims and other powerful people who took part in Epstein's sex crimes," according to a Miami Herald examination of thousands of emails, court documents and FBI records.

Dozens of women alleged that Epstein molested and raped them when they were underaged using a sophisticated human trafficking network. A civil trial is scheduled to begin on Tuesday in Palm Beach County that may finally let these women tell their stories in court.

Behind the scenes: While he was allegedly raping teenage girls, Epstein cultivated cozy relationships with America's elites.

- Bill Clinton flew on Epstein's plane, nicknamed the "Lolita Express," numerous times, according to flight logs.
- And Donald Trump, in a profile with *New York* magazine written several years before the police caught up with Epstein, praised his friend as a "terrific guy." "It is even said that he likes beautiful women as much as I do," Trump said of Epstein, "and many of them are on the younger side."
- Dershowitz was also friendly with Epstein before the broader public knew he was a pedophile.

Dershowitz confirmed to me that he received a massage at Epstein's Palm Beach home, adding that the woman who provided it was of legal age.

- "What happened was I, um, he lent us, this was well before any of this thing came out, he lent us his house once. And I was there, my grandchildren were there, my daughter was there, and we all got massages."
- "And, um, it was therapeutic. I had a therapeutic massage with an old old Russian, but I never never ... and that was part of when we had his house for about a week during I think it was Christmas vacation."
- "Believe me, if I had known that anything improper had ever taken place in that house, I never would have allowed my children, my grandchildren, my wife, my daughter-in-law, my son, to have spent time there. I can tell you categorically there were no inappropriate pictures, no inappropriate anythings. It was like any other house."

One of Epstein's accusers, Virginia Roberts, has claimed Dershowitz had sex with her when she was underage. Dershowitz has denied the allegation and told the Miami Herald "the story was 100 percent flatly categorically made-up" so "she could get money."

Go deeper: Trump defender Dershowitz shunned by Martha's Vineyard

SEXUAL ASSAULT

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EXHIBIT 8

http://www.vanityfair.com/news/2003/03/jeffrey-epstein-200303

Society

The Talented Mr. Epstein

Lately, Jeffrey Epstein's high-flying style has been drawing oohs and aahs: the bachelor financier lives in New York's largest private residence, claims to take only billionaires as clients, and flies celebrities including Bill Clinton and Kevin Spacey on his Boeing 727. But pierce his air of mystery and the picture changes. Vicky Ward explores Epstein's investment career, his ties to retail magnate Leslie Wexner, and his complicated past.
by

- Vicky Ward

June 27, 2011 12:00 am

On Manhattan's Upper East Side, home to some of the most expensive real estate on earth, exists the crown jewel of the city's residential town houses. With its 15-foot-high oak door, huge arched windows, and *nine* floors, it sits on—or, rather, commands—the block of 71st Street between Fifth and Madison Avenues. Almost ludicrously out of proportion with its four- and five-story neighbors, it seems more like an institution than a house. This is perhaps not surprising—until 1989 it was the Birch Wathen private school. Now it is said to be Manhattan's largest private residence.

Inside, amid the flurry of menservants attired in sober black suits and pristine white gloves, you feel you have stumbled into someone's private Xanadu. This is no mere rich person's home, but a high-walled, eclectic, imperious fantasy that seems to have no boundaries.

The entrance hall is decorated not with paintings but with row upon row of individually framed eyeballs; these, the owner tells people with relish, were imported from England, where they were made for injured soldiers. Next comes a marble foyer, which does have a painting, in the manner of Jean Dubuffet … but the host coyly refuses to tell visitors who painted it. In any case, guests are like pygmies next to the nearby twice-life-size sculpture of a naked African warrior.

Despite its eccentricity the house is curiously impersonal, the statement of someone who wants to be known for the scale of his possessions. Its occupant, financier Jeffrey Epstein, 50, admits to friends that he likes it when people think of him this way. A good-looking man, resembling Ralph Lauren, with thick gray-white hair and a weathered face, he usually dresses in jeans, knit shirts, and loafers. He tells people he bought the house because he knew he "could never live anywhere bigger." He thinks 51,000 square feet is an appropriately large space for someone like himself, who deals mostly in large concepts—especially large sums of money.

Guests are invited to lunch or dinner at the town house—Epstein usually refers to the former as "tea," since he likes to eat bite-size morsels and drink copious quantities of Earl Grey. (He does not touch alcohol or tobacco.) Tea is served in the "leather room," so called because of the cordovan-colored fabric on the walls. The chairs are covered in a leopard print, and on the wall

hangs a huge, Oriental fantasy of a woman holding an opium pipe and caressing a snarling lionskin. Under her gaze, plates of finger sandwiches are delivered to Epstein and guests by the menservants in white gloves.

Upstairs, to the right of a spiral staircase, is the "office," an enormous gallery spanning the width of the house. Strangely, it holds no computer. Computers belong in the "computer room" (a smaller room at the back of the house), Epstein has been known to say. The office features a gilded desk (which Epstein tells people belonged to banker J. P. Morgan), 18th-century black lacquered Portuguese cabinets, and a nine-foot ebony Steinway "D" grand. On the desk, a paperback copy of the Marquis de Sade's *The Misfortunes of Virtue* was recently spotted. Covering the floor, Epstein has explained, "is the largest Persian rug you'll ever see in a private home—so big, it must have come from a mosque." Amid such splendor, much of which reflects the work of the French decorator Alberto Pinto, who has worked for Jacques Chirac and the royal families of Jordan and Saudi Arabia, there is one particularly startling oddity: a stuffed black poodle, standing atop the grand piano. "No decorator would ever tell you to do that," Epstein brags to visitors. "But I want people to think what it means to stuff a dog." People can't help but feel it's Epstein's way of saying that he always has the last word.

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In addition to the town house, Epstein lives in what is reputed to be the largest private dwelling in New Mexico, on an $18 million, 7,500-acre ranch which he named "Zorro." "It makes the town house look like a shack," Epstein has said. He also owns Little St. James, a 70-acre island in the U.S. Virgin Islands, where the main house is currently being renovated by Edward Tuttle, a designer of the Amanresorts. There is also a $6.8 million house in Palm Beach, Florida, and a fleet of aircraft: a Gulfstream IV, a helicopter, and a Boeing 727, replete with trading room, on which Epstein recently flew President Clinton, actors Chris Tucker and Kevin Spacey, supermarket magnate Ron Burkle, Lew Wasserman's grandson, Casey Wasserman, and a few others, on a mission to explore the problems of AIDS and economic development in Africa.

Epstein is charming, but he doesn't let the charm slip into his eyes. They are steely and calculating, giving some hint at the steady whir of machinery running behind them. "Let's play chess," he said to me, after refusing to give an interview for this article. "You be white. You get the first move." It was an appropriate metaphor for a man who seems to feel he can win no matter what the advantage of the other side. *His* advantage is that no one really seems to know him or his history completely or what his arsenal actually consists of. He has carefully engineered it so that he remains one of the few truly baffling mysteries among New York's moneyed world. People know snippets, but few know the whole.

"He's very enigmatic," says Rosa Monckton, the former C.E.O. of Tiffany & Co. in the U.K. and a close friend since the early 1980s. "You think you know him and then you peel off another ring of the onion skin and there's something else extraordinary underneath. He never reveals his hand.... He's a classic iceberg. What you see is not what you get."

Even acquaintances sense a curious dichotomy: Yes, he lives like a "modern maharaja," as Leah Kleman, one of his art dealers, puts it. Yet he is fastidiously, almost obsessively private—he lists

himself in the phone book under a pseudonym. He rarely attends society gatherings or weddings or funerals; he considers eating in restaurants like "eating on the subway"—i.e., something he'd never do. There are many women in his life, mostly young, but there is no one of them to whom he has been able to commit. He describes his most public companion of the last decade, Ghislaine Maxwell, 41, the daughter of the late, disgraced media baron Robert Maxwell, as simply his "best friend." He says she is not on his payroll, but she seems to organize much of his life—recently she was making telephone inquiries to find a California-based yoga instructor for him. (Epstein is still close to his two other long-term girlfriends, Paula Heil Fisher, a former associate of his at the brokerage firm Bear Stearns and now an opera producer, and Eva Andersson Dubin, a doctor and onetime model. He tells people that when a relationship is over the girlfriend "moves up, not down," to friendship status.)

Some of the businessmen who dine with him at his home—they include newspaper publisher Mort Zuckerman, banker Louis Ranieri, Revlon chairman Ronald Perelman, real-estate tycoon Leon Black, former Microsoft executive Nathan Myhrvold, Tom Pritzker (of Hyatt Hotels), and real-estate personality Donald Trump—sometimes seem not all that clear as to what he actually does to earn his millions. Certainly, you won't find Epstein's transactions written about on Bloomberg or talked about in the trading rooms. "The trading desks don't seem to know him. It's unusual for animals *that* big not to leave any footprints in the snow," says a high-level investment manager.

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Unlike such fund managers as George Soros and Stanley Druckenmiller, whose client lists and stock maneuverings act as their calling cards, Epstein keeps all his deals and clients secret, bar one client: billionaire Leslie Wexner, the respected chairman of Limited Brands. Epstein insists that ever since he left Bear Stearns in 1981 he has managed money only for billionaires—who depend on him for discretion. "I was the only person crazy enough, or arrogant enough, or misplaced enough, to make my limit a billion dollars or more," he tells people freely. According to him, the flat fees he receives from his clients, combined with his skill at playing the currency markets "with very large sums of money," have afforded him the lifestyle he enjoys today.

Why do billionaires choose him as their trustee? Because the problems of the mega-rich, he tells people, are different from yours and mine, and his unique philosophy is central to understanding those problems: "Very few people need any more money when they have a billion dollars. The key is not to have it do harm more than anything else.... You don't want to lose your money."

He has likened his job to that of an architect—more specifically, one who specializes in remodeling: "I always describe [a billionaire] as someone who started out in a small home and as he became wealthier had add-ons. He added on another addition, he built a room over the garage ... until you have a house that is usually a mess.... It's a large house that has been put together over time where no one could foretell the financial future and their accompanying needs."

He makes it sound as though his job combines the roles of real-estate agent, accountant, lawyer, money manager, trustee, and confidant. But, as with Jay Gatsby, myths and rumor swirl around Epstein.

Here are some of the hard facts about Epstein—ones that he doesn't mind people knowing: He grew up middle-class in Brooklyn. His father worked for the city's parks department. His parents viewed education as "the way out" for him and his younger brother, Mark, now working in real estate. Jeffrey started to play the piano—for which he maintains a passion—at five, and he went to Brooklyn's Lafayette High School. He was good at mathematics, and in his early 20s he got a job teaching physics and math at Dalton, the elite Manhattan private school. While there he began tutoring the son of Bear Stearns chairman Ace Greenberg and was friendly with a daughter of Greenberg's. Soon he went to Bear Stearns, where, under the mentorship of both Greenberg and current Bear Stearns C.E.O. James Cayne, he did well enough to become a limited partner—a rung beneath full partner. He abruptly departed in 1981 because, he has said, he wanted to run his own business.

Thereafter the details recede into shadow. A few of the handful of current friends who have known him since the early 1980s recall that he used to tell them he was a "bounty hunter," recovering lost or stolen money for the government or for very rich people. He has a license to carry a firearm. For the last 15 years, he's been running his business, J. Epstein & Co.

Since Leslie Wexner appeared in his life—Epstein has said this was in 1986; others say it was in 1989, at the earliest—he has gradually, in a way that has not generally made headlines, come to be accepted by the Establishment. He's a member of various commissions and councils: he is on the Trilateral Commission, the Council on Foreign Relations, the New York Academy of Sciences, and the Institute of International Education.

His current fan club extends to Cayne, Henry Rosovsky, the former dean of Harvard's Faculty of Arts and Sciences, and Larry Summers, Harvard's current president. Harvard law professor Alan Dershowitz says, "I'm on my 20th book.... The only person outside of my immediate family that I send drafts to is Jeffrey." Real-estate developer and philanthropist Marshall Rose, who has worked with Epstein on projects in New Albany, Ohio, for Wexner, says, "He digests and decodes the information very rapidly, which is to me terrific because we have shorter meetings."

Also on the list of admirers are former senator George Mitchell and a gaggle of distinguished scientists, most of whom Epstein has helped fund in recent years. They include Nobel Prize winners Gerald Edelman and Murray Gell-Mann, and mathematical biologist Martin Nowak. When these men describe Epstein, they talk about "energy" and "curiosity," as well as a love for theoretical physics that they don't ordinarily find in laymen. Gell-Mann rather sweetly mentions that "there are always pretty ladies around" when he goes to dinner *chez* Epstein, and he's under the impression that Epstein's clients include the Queen of England. Both Nowak and Dershowitz were thrilled to find themselves shaking the hand of a man named "Andrew" in Epstein's house. "Andrew" turned out to be Prince Andrew, who subsequently arranged to sit in the back of Dershowitz's law class.

Epstein gets annoyed when anyone suggests that Wexner "made him." "I had really rich clients before," he has said. Yet he does not deny that he and Wexner have a special relationship. Epstein sees it as a partnership of equals. "People have said it's like we have one brain between two of us: each has a side."

"I think we both possess the skill of seeing patterns," says Wexner. "But Jeffrey sees patterns in politics and financial markets, and I see patterns in lifestyle and fashion trends. My skills are not in investment strategy, and, as everyone who knows Jeffrey knows, his are not in fashion and design. We frequently discuss world trends as each of us sees them."

By the time Epstein met Wexner, the latter was a retail legend who had built a $3 billion empire—one that now includes Victoria's Secret, Express, and Bath & Body Works—from $5,000 lent him by his aunt. "Wexner saw in Jeffrey the type of person who had the potential to realize his [Jeffrey's] dreams," says someone who has worked closely with both men. "He gave Jeffrey the ball, and Jeffrey hit it out of the park."

Wexner, through a trust, bought the town house in which Epstein now lives for a reported $13.2 million in 1989. In 1993, Wexner married Abigail Koppel, a 31-year-old lawyer, and the newlyweds relocated to Ohio; in 1996, Epstein moved into the town house. Public documents suggest that the house is still owned by the trust that bought it, but Epstein has said that he now owns the house.

Wexner trusts Epstein so completely that he has assigned him the power of fiduciary over all of his private trusts and foundations, says a source close to Wexner. In 1992, Epstein even persuaded Wexner to put him on the board of the Wexner Foundation in place of Wexner's ailing mother. Bella Wexner recovered and demanded to be reinstated. Epstein has said they settled by splitting the foundation in two.

Epstein does not care that he comes between family members. In fact, he sees it as his job. He tells people, "I am there to represent my client, and if my client needs protecting—sometimes even from his own family—then it's often better that people hate me, not the client."

"You've probably heard I'm vicious in my representation of my clients," he tells people proudly; Leah Kleman describes his haggling over art prices as something like a scene out of the movie *Mad Max: Beyond Thunderdome.* Even a former mentor says he's seen "the dark side" of Epstein, and a Bear Stearns source recalls a meeting in which Epstein chewed out a team making a presentation for Wexner as being so brutal as to be "irresponsible."

One reporter, in fact, received three threats from Epstein while preparing a piece. They were delivered in a jocular tone, but the message was clear: There will be trouble for your family if I don't like the article.

On the other hand, Epstein is clearly very generous with friends. Joe Pagano, an Aspen-based venture capitalist, who has known Epstein since before his Bear Stearns days, can't say enough nice things: "I have a boy who's dyslexic, and Jeffrey's gotten close to him over the years.... Jeffrey got him into music. He bought him his first piano. And then as he got to school he had difficulty ... in studying ... so Jeffrey got him interested in taking flying lessons."

Rosa Monckton recalls Epstein telling her that her daughter, Domenica, who suffers from Down syndrome, needed the sun, and that Rosa should feel free to bring her to his house in Palm Beach anytime.

Some friends remember that in the late 80s Epstein would offer to upgrade the airline tickets of good friends by affixing first-class stickers; the only problem was that the stickers turned out to be unofficial. Sometimes the technique worked, but other times it didn't, and the unwitting recipients found themselves exiled to coach. (Epstein has claimed that he paid for the upgrades, and had no knowledge of the stickers.) Many of those who benefited from Epstein's largesse claim that his generosity comes with no strings attached. "I never felt he wanted anything from me in return," says one old friend, who received a first-class upgrade.

Epstein is known about town as a man who loves women—lots of them, mostly young. Model types have been heard saying they are full of gratitude to Epstein for flying them around, and he is a familiar face to many of the Victoria's Secret girls. One young woman recalls being summoned by Ghislaine Maxwell to a concert at Epstein's town house, where the women seemed to outnumber the men by far. "These were not women you'd see at Upper East Side dinners," the woman recalls. "Many seemed foreign and dressed a little bizarrely." This same guest also attended a cocktail party thrown by Maxwell that Prince Andrew attended, which was filled, she says, with young Russian models. "Some of the guests were horrified," the woman says.

"He's reckless," says a former business associate, "and he's gotten more so. Money does that to you. He's breaking the oath he made to himself—that he would never do anything that would expose him in the media. Right now, in the wake of the publicity following his trip with Clinton, he must be in a very difficult place."

According to S.E.C. and other legal documents unearthed by *VANITY FAIR,* Epstein may have good reason to keep his past cloaked in secrecy: his real mentor, it might seem, was not Leslie Wexner but Steven Jude Hoffenberg, 57, who, for a few months before the S.E.C. sued to freeze his assets in 1993, was trying to buy the *New York Post.* He is currently incarcerated in the Federal Medical Center in Devens, Massachusetts, serving a 20-year sentence for bilking investors out of more than $450 million in one of the largest Ponzi schemes in American history.

When Epstein met Hoffenberg in London in the 1980s, the latter was the charismatic, audacious head of the Towers Financial Corporation, a collection agency that was supposed to buy debts that people owed to hospitals, banks, and phone companies. But Hoffenberg began using company funds to pay off earlier investors and service a lavish lifestyle that included a mansion on Long Island, homes on Manhattan's Sutton Place and in Florida, and a fleet of cars and planes.

Hoffenberg and Epstein had much in common. Both were smart and obsessed with making money. Both were from Brooklyn. According to Hoffenberg, the two men were introduced by Douglas Leese, a defense contractor. Epstein has said they were introduced by John Mitchell, the late attorney general.

Epstein had been running International Assets Group Inc. (I.A.G.), a consulting company, out of his apartment in the Solo building on East 66th Street in New York. Though he has claimed that he managed money for billionaires only, in a 1989 deposition he testified that he spent 80 percent of his time assisting people recover stolen money from fraudulent brokers and lawyers.

He was also not above entering into risky, tax-sheltered oil and gas deals with much smaller investors. A lawsuit that Michael Stroll, the former head of Williams Electronics Inc., filed against Epstein shows that in 1982 I.A.G. received an investment from Stroll of $450,000, which Epstein put into oil. In 1984 Stroll asked for his money back; four years later he had received only $10,000. Stroll lost the suit, after Epstein claimed in court, among other things, that the check for $10,000 was for a horse he'd bought from Stroll. "My net worth never exceeded four and a half million dollars," Stroll has said.

Hoffenberg, says a close friend, "really liked Jeffrey…. Jeffrey has a way of getting under your skin, and he was under Hoffenberg's." Also appealing to Hoffenberg were Epstein's social connections; they included oil mogul Cece Wang (father of the designer Vera) and Mohan Murjani, whose clothing company grew into Gloria Vanderbilt Jeans. Epstein lived large even then. One friend recalls that when he took Canadian heiress Wendy Belzberg on a date he hired a Rolls-Royce especially for the occasion. (Epstein has claimed he owned it.)

In 1987, Hoffenberg, according to sources, set Epstein up in the offices he still occupies in the Villard House, on Madison Avenue, across a courtyard from the restaurant Le Cirque. Hoffenberg hired his new protégé as a consultant at $25,000 a month, and the relationship flourished. "They traveled everywhere together—on Hoffenberg's plane, all around the world, they were always together," says a source. Hoffenberg has claimed that Epstein confided in him, saying, for example, that he had left Bear Stearns in 1981 after he was discovered executing "illegal operations."

Several of Epstein's Bear Stearns contemporaries recall that Epstein left the company very suddenly. Within the company there were rumors also that he was involved in a technical infringement, and it was thought that the executive committee asked that he resign after his two supporters, Ace Greenberg and Jimmy Cayne, were outnumbered. Greenberg says he can't recall this; Cayne denies it happened, and Epstein has denied it as well. "Jeffrey Epstein left Bear Stearns of his own volition," says Cayne. "It was never suggested that he leave by any member of management, and management never looked into any improprieties by him. Jeffrey said specifically, 'I don't want to work for anybody else. I want to work for myself.'" Yet, this is not the story that Epstein told to the S.E.C. in 1981 and to lawyers in a 1989 deposition involving a civil business case in Philadelphia.

In 1981 the S.E.C.'s Jonathan Harris and Robert Blackburn took Epstein's testimony and that of other Bear Stearns employees in part of what became a protracted case about insider trading around a tender offer placed on March 11, 1981, by the Seagram Company Ltd. for St. Joe Minerals Corp. Ultimately several Italian and Swiss investors were found guilty, including Italian financier Giuseppe Tome, who had used his relationship with Seagram owner Edgar Bronfman Sr. to obtain information about the tender offer.

After the tender offer was announced, the S.E.C. began investigating trades involving St. Joe at Bear Stearns and other firms. Epstein resigned from Bear Stearns on March 12. The S.E.C. was tipped off that Epstein had information on insider trading at Bear Stearns, and it was therefore obliged to question him. In his S.E.C. testimony, given on April 1, 1981, Epstein claimed that he had found "offensive" the way Bear Stearns management had handled a disciplinary action

following its discovery that he had committed a possible "Reg D" violation—evidently he had lent money to his closest friend. (In the 1989 deposition he said that he'd lent approximately $20,000 to Warren Eisenstein, to buy stock.) Such an action could have been considered improper, although Epstein claimed he had not realized this until afterward.

According to Epstein, Bear Stearns management had questioned him about the loan around March 4. The questioners, Epstein said, were Michael (Mickey) Tarnopol and Alvin Einbender. In his 1989 deposition Epstein recalled that the partner who had made an "issue" of the matter was Marvin Davidson. On March 9, Epstein said, he had met with Tarnopol and Einbender again, and the two partners told him that the executive committee had weighed the offense, together with previous "carelessness" over expenses, and he would be fined $2,500.

"There was discussion whether, in fact, I had ever put in an airline ticket for someone else and not myself and I said that it was possible, … since my secretary handles my expenses," Epstein told the S.E.C. In his 1989 testimony he stated that the "Reg D" incident had cost him a shot at partnership that year.

What the S.E.C. seemed to be especially interested in was whether there was a connection between Epstein's leaving and the alleged insider trading in St. Joe Minerals by other people at Bear Stearns:

Q: Sir, are you aware that certain rumors may have been circulating around your firm in connection with your reasons for leaving the firm?

A: I'm aware that there were many rumors.

Q: What were the rumors you heard?

A: Nothing to do with St. Joe.

Q: Can you relate what you heard?

A: It was having to do with an illicit affair with a secretary.

Q: Have you heard any other rumors suggesting that you had made a presentation or communication to the Executive Committee concerning alleged improprieties by other members or employees of Bear Stearns?

A: I, in fact, have heard that rumor, but it's been from Mr. Harris in our conversation last week.

Q: Have you heard it from anyone else?

A: No.

A little later the interview focuses on James Cayne:

Q: Did you ever hear while you were at Bear Stearns that Mr. Cayne may have trader or insider information in connection with St. Joe Minerals Corporation?

Q: Did Mr. Cayne ever have any conversation with you about St. Joe Minerals?

Q: Did you happen to overhear any conversations between Mr. Cayne and anyone else regarding St. Joe Minerals?

And still later in the questioning comes this exchange:

Q: Have you had any type of business dealings with Mr. Cayne?

A: There's no relationship with Bear Stearns.

Q: Pardon?

A: Other than Bear Stearns, no.

Q: Have you been a participant in any type of business venture with Mr. Cayne?

Q: Do you have any expectation of participating in any business venture with Mr. Cayne?

Q: Have you had any business participations with Mr. Theram?

A: No; nor do I anticipate any.

Q: Mr. Epstein, did anyone at Bear Stearns tell you in words or substance that you should not divulge anything about St. Joe Minerals to the staff of the Securities and Exchange Commission?

Q: Has anyone indicated to you in any way, either directly or indirectly, in words or substance, that your compensation for this past year or any future monies coming to you from Bear Stearns will be contingent upon your not divulging information to the Securities and Exchange Commission?

A: No.

Despite the circumstances of Epstein's leaving, Bear Stearns agreed to pay him his annual bonus—which he anticipated as being approximately $100,000.

The S.E.C. never brought any charges against anyone at Bear Stearns for insider trading in St. Joe, but its questioning seems to indicate that it was skeptical of Epstein's answers. Some sources have wondered why, if he was such a big producer at Bear Stearns, he would have given it up over a mere $2,500 fine.

Certainly the years after Epstein left the firm were not obviously prosperous ones. His luck didn't seem to change until he met Hoffenberg.

One of Epstein's first assignments for Hoffenberg was to mastermind doomed bids to take over Pan American World Airways in 1987 and Emery Air Freight Corp. in 1988. Hoffenberg claimed in a 1993 hearing before a grand jury in Illinois that Epstein came up with the idea of financing these bids through Towers's acquisition of two ailing Illinois insurance companies, Associated Life and United Fire. "He was hired by us to work on the securities side of the insurance companies and Towers Financial, supposedly to make a profit for us and for the companies," Hoffenberg reportedly told the grand jury. He also alleged that Epstein was the "technician," executing the schemes, although, having no broker's license, he had to rely on others to make the trades. Much of Hoffenberg's subsequent testimony in his criminal case has proven to be false, and Epstein has claimed he was merely asked how the bids could be accomplished and has said he had nothing to do with the financing of them. Yet Richard Allen, the former treasurer of United Fire, recalls seeing Epstein two or three times at the company. He and another executive say they had direct dealing with Epstein over the finances. And in his deposition of 1989, Epstein stated that he was the one who executed "all" Hoffenberg's instructions to buy and sell the stock. He called it "making the orders." He could not recall whether he had chosen the brokers used.

To win approval from the Illinois insurance regulators for Towers's acquisition of the companies, Hoffenberg promised to inject $3 million of new capital into them. In fact, in his grand-jury testimony Hoffenberg claimed that he, his chief operating officer, Mitchell Brater, and Epstein came up with a scheme to steal $3 million of the insurance companies' bonds to buy Pan Am and Emery stock. "Jeffrey Epstein and Mitch Brater arranged the various brokerage accounts for the bonds to be placed with in New York, and I think one in Chicago, Rodman & Renshaw," Hoffenberg reportedly said. Then, said Hoffenberg, while making it appear as though they were investing the bonds in much safer financial instruments, they used them as collateral to buy the stock. "Epstein was the person in charge of the transactions, and Mitchell Brater was assisting him with it in coordination on behalf of the insurance companies' money," Hoffenberg claimed at the time.

At one point, according to Hoffenberg, a broker forged the documents necessary for a $1.8 million check to be written on insurance-company funds. The check was used to buy more stock in the takeover targets. Meanwhile, in order to throw the insurance regulators off, the $1.8 million was reported as being safely invested in a money-market account.

United Fire's former chief financial officer Daniel Payton confirms part of Hoffenberg's account. He says he recalls making one or two telephone calls to Epstein (at Hoffenberg's direction) about the missing bonds. "He said, 'Oh, yeah, they still exist.' But we found out later that he had sold those assets … leveraged them … [and] used some margin account to take some positions in … Emery and Pan Am," says Payton.

Epstein's extraordinary creativity was, according to Hoffenberg, responsible for the purchase by the insurance companies of a $500,000 bond, with no money down. "Epstein created a great scheme to purchase a $500,000 treasury bond that would not be shown … [as] margined or collateralized," he reportedly told the grand jury. "It looked like it was free and clear but it actually wasn't," he said.

Epstein has denied he ever had any dealings with anyone from the insurance companies. But Richard Allen says he recalls talking to Epstein at Hoffenberg's direction and telling him it was urgent they retrieve the missing bonds for a state examination. According to Allen, Epstein said, "We'll get them back." He had "kind of a flippant attitude," says Allen. "They never came back."

Epstein, according to Hoffenberg, also came up with a scheme to manipulate the price of Emery Freight stock in an attempt to minimize the losses that occurred when Hoffenberg's bid went wrong and the share price began to fall. This was alleged to have involved multiple clients' accounts controlled by Epstein.

Eventually, in 1991, insurance regulators in Illinois sued Hoffenberg. He settled the case, and Epstein, who was only a paid consultant, was never deposed or accused of any wrongdoing. Barry Gross, the attorney who was handling the suit for the regulators, says of Epstein, "He was very elusive.... It was hard to really track him down. There were a substantial number of checks for significant dollars that were paid to him, I remember.... He was this character we never got a handle on. Again we presumed that he was involved with the Pan Am and Emery run that Hoffenberg made, but we never got a chance to depose him."

"From the government's discovery in the main sentencing against Hoffenberg it would seem the government was perhaps a bit lazy," says David Lewis, who represented Mitchell Brater. "They went for what they knew they could get ... and that was the fraudulent promissory notes [i.e., the much larger and unrelated part of Hoffenberg's fraud, based in New York State].... What they couldn't get, they didn't bother with."

Another lawyer involved in the criminal prosecution of Hoffenberg says, "In a criminal investigation like that, when there is a guilty plea, to be quick and dirty about it, discovery is always incomplete.... They don't have to line up witnesses; they don't have to learn every fact that might come out on cross-examination."

Epstein was involved with Hoffenberg in other questionable transactions. Financial records show that in 1988 Epstein invested $1.6 million in Riddell Sports Inc., a company that manufactures football helmets. Among his co-investors were the theater mogul Robert Nederlander and attorney Leonard Toboroff. A source close to this transaction claims that Epstein told Nederlander and Toboroff that he had raised his share of the money from a Swiss banker, whose identity they could not be allowed to know. But Hoffenberg has claimed the money came from him, and Towers's financial statements for that year show a loan to Epstein of $400,000. (Epstein has said he can't remember the details and has disputed the accuracy of the Towers financial reports.)

Around the same time, Nederlander and Toboroff let Epstein come in with them on a scheme to make money out of Pennwalt, a Pennsylvania chemical company. The plan was to group together with two other parties to take a substantial declared position in the stock. According to a source, Epstein was supposed to help Nederlander and Toboroff raise $15 million. He seemed to fail to find other investors, say those familiar with the deal. (Epstein has said he was merely an investor.) He invested $1 million, which he told his co-investors was his own money. But in his

1989 deposition he said that he put in only $300,000 of his own money. Where did the rest come from? Hoffenberg has said it came from him, in a loan that Nederlander and Toboroff didn't know about.

Two things happened that alarmed Nederlander and Toboroff. After the group signaled a possible takeover, the Pennwalt management threatened to sue the would-be raiders. Epstein was reluctant initially to give a deposition about his share of the money, telling Toboroff there were "reasons" he didn't want to. Then, after the opportunity for new investors was closed, co-investors recall Epstein announcing that he'd found one at last: Dick Snyder, then C.E.O. of the publisher Simon & Schuster, who wanted to put up approximately $500,000. (Neither Epstein nor Snyder can now recall the investment. Yet in the 1989 deposition Epstein said that he had recruited Snyder, whom he had met socially, into the deal.)

According to a source, Toboroff and Nederlander told Epstein that Snyder was too late, but, without their realizing it, Hoffenberg has claimed, Snyder wrote a check to Hoffenberg and bought out some of his investment. But then Snyder wanted out.

"Nederlander started to get these irate calls from [Snyder,] who wasn't part of the deal, saying he was owed all this money," says someone close to the deal. Toboroff and Nederlander were baffled.

Eventually, a source close to Hoffenberg says, Hoffenberg paid Snyder off.

Just as Nederlander and Toboroff were growing wary of Epstein, he became increasingly involved with Leslie Wexner, whom he had met through insurance executive Robert Meister and his late wife. Epstein has told people that he met Wexner in 1986 in Palm Beach, and that he won his confidence by persuading him not to invest in the stock market, just as the 1987 crash was approaching. His story has subsequently changed. When asked if Wexner knew about his connection to Hoffenberg, Epstein said that he began working for Wexner in 1989, and that "it was certainly not the same time."

Wherever and whenever it was that Epstein and Wexner actually met, there was an immediate and strong personal chemistry. Wexner says he thinks Epstein is "very smart with a combination of excellent judgment and unusually high standards. Also, he is always a most loyal friend."

Sources say Epstein proved that he could be useful to Wexner as well, with "fresh" ideas about investments. "Wexner had a couple of bad investments, and Jeffrey cleaned those up right away," says a former associate of Epstein's.

Before he signed on with Wexner, Epstein had several meetings with Harold Levin, then head of Wexner Investments, in which he enunciated ideas about currencies that Levin found incomprehensible. "In fact," says someone who used to work very closely with Wexner, "almost everyone at the Limited wondered who Epstein was; he literally came out of nowhere."

"Everyone was mystified as to what his appeal was," says Robert Morosky, a former vice-chairman of the Limited.

Much of Epstein's work is related to cleaning up, tightening budgets, and efficiencies. One person who worked for Wexner and who saw a contract drawn up between the two men says Epstein is involved in "everything, not just a little here, a little there. Everything!" In addition, he says, "Wexner likes having a hatchet man.... Whenever there is dirty work to be done he'd stick Jeffrey on it.... He has a reputation for being ruthless but he gets the job done."

Epstein has evidently been asked to fire personal-staff members when needed. "He was that mysterious person that everyone was scared to death of," says a former employee.

Meanwhile, he is also less than popular with some people outside Wexner's company with whom he now deals. "He 'inserted' himself into the construction process of Leslie Wexner's yacht.... That resulted in litigation down the road between Mr. Wexner and the shipyard that eventually built the vessel," says Lars Forsberg, a lawyer whose firm at the time, Dickerson and Reily, was hired to deal with litigation stemming from the construction of Wexner's *Limitless*—at 315 feet, one of the largest private yachts in the world. Evidently, Epstein stalled on paying Dickerson and Reily for its work. "It's probably once or twice in my legal career that I've had to sue a client for payment of services that he'd requested and we'd performed ... without issue on the performance," says Forsberg. In the end the matter was settled, but Epstein claims he now has no recollection of it.

The incident is one of a number of disputes Epstein has become embroiled in. Some are for sums so tiny as to be baffling; for instance, Epstein sued investment adviser Herbert Glass, who sold him the Palm Beach house in 1990, for $13,444—Epstein claimed this was owed him for furnishings removed by Glass.

In 1998 the U.S. Attorney's Office sued Epstein for illegally subletting the former home of the deputy consul general of Iran to attorney Ivan Fisher and others. Epstein paid $15,000 a month in rent to the State Department, but he charged Fisher and his colleagues $20,000. Though the exact terms of the agreement are sealed, the court ruled against Epstein.

Wexner offers some insight into his friend's combative style. "Many times people confuse winning and losing," Wexner says. "Jeffrey has the unusual quality of knowing when he is winning. Whether in conversations or negotiations, he always stands back and lets the other person determine the style and manner of the conversation or negotiation. And then he responds in their style. Jeffrey sees it in chivalrous terms. He does not pick a fight, but if there is a fight, he will let you choose your weapon."

One case is rather more serious. Currently, Citibank is suing Epstein for defaulting on loans from its private-banking arm for $20 million. Epstein claims that Citibank "fraudulently induced" him into borrowing the money for investments. Citibank disputes this charge.

The legal papers for another case offer a rare window into Epstein's finances. In 1995, Epstein stopped paying rent to his landlord, the nonprofit Municipal Arts Society, for his office in the Villard House. He claimed that they were breaking the terms of the lease by not letting his staff in at night. The case was eventually settled. However, one of the papers filed in this dispute is Epstein's financial statement for 1988, in which he claimed to be worth $20 million. He listed

that he owned $7 million in securities, $1 million in cash, zero in residential property (although he told sources that he had already bought the home in Palm Beach), and $11 million in other assets, including his investment in Riddell. A co-investor in Riddell says: "The company had been bought with a huge amount of debt, and it wasn't public, so it was meaningless to attach a figure like that to it … the price it cost was about $1.2 million." The co-investors bought out Epstein's share in Riddell in 1995 for approximately $3 million. At that time, when Epstein was asked, as a routine matter, to sign a paper guaranteeing he had access to a few million dollars in case of any subsequent disputes over the sale price, Wexner signed for him. Epstein has explained that this was because the co-investors wanted an indemnity against being sued by Wexner. One of the investors calls this "bullshit."

Epstein's appointment to the board of New York's Rockefeller University in 2000 brought him into greater social prominence. Boasting such social names as Nancy Kissinger, Brooke Astor, and Robert Bass, the board also includes such pre-eminent scientists as Nobel laureate Joseph Goldstein. "Epstein was thrilled to be elected," says someone who knows him.

After one term Epstein resigned. According to *New York* magazine, this was because he didn't like to wear a suit to meetings. A spokesperson for the Rockefeller board says Epstein left because he had insufficient time to commit; a board member recalls that he was "arrogant" and "not a good fit." The spokesperson admits that it is "infrequent" for board members not to be renominated after only one term.

Still, the recent spate of publicity Epstein has inspired does not seem to have fazed him. In November he was spotted in the front row of the Victoria's Secret fashion show at New York's Lexington Avenue Armory; around the same time the usual coterie of friends and beautiful women were whisked off to Little St. James (which he tells people has been renamed Little St. Jeff) for a long weekend.

Thanks to Epstein's introductions, says Martin Nowak, the biologist finds himself moving from Princeton to Harvard, where he is assuming the joint position of professor of mathematics and professor of biology. Epstein has pledged at least $25 million to Harvard to create the Epstein Program for Mathematical Biology and Evolutionary Dynamics, and Epstein will have an office at the university. The program will be dedicated to searching for nature's algorithms, a pursuit that is a specialty of Nowak's. For Epstein this must be the summit of everything he has worked toward: he has been seen proudly displaying Harvard president Larry Summers's letter of commitment as if he can't quite believe it is real. He says he was reluctant to have his name attached to the program, but Summers persuaded him. He rang his mentor Wexner about it, and Wexner told him it was all right.

An insatiable, restless soul, always on the move, Epstein builds a tremendous amount of downtime into his hectic work schedule. Yet there is something almost programmed about his relaxation: it's as if even pleasure has to be measured in terms of self-improvement. Nowak says that, when he goes to stay with Epstein in the Caribbean, they'll get up at six and, as the sun rises, have three-hour conversations about theoretical physics. "Then he'll go off and do some work, re-appear, and we'll talk some more."

http://www.vanityfair.com/news/2003/03/jeffrey-epstein-200303

Another person who went to the island with Epstein, Maxwell, and several beautiful women remembers that the women "sat around one night teasing him about the kinds of grasping women who might want to date him. He was amused by the idea…. He's like a king in his own world."

Many people comment there is something innocent, almost childlike about Jeffrey Epstein. They see this as refreshing, given the sophistication of his surroundings. Alan Dershowitz says that, as he was getting to know Epstein, his wife asked him if he would still be close to him if Epstein suddenly filed for bankruptcy. Dershowitz says he replied, "Absolutely. I would be as interested in him as a friend if we had hamburgers on the boardwalk in Coney Island and talked about his ideas."

EXHIBIT 6

https://twitter.com/AlanDersh

EXHIBIT 5

Letters

Letter to the Editor: Article Misrepresented Dershowitz

2

By Alan M. Dershowitz
Alan M. Dershowitz is a Professor of Law emeritus at Harvard Law School.

December 5, 2018

To the editor,

The Crimson story regarding Jeffrey Epstein omitted the central point I made in my interview with the reporter. I welcome an investigation by Harvard or any other institution, including prosecutors, into the wilfully false charges made by Virginia Roberts for financial gain. Omitting this crucial statement is irresponsible and unethical journalism.

Virginia Roberts leveled her false accusations four years ago. At the time, I disproved them categorically. The matter was put to rest, with even her lawyers admitting that it was a mistake and wrong. Then four years later the Miami Herald recycled this false accusation and The Crimson reported on the Herald's recycled report. I wrote a letter to the editor of the Herald pointing to the incontrovertible evidence that Roberts made up the accusation out of whole cloth in order to obtain millions of dollars from Leslie Wexner.

I was able to disprove Roberts' false accusation by producing all of my travel, AmEx, and TV appearance records which showed where I was, and, more importantly, where I wasn't during the entire period Virginia Roberts was in contact with Jeffrey Epstein. These records prove incontrovertibly that I could not have been, and was not, where Roberts' falsely claimed to have met me — a Caribbean Island, a New Mexico Ranch, a private jet, a Palm Beach mansion — during the relevant time period.

I also called for an independent investigation by the former Director of the F.B.I., a highly respected former federal judge and assistant U.S. attorney. He reviewed all of the records and other evidence and concluded that "the totality of the evidence ... refutes the allegations."

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In addition, the judge before whom the accusation was made struck the accusation from the record and sanctioned her lawyers for filing it. One of her own lawyers then acknowledged that his client was "wrong" "simply wrong," and her other lawyers formally withdrew the accusation, admitting it was a "mistake."

Not only did Virginia Roberts lie about me, she lied about Al and Tipper Gore and President Bill Clinton claiming that she met the three of them on Jeffrey Epstein's island — a claim refuted by secret service records that established that none of the three were on that island during that period of time.

There is evidence that directly proves I was framed. These include emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons." These exculpatory documents have been sealed by Roberts' lawyers and I am seeking to make them public.

Roberts' closest friend told me that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from Leslie Wexner and that Roberts had never previously included me among the people with whom she claimed to have had sex. I have a tape recording of this conversation.

Not surprisingly, Roberts made her false claims against me only in court documents that immunize her from being sued for defamation. When she was interviewed by the Miami Herald, she refused to repeat her false allegations outside of court. The Crimson did not ask her directly to repeat her false allegations to them. As a matter of journalistic ethics, The Crimson should not have published an accusation without interviewing the accuser on the record. I now challenge Roberts to repeat her false accusations to The Crimson or other media, so that I can sue her for defamation and let a jury decide — after seeing all the evidence including the emails and book manuscript — who is telling the truth and who is lying.

I want an investigation or trial to finally prove that Roberts made up the entire story, so that it can finally be put to rest.

Alan M. Dershowitz is a Professor of Law emeritus at Harvard Law School.

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EXHIBIT 4

Dershowitz Goes Off on Woman Who Made Underage Sex Allegations: 'She Should Be Seriously Punished'

by Ronn Blitzer | 2:26 pm, December 4th, 2018

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Just hours after convicted pedophile **Jeffrey Epstein** agreed to settle a civil case brought against him by attorney **Bradley Edwards**, Epstein's lawyer from his past criminal case, **Alan Dershowitz**, discussed his former client on the Law&Crime Network. Epstein was accused of trafficking more than 40 underage girls for sex, and one such girl claimed Dershowitz himself had sex with her when she was underage.

Dershowitz vehemently denies the claim, telling host **Brian Ross** that accuser **Virginia Roberts** is a "certified, complete, total liar," and that her allegations are a "complete and total fabrication." He also added that she should be punished by the law for what she did.

The Harvard Law Professor Emeritus noted that Roberts' allegations were eventually withdrawn, and that the FBI recognized the evidence showed he was not where she said he was. He pointed to documented evidence that proves he is innocent.

"I can prove conclusively that she made the whole thing up," Dershowitz said, citing travel records that he says prove where he was at the time she claims she had sex with him. "It's conclusive, conclusive evidence."

"More importantly, I can prove where I wasn't," he said, after stating outright, "Never met her, don't know who she is, never heard of her."

Similarly, Dershowitz said that Roberts claimed that notable figures such as **Bill Clinton**, **Al Gore**, and **Tipper Gore** were present on an

island, when Secret Service records proved they were never even there.

Dershowitz said Roberts' allegations were part of an extortion plot, and that she "should be seriously punished for submitting false information and a false affidavit."

The attorney emphasized that Roberts has not been willing to repeat her allegations against him in public, and that she has only accused him in the context of litigation, which affords certain protections.

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"She simply hides behind litigation privileges," Dershowitz said, encouraging Ross to call Roberts and see if she would repeat her claims. "And if she does, I will be in court the next day suing her for defamation and I will win the case 'cause I can prove conclusively that she made up the whole story from top to bottom."

Ross then turned to the controversial deal that Epstein received from federal prosecutors who were investigating the trafficking case against him. Federal prosecutors agreed not to prosecute him, and let him plead guilty to state charges that resulted in a 13-month prison sentence that allowed Epstein to leave prison during the day for work. Federal prosecutors allegedly did not even inform victims before making the deal, which is now the subject of a request for an Inspector General investigation. Congressional Democrats said in a letter that they want to know more about the circumstances surrounding the deal, which was made by then-U.S. Attorney and current Secretary of Labor **Alex Acosta**.

As Epstein's defense attorney in that case, Dershowitz is not upset about it the deal at all.

"I'm very proud of that deal, that's what lawyers are supposed to do," he said. "Lawyers are supposed to get the best deals they can." If he could have gotten 10 months or no time at all, that would have been even better, he said.

Acosta said in the past that Epstein's lawyers, including Dershowitz, put pressure on his office by investigating his staff. Dershowitz has denied this.

"Acosta was very tough," Dershowitz said, contrary to concerns that he did anything improper. Dershowitz pointed out that the problem feds had was proving that girls were transported in interstate commerce.

"Unless you can prove that, you don't have a federal case, only a state case."

[Image via Law & Crime Network screengrab]

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Alan Dershowitz, Jefrey Epstein

EXHIBIT 2

Letter to the Editor: Alan Dershowitz responds to Raw Story report

RAW STORY - COMMENTARY
01 DEC 2018 AT 18:36 ET

Alan Dershowitz (Fox News)

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To the Editor,

In your recent story titled "**Trump Defender Alan Dershowitz is deeply involved in the sordid Jeffrey Epstein scandal**" you level outright false claims that I had sexual encounters with Virginia Roberts. These are exactly the same false claims that were made in 2014 and were thoroughly disproved and withdrawn.

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

After leveling these claims in detail, you say that I "steadfastly denied her claims." Not only did I deny the claims, I conclusively disproved them. I produced my travel, phone, credit card, and TV appearance records conclusively proving I could not have been and was not in any of the places Roberts claims I was during the time that she knew Epstein. The former Director of the F.B.I., assisted by a former assistant U.S. attorney and a chief federal marshal, reviewed these records and the other evidence and concluded that "the totality of the evidence found during the investigation refutes the allegations." The judge struck Robert's affidavit and sanctioned her lawyers for filing it, and her lawyers then withdrew their accusation admitting that it was a mistake. After reviewing the evidence, ABC News cancelled their plan to show an interview with Roberts because she was not credible.

There is other evidence, currently under seal, that directly establishes my innocence. I am seeking to unseal emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons."

There is also irrefutable evidence that Roberts lied about other people for money. She told a British tabloid that she met Al and Tipper Gore on Epstein's Island and she swore that she had dinner with Bill Clinton on the Island. But Secret Service records prove that none of these people were on the Island. Indeed, the Gores didn't even know Epstein.

I have a tape recording of a conversation with Robert's closest friend in which she says that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from a wealthy businessman, and that Roberts had never previously included me among the people with whom she claimed to have had sex.

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

One of Roberts own lawyers has acknowledged in front of witnesses that Roberts' claims against me are "wrong" "simply wrong." The evidence of my innocence is indisputable: I never met Roberts; I never had sex with her; she simply made up the entire story for money.

Roberts made her false claims against me in court documents that immunize her from being sued for defamation. I challenge her to repeat her false accusations out of court, so that I can sue her for defamation and let a jury decide—after seeing all the evidence including the emails and book manuscript—who is telling the truth and who is lying.

*Editors Note: Professor Alan Dershowitz sent the previous response to our story, "**Trump Defender Alan Dershowitz is deeply involved in the sordid Jeffrey Epstein scandal**." In his response, Mr. Dershowitz claims Raw Story accused him of having sexual encounters with Virginia Roberts. Upon careful review of **our story**, both before and after publication, this is not the case. Our story reports the accusations leveled by others.*

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

EXHIBIT 1

Even from jail, sex abuser manipulated the system. His victims were kept in the dark

BY Julie K. Brown
NOV. 28, 2018

PERVERSION of JUSTICE

A decade before #MeToo, a multimillionaire sex offender from Florida got the ultimate break.

Palm Beach County Courthouse

June 30, 2008

Jeffrey Edward Epstein appeared at his sentencing dressed comfortably in a blue blazer, blue shirt, jeans and gray sneakers. His attorney, Jack Goldberger, was at his side.

At the end of the 68-minute hearing, the 55-year-old silver-haired financier — accused of sexually abusing dozens of underage girls — was fingerprinted and handcuffed, just like any other criminal sentenced in Florida.

But inmate No. W35755 would not be treated like other convicted sex offenders in the state of Florida, which has some of the strictest sex offender laws in the nation.

Ten years before the #MeToo movement raised awareness about the kid-glove handling of powerful men accused of sexual abuse, Epstein's lenient sentence and his extraordinary treatment while in custody are still the source of consternation for the victims he was accused of molesting when they were minors.

Beginning as far back as 2001, Epstein lured a steady stream of underage girls to his Palm Beach mansion to engage in nude massages, masturbation, oral sex and intercourse, court and police records show. The girls — mostly from disadvantaged, troubled families — were recruited from middle and high schools around Palm Beach County. Epstein would pay the girls for massages and offer them further money to bring him new girls every time he was at his home in Palm Beach, according to police reports.

The girls, now in their late 20s and early 30s, allege in a series of federal civil lawsuits filed over the past decade that Epstein sexually abused hundreds of girls, not only in Palm Beach, but at his homes in Manhattan, New Mexico and in the Caribbean.

In 2007, the FBI had prepared a 53-page federal indictment charging Epstein with sex crimes that could have put him in federal prison for life. But then-Miami U.S. Attorney Alexander Acosta signed off on a non-prosecution agreement, which was negotiated, signed and sealed so that no one would know the full scope of Epstein's crimes. The indictment was shelved, never to be seen again.

Epstein instead pleaded guilty to lesser charges in state court, and was required to register as a sex offender. He was sentenced to 18 months incarceration.

But Epstein — who had a long list of powerful, politically connected friends — didn't go to state prison like most sex offenders in Florida. Instead, the multimillionaire was assigned to a private wing of the Palm Beach County stockade, where he was able to hire his own security detail. Even then, he didn't spend much time in a cell. He was allowed to go to his downtown West Palm Beach office for work release, up to 12 hours a day, six days a week, records show.

Read Next

LOCAL

Sex abuser Jeffrey Epstein was surrounded by powerful people. Here's a sampling

He was permitted to hire his own private psychologist for his required sex-offender counseling, and after his release from jail, his subsequent year of probation under house arrest was filled with trips on his corporate jet to Manhattan and to his home in the U.S. Virgin Islands — all approved by the courts with no objections from the state.

On the morning of his sentencing in 2008, none of Epstein's victims were in the courtroom to protest his soft jail term or the unusual provisions of his incarceration and probation — and that was by design.

Palm Beach multimillionaire Jeffrey Epstein is a free man, despite sexually abusing dozens of underage girls according to police and prosecutors. His victims have never had a voice, until now.

By

Emails and letters contained in court filings reveal the cozy, behind-the-scenes dealings between federal prosecutors and Epstein's indomitable legal team during the run-up to his federal plea deal, as they discussed ways to minimize his criminal charges and avoid informing the girls about the details of the deal until after the case was resolved.

That arrangement benefited Epstein in a number of ways. Unlike other high-profile sex crime cases, federal prosecutors agreed to keep his sentencing quiet, thereby limiting media coverage. His underage victims — identified in FBI documents — weren't told about the plea deal so they weren't in court, where they could voice their objections and possibly sway the judge to give Epstein a harsher sentence or reject the agreement altogether.

Most important, Epstein's crimes would be reduced to felony prostitution charges, giving him the ability to argue that the girls weren't victims at all — they were prostitutes.

Four accomplices named in Epstein's non-prosecution agreement — Nadia Marcinkova, Sarah Kellen, Adriana Ross and Lesley Groff — were also given immunity from federal prosecution. Marcinkova was a young girl when Epstein brought her from Yugoslavia to live with him. Several victims told police that she was involved in orgies with Epstein and underage girls. Ross, Groff and Kellen, now known by her married name, Vickers, were schedulers who arranged his underage sex sessions, according to the FBI and police.

Marcinkova and Kellen, through their attorneys, declined to comment for this story. The Herald was unsuccessful in reaching Ross and Groff.

Acosta, who is now President Donald Trump's secretary of labor, told lawmakers last year at his confirmation hearing that he did not know that Epstein would receive such liberal treatment while incarcerated. But court records show that federal prosecutors under his authority acquiesced to many of Epstein's demands, including that he not go to federal or state prison.

"I can't remember how I found out that he had taken a plea," said Courtney Wild, identified by the FBI as one of more than three dozen underage girls — some of them as young as 13 — who had been molested by Epstein at his waterfront estate between 2001 and 2005.

"We were purposefully misled into believing that his sentencing [in state court] had nothing to do with the federal crimes he committed against me or the other girls."

Epstein, now 65, was released in 2009 after serving 13 months.

Wild, who was 14 when she met Epstein, is suing the federal government, alleging that prosecutors kept her and other victims in the dark as part of a conspiracy to give Epstein — described in the lawsuit as "a powerful, politically connected multimillionaire" — one of the most lenient deals for a serial child sex offender in history.

Courtney Wild is suing the federal government, claiming that prosecutors deliberately kept her and other victims of Jeffrey Epstein in the dark about the status of his case. The U.S. Attorney's Office signed a non-prosecution agreement with the multimillionaire. Emily Michot *EMICHOT@MIAMIHERALD.COM*

Now 31, Wild is Jane Doe No. 1 in "Jane Doe 1 and Jane Doe 2 vs. the United States," which seeks to overturn Epstein's plea agreement on the grounds that it was executed in violation of the federal Crime Victims' Rights Act. The measure affords crime victims a series of rights, including to confer with prosecutors and to be notified about plea negotiations and sentencing.

That lawsuit — and an unrelated state court case scheduled for trial on Dec. 4 — could expose more about Epstein's crimes, as well as who else was involved and whether there was any undue influence that tainted the federal case.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

Your digital subscription, starting at $0.99 for the first month, supports investigative journalism like this.

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Some of Epstein's victims will finally have an opportunity to testify for the first time as part of the Dec. 4 case in state court in Palm Beach County. It pits Fort Lauderdale attorney Bradley Edwards against Epstein, who had accused Edwards of malfeasance in his representation of several victims.

Jack Scarola, the attorney representing Edwards, said Epstein should be held accountable for his unrelenting attacks against Edwards — as well as others who were involved in his case.

"We are going to demonstrate through this case that no one — no matter how much money they have — can abuse children and then attempt to bully those who come to the defense of children," said Scarola, a former state prosecutor.

Florida and beyond

Few people had as much insight into Epstein's lifestyle — and its international reach — as Virginia Roberts. By age 16, Roberts had lived a life that was beyond that of most high school girls.

At 11, she says, she was sexually molested by a family friend. At 12, she was smoking pot and skipping school. At 13, she was in and out of foster homes, and at 14, she was on the street.

In Miami, the runaway became a captive of a 65-year-old sex trafficker, Ron Eppinger. For months, she says, she was sexually abused, kept in an apartment and pimped out to pedophiles. After his indictment in 2000 on trafficking charges, Roberts returned to West Palm Beach and tried to heal.

Virginia Roberts, now Giuffre, says she was 16 and working as a locker room attendant at Donald Trump's Mar-a-Lago resort when she was approached by Ghislaine Maxwell, Jeffrey Epstein's associate, about becoming a masseuse for Epstein. *COURTESY OF VIRGINIA ROBERTS*

That summer, when Roberts was 16, she said her father helped her get a job as a locker room attendant at the spa at Donald Trump's Mar-a-Lago resort in Palm Beach, records show. Her father worked at the resort as a maintenance man.

There she said she met Ghislaine Maxwell, an Epstein friend and socialite daughter of the late British publishing magnate Robert Maxwell. She offered Roberts an opportunity to become a massage therapist, working for Epstein.

In a sworn court affidavit and in a recent interview with the Herald, Roberts described how Epstein and Maxwell began grooming her — not just to perform massages, but to sexually pleasure them and others.

"It started with one and it trickled into two and so on," Roberts told the Herald. "And before you know it, I'm being lent out to politicians and academics and royalty."

Roberts, too, was ordered to find Epstein girls — the younger, the better — by trolling areas where teenagers congregated, such as shopping malls, to lure girls to whatever residence Epstein was staying in at the time, she told the Herald.

She began to travel with Epstein and Maxwell to Epstein's other homes, in New York, New Mexico and the U.S. Virgin Islands — and her trips are documented in flight logs that frequently list her name or her initials as a passenger, court records show.

"His appetite was insatiable. He wanted new girls, fresh, young faces every single day — that was just the sickness that he had," Roberts said.

Neither Epstein nor his lead attorney, Goldberger, responded to requests for comment.

Roberts alleges that Epstein had cameras throughout his homes and said he liked her to tell him about the sexual peccadilloes of various important men she had sex with.

"Epstein and Maxwell also got girls for Epstein's friends and acquaintances. Epstein specifically told me that the reason for him doing this was so that they would 'owe him,' they would 'be in his pocket,' and he would 'have something on them,' " Roberts said in a court affidavit. "I understood him to

mean that when someone was in his pocket, they owed him favors.''

Roberts elaborated in her interview with the Herald, saying that Epstein had access to girls through a modeling agency that recruited them from overseas.

Epstein, who was close to Les Wexner, the owner of Victoria's Secret, often talked about his connections to people in the modeling, fashion and acting industries, Roberts told the Herald.

"He [Epstein] would tell the girls, 'Hey, I will give you a modeling contract if you go have sex with this man [whichever acquaintance Epstein designated],' " she said.

Roberts' story about the modeling agency is supported, to a degree, by the sworn statement of a Miami woman named Maritza Vasquez, who was later interviewed in New York by an FBI agent from Miami. Vasquez worked as a bookkeeper for Mc2, owned by Epstein associate Jean-Luc Brunel. He employed scouts in South America, Europe and the former Soviet Union to find him models to bring to the United States, Vasquez said in a 2010 sworn court deposition obtained by the Herald.

Vasquez stated in the deposition that from 2003 to 2006 she handled all the finances and payroll for the agency, including a bank transaction involving Epstein. She said Epstein invested $1 million in Mc2.

The models were often very young — 13, 14 and 15 — and some of them were housed in apartments at 301 E. 66th St. in New York, a building purportedly owned by Epstein, the deposition said.

Epstein didn't charge the girls rent, Vasquez said, but Brunel charged them $1,000 a month, with four of them at a time sharing one apartment. The girls who were the youngest and most beautiful stayed at the 66th Street apartments, which were more luxurious than the other apartments that were used to house models who were not as young and desirable, she said.

Vasquez once let one of the models, who was 14, stay overnight with her after the girl ran into trouble with police for trying to get into a Manhattan nightclub. Vasquez also testified that she helped a lawyer obtain visas for the foreign models, and assisted with their transportation to and from modeling assignments and parties.

Vasquez said that even though the agency employed 200 to 300 models, the company didn't make any money and Brunel was always broke. Brunel would later sue Epstein, alleging that the financier's sex scandal had caused his business to fail, but the suit was eventually dropped.

Vasquez testified it wasn't unusual for the agency to send girls to an assignment with a wealthy client for $100,000 or more, but the girl wouldn't be paid the full amount — or anything at all — if she refused to be "molested.''

Vasquez considered herself a mother figure and often coached the youngest girls to stick to the 9-to-5 modeling assignments because she didn't think it was appropriate for them to be having sex.

She said she met Epstein only once, but she often helped arrange for girls — many of them underage — to be sent to his homes in New York, Palm Beach and his island in the Caribbean for parties. She heard salacious rumors about Epstein's parties, but testified she had no firsthand knowledge about whether they involved sex.

Vasquez said that she was questioned by the FBI and she tried to tell agents where to look for evidence.

Vasquez was eventually let go from the agency after she was accused of stealing money — money she claims was given to her by Brunel. Vasquez said she was placed on probation for the theft. She never heard from the FBI about Epstein again.

The Herald was unsuccessful in reaching Brunel through his former attorney.

In a written statement released in 2015, Brunel denied any involvement in trafficking underage models.

"I strongly deny having participated, neither directly nor indirectly, in the actions Mr. Jeffrey Epstein is being accused of," he said. "I strongly deny having committed any illicit act or any wrongdoing in the course of my work as a scouter or model agencies manager."

Too old at 19

In 2003, when Roberts turned 19, it was clear that Epstein had lost interest because she was too old for him, she said. She convinced him to pay for her to get training to become a real professional masseuse so that she could move on.

In an interview, she explained that Epstein arranged for her to take a class in Thailand, but it came with a hitch: She said she was instructed to pick up a Thai girl he had arranged to come to the States.

Roberts, who showed the Herald the written instructions for the rendezvous, never picked up the girl because Roberts met a man on the trip who would become her husband. The couple married and moved to Australia, where they currently live.

In 2007 — at the same time the FBI was investigating Epstein — Roberts, pregnant with her second child, said she unexpectedly received phone calls from Maxwell and Epstein. She said they were worried that she had told police about them. She assured them she had not spoken to anyone, she said.

Shortly afterward, Roberts said, she was contacted by someone who claimed to be with the FBI. But she was afraid to tell that person details, fearing it was really an Epstein associate posing as an FBI agent.

That agent, identified in court papers as Timothy Slater, confirmed that he and the other agent on the case, Nesbitt Kuyrkendall, called Roberts in January or February 2007. In a sworn statement, Slater said he informed Roberts that they suspected she was a victim of Epstein's.

The agent said Roberts answered basic questions, but became uncomfortable and "asked that I not bother her again."

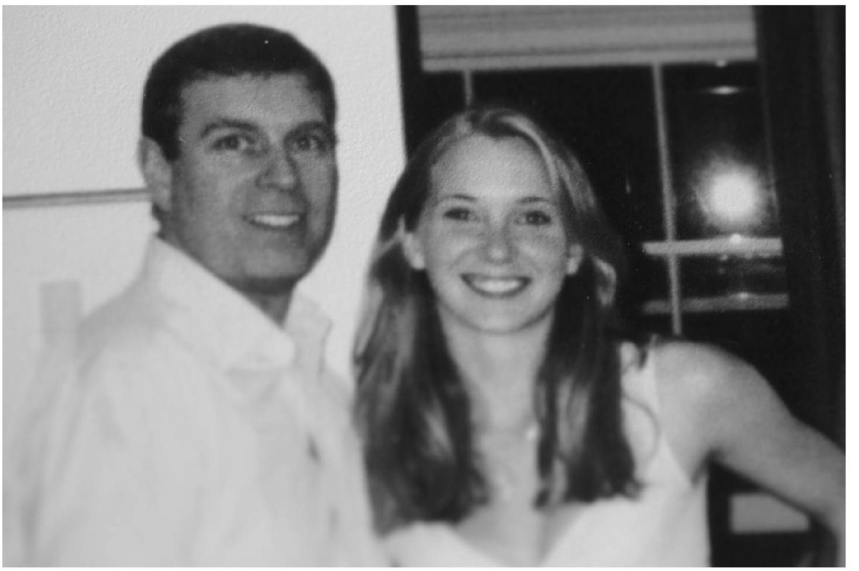
Roberts said the agent didn't try too hard to convince her to talk, and she was surprised when he hung up after asking her a few graphic questions about her sex life. She said she was suspicious, but would have cooperated had the FBI talked to her in person and explained why they were asking about Epstein.

"I was still scared to death," Roberts said. "Jeffrey used to tell me that he owned the entire Palm Beach Police Department. I just didn't want my family harmed."

She nevertheless was listed by federal prosecutors as one of Epstein's Palm Beach victims.

As the years went by and Roberts had a daughter, she would be haunted by a fear that Epstein was still taking advantage of young girls. In 2011, she went public in a paid interview with a British tabloid, the Daily Mail, asserting that she had had sex with Prince Andrew, one of Epstein's friends, several times when she was a teen.

In her 2015 affidavit, she discussed in detail some of her alleged sex encounters with the prince and Epstein's other friends, including lawyer Alan Dershowitz. Edwards included the affidavit in the court file as part of the Jane Does' Crime Victims' Rights Act case, at which time it became public.



Virginia Roberts says she was loaned out by Jeffrey Epstein to his friend Prince Andrew, shown here. He denies they had sex. *COURTESY OF VIRGINIA ROBERTS*

In the affidavit, Roberts claimed that Epstein and Maxwell directed her to have sex with Andrew and Dershowitz and others. She had sex with Andrew three times, she alleged — once in London, when she was 17, again in New York, when she was 17, and a third time, as part of an orgy on Epstein's island, when she was 18. By law, at 17, she would have been above the age of consent in New York and England, but not in Florida, where the age of consent is 18.

As part of the affidavit, Roberts furnished a photograph of her with the prince and Maxwell, which she said was taken in London.

Dershowitz, who was part of Epstein's criminal defense team, was often a guest at Epstein's homes, she said.

"I had sexual intercourse with Dershowitz at least six times," Roberts wrote in the 2015 court affidavit. "The first time was when I was about 16, early on in my servitude to Epstein and it continued until I was 19." She detailed some of those alleged trysts, which she said happened at Epstein's homes in Palm Beach, New Mexico and on Epstein's island.

One of Epstein's housemen, Juan Alessi, testified in a 2009 sworn deposition that Dershowitz visited Epstein's Palm Beach home four or five times a year. He said that Roberts was a frequent visitor as well, but he never placed Dershowitz and Roberts at the house at the same time.

Alessi, who testified he worked for Epstein from 1999 to 2002, said there were often young girls who gave massages at the house, even in the middle of the night. But he said he never checked their ages, and only knew one girl for certain who was underage, because he had picked her up from high school. That girl, who is now an actress, was not one of Epstein's masseuses, Alessi said.

He also said he was Maxwell's driver, and he recalls waiting outside of Mar-a-Lago the day Maxwell met Roberts. He testified he saw Maxwell talking to Roberts and recalls Roberts coming to Epstein's mansion later that day. One of Alessi's jobs was to drive Maxwell to various spas in Palm Beach where she left business cards in order to "recruit" more masseuses, he said in the sworn deposition.

Dershowitz, Prince Andrew and Maxwell have long denied Roberts' allegations.

In an interview with the Herald, Dershowitz reiterated that he had never met Roberts, and never saw Epstein with any underage girls.

"The story was 100 percent flatly categorically made-up," he said, adding that Roberts and her attorneys fabricated the assertion in order to get money from other powerful, wealthy people she alleges she had sex with.

"The only possible reason to accuse me in public and [them] in private is so she could get money," Dershowitz said.

Edwards and his co-counsel in the Crime Victims' lawsuit, University of Utah law professor Paul Cassell, sued Dershowitz for defamation and Dershowitz countersued in 2015. The case was settled out of court, with Dershowitz saying he had been vindicated.

Dershowitz said he received a massage at Epstein's Palm Beach home only once — but that it was just a regular, therapeutic massage by a masseuse — not by Roberts or anyone underage. Dershowitz's wife was there at Epstein's house at the time, Dershowitz said in the deposition taken for the case in 2015.

"I never had any knowledge of Jeffrey Epstein having any contact with any underage women — ever," Dershowitz told the Herald.

Edwards and Cassell admitted making a "tactical mistake" in filing the accusations against Dershowitz as part of a lawsuit not involving him. But they emphasized that the settlement had no bearing on the veracity of Roberts' allegations.

The judge for the Crime Victims' Rights Act lawsuit agreed that the affidavit was misplaced in that case, and it was dropped.

Prince Andrew's spokesman at Buckingham Palace did not respond to an email requesting comment.

Roberts, now 35, said it has taken her a long time to stand up to Epstein. She and 20 other victims received settlements from Epstein, ranging from $50,000 to more than $1 million. The exact amounts have been kept confidential.

"It takes so long until you are able to speak about it. It took me having a daughter and looking at this young, beautiful innocent baby to say I want to speak out about it now. I'm hoping that this will bring out more girls so that they say, Me Too."

The state court hearing

The judge at Epstein's sentencing hearing at the Palm Beach County Courthouse knew very little about Epstein's crimes. The sentencing paperwork was restricted to Epstein's specific charges: one count of solicitation of prostitution and one count of procuring a person under the age of 18 for prostitution.

"Are there more than one victim?" Circuit Court Judge Deborah Dale Pucillo asked the prosecutor at Epstein's sentencing on June 30, 2008.

"There's several," replied assistant state prosecutor Lanna Belohlavek.

"Are all the victims in both of these cases in agreement with the terms of this plea?" Pucillo later asked.

"Yes," Belohlavek replied, telling the judge that she had spoken to "several" of Epstein's victims.

Emails show that federal prosecutors didn't want the judge to know how many victims and accomplices there were.

Federal prosecutor A. Marie Villafaña — in a September 2007 email to Epstein lawyer Jay Lefkowitz — said: "I will mention co-conspirators but I would prefer not to highlight for the judge all the other crimes and all the other persons that we could charge."

Attorney Spencer Kuvin happened to be in court that day because he'd heard Epstein was to appear, but Kuvin didn't know why. He figured he'd use it as an opportunity to serve Epstein with civil court papers involving one of several victims he represented. Instead, he listened to what was happening and couldn't believe that no one had contacted him or his clients.

"I was shocked to learn that the proceeding involved my client's case and there was nothing I could do except watch as they disposed of her case without ever telling her," Kuvin said.

At the hearing, Belohlavek and Epstein's attorney, Goldberger, were in sync, the court transcript shows. Epstein would be required to register as a sex offender, but his probation would not be served under the strict requirements of sex offender probation.

Jeffrey Epstein is a registered sex offender in New York State and Florida. Emily Michot *EMICHOT@MIAMIHERALD.COM*

The judge didn't question those provisions, but she did ask why Epstein was going to serve his sentence in the Palm Beach County stockade instead of in a Florida state prison, like most sex offenders.

After he pleaded guilty in state court, Jeffrey Epstein was assigned to a private section of the Palm Beach County stockade. Soon, however, he was allowed to leave the compound six days a week, 12 hours a day, for what was termed work release. Emily Michot *EMICHOT@MIAMIHERALD.COM*

"We just decided that was the best way to accomplish what needed to be done here and the parties agreed that that sentence satisfied everyone's requirements,'' Goldberger replied.

Said Judge Pucillo: "The taxpayers of Palm Beach County are going to pay 18 months to house this guy instead of DOC [the Department of Corrections]?"

Belohlavek: "Right.''

Pucillo did not respond to a request for comment on the case.

Villafaña, the lead federal prosecutor in Epstein's case, was in the courtroom, but there's no indication she objected to Epstein's cozier jail accommodations.

When he entered jail in July 2008, Epstein was arguably the most well-known inmate there. Records also show that Epstein hired Palm Beach sheriff's deputies for his security details, paying them for the hours they spent monitoring him on work release at his West Palm Beach office, where he often stayed until 10 p.m., jail logs show.

The Herald reviewed their time sheets, showing that the deputies logged visitors coming and going to and from his office throughout the day. A record log of his visitors was kept in a safe, but the log no longer exists, according to a spokeswoman for the Palm Beach County Sheriff's Office.

One deputy who often worked Epstein's detail said that his assignment was to stay in a front reception room of Epstein's office. Epstein was in a separate office — with the door closed — most of the day as he accepted visitors, both male and female, the deputies' logs show.

"It was not our job to monitor what he was doing in that office,'' the deputy, now retired, told the Herald.

In their early reports in July 2008, the deputies referred to Epstein as "inmate'' but within a few weeks the language had changed and he was called a "client." He was occasionally allowed to take a break for lunch by sitting outside in a park, the records show, and they also gave him permission to scout for a new office. While on work release, he was required to wear an ankle bracelet to monitor his whereabouts.

The work release was approved by the Palm Beach County Sheriff's Office, said spokeswoman Therese Barbera.

"Jeffrey Epstein, while in custody, met the criteria for the Work Release Program," Barbera wrote in an email. "There was no factual basis to deny Mr. Epstein the same availability of this program that is offered to other inmates under similar circumstances. Mr. Epstein was closely monitored and there were no problems encountered during his time in the program."

But the sheriff's own work release policy — a copy of which Barbera provided to the Herald — specifically notes that sex offenders aren't eligible for work release.

While officially confined to the Palm Beach County stockade, serving time for his sex offenses, Jeffrey Epstein was allowed to spend half his day at this West Palm Beach office building. It was called work release, although Palm Beach Sheriff's Office rules prohibit work-release status for sexual offenders. Emily Michot *EMICHOT@MIAMIHERALD.COM*

At first, Barbera questioned whether Epstein was a sex offender at all, noting that he didn't have to register officially until after his release from the jail in 2009. But his court papers clearly listed him as a sex offender. In fact, the papers Epstein signed — obtained by the Herald — included all the laws governing registered sex offenders in Florida.

Barbera refused to explain why Epstein was seemingly allowed to deviate from the agency's policies. She also would not respond to requests for an accounting of the amount of money that Epstein paid the sheriff's office for his private details.

Palm Beach Sheriff Ric Bradshaw, who has been in office since 2004 — and is widely considered to be one of the most powerful people in the county — did not respond to requests for comment.

A spokeswoman for Palm Beach County Sheriff Ric Bradshaw declined to say why Jeffrey Epstein was allowed work-release status despite rules prohibiting work release for sex offenders. Taylor Jones *PALM BEACH POST*

Epstein's registration requirements are somewhat confusing, even to those who are responsible for keeping his registration. The Florida Department of Law Enforcement, which keeps the online registry, and the Palm Beach County Sheriff's Office, where Epstein has to register in person twice a year, gave

conflicting explanations over the past six months about who is responsible for ensuring that he is complying with the law.

On Nov. 14, the Herald asked the sheriff's office for a full accounting of Epstein's check-ins for 2018. The record the office supplied two days later showed he registered in January and in July — as required. But PBSO also inexplicably had him registering on Nov. 14 — the very same day that the Herald asked for the records from the sheriff's office.

When asked about this sudden registration, Barbera replied: "The information we provided you was a snapshot from the FDLE website. Perhaps, someone from FDLE can provide a reason for you."

Said FDLE spokeswoman Gretl Plessinger in an email: "The screenshot is not on the public registry. This is information inputted by the local agency when the offender comes into the local sheriff's office to register."

Plessinger said Epstein is not covered by the state's new three-day rule, which requires sex offenders to re-register when they come to stay in Florida for three days or more. His town of Palm Beach home is already on file, as a temporary residence, she said.

So it's not clear why he would have suddenly registered a third time on Nov. 14.

State Sen. Lauren Book, a child sex abuse survivor and vocal advocate for tough sex offender monitoring, called the case an appalling example of how those in the justice system allow wealthy people to skirt the law and bend the rules.

"These prosecutors, and judges and sheriffs who are making these decisions and allowing things to fly — we have to hold these people accountable. They are supposed to uphold the law — regardless of who a person is and how much money they have in the bank or who they had on their airplane."

Piece by piece

Over the years, Courtney Wild, Virginia Roberts and more than a dozen other women who say they were victims of Epstein have been quietly challenging the traditional legal norms that have failed to punish Epstein and other men in positions of power for sexual abuse.

Epstein has paid millions of dollars in civil compensation that, for the most part, has kept the details about his operation out of the public eye. As a result, much — but not all — of the testimony and evidence collected as part of the vast litigation has been sealed or redacted from public court records.

The girls who were abused by Jeffrey Epstein and the cops who championed their cause remain angry over what they regard as a gross injustice, while Epstein's employees and those who engineered his non-prosecution agreement have prospered.

By

Taking a page from Epstein's legal team, lawyers representing Epstein's victims hired private investigators and former police detectives to dig into Epstein's life. Over the past decade, they've tracked down hundreds of people, including dozens of other potential victims; they've interviewed Epstein's recruiters, bookkeepers, housekeepers, butlers, pilots and drivers. They've traveled around the country and the world, taking statements and sworn depositions, coaxing people to talk who had previously been too reticent to come forward.

In short, they did what criminal prosecutors didn't do.

Some of the information they've learned was given to federal authorities in New York. Edwards said those authorities have shown no interest in opening a new investigation focused on crimes he is alleged to have committed in that state, where he is listed as a level 3 sex offender, the most dangerous category, considered at risk to re-offend, records show. In New York, he has to register every 90 days.

Virginia Roberts holds a photo of herself at age 16, when she says Palm Beach multimillionaire Jeffrey Epstein began abusing her sexually. Emily Michot
EMICHOT@MIAMIHERALD.COM

Holding abusers accountable

In 2015, Roberts sued Maxwell for defamation in New York after Maxwell called her a liar in a news interview. The civil lawsuit was an effort by Roberts not just to clear her name, but an attempt to prove that Epstein and Maxwell operated an international underage sex trafficking operation. The lawsuit was settled out of court in 2017 and nearly all the evidence presented in the case has been sealed.

Roberts' attorney, Sigrid McCawley, claims that Roberts received a sizable settlement, although the amount is confidential.

"She wanted to hold her abusers accountable and we were able to do that by bringing this case ... which we ultimately settled very successfully for her," said McCawley, an associate of noted Bush-Gore recount lawyer David Boies, who has also pursued cases against Epstein in federal court in New York.

Maxwell's lawyer, Laura Menninger, declined to comment, referring the Herald to the court history.

"[Roberts] fabricated a story of abuse at the hands of Ms. Maxwell in exchange for hundreds of thousands of dollars from British tabloids with a motive for selling papers and advertisements and without regard for truth, veracity or substantiation," Menninger noted in a 2016 response filed in the case.

In February, the Miami Herald filed a federal court motion in the Southern District of New York, seeking access to documents that were sealed in the Maxwell case. The motion, which was not opposed by Roberts, could have cast light on the full scope of Epstein's possible sex trafficking operation, who was involved and whether it was covered up. Maxwell has opposed the Herald's motion, which was denied in August.

The Herald is appealing.

Today, Epstein has a new private jet, which takes him around the world. Flight records show that he spends most of his time on his private island, Little St. James in the U.S. Virgin Islands, which he now lists as his permanent residence. He is registered in New York and the U.S. Virgin Islands as a sex offender. New Mexico, where he owns a sprawling ranch, does not list him as a convicted sex offender.

As part of its investigation, the Herald learned that in 2013, the federal government conceded that it had given Epstein what it called "valuable consideration" for information he provided to the FBI as part of his plea deal. The documents do not elaborate, but Epstein — a hedge fund manager who once worked for the investment firm Bear Stearns — was listed as a key investor who lost money in the financial crash of 2008.

Francey Hakes, a former federal child sex crimes prosecutor, said any consideration the government gave to Epstein should be made public.

"The public has a right to know why he got a slap on the wrist, and what was the interest that was so great that allowed him to not get prosecuted?"

Nadia Marcinkova, now a professional pilot, worked for Jeffrey Epstein when he was molesting young women. Victims told police Marcinkova would participate in sex acts, often as Epstein choreographed every move. Jerod Harris

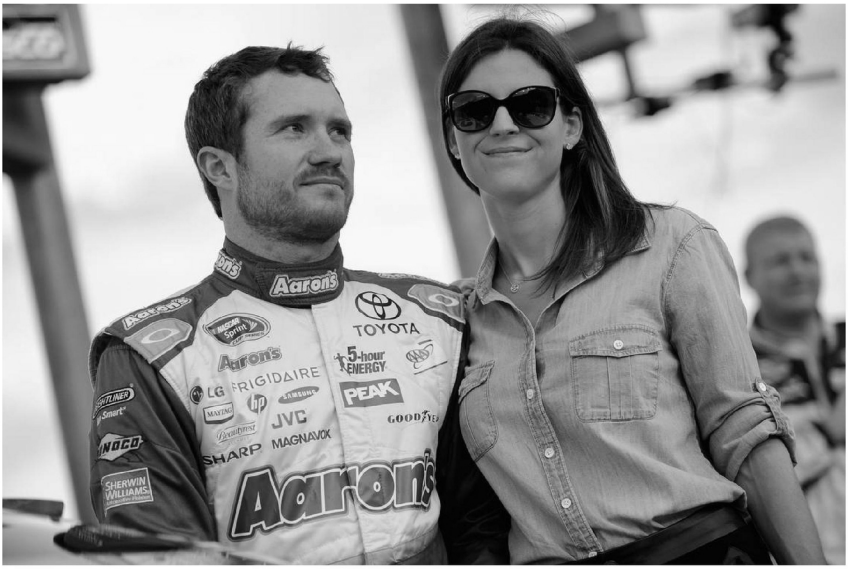
In recent years, Epstein has been traveling the world in his new Gulfstream V jet. He has been active in various charitable causes and scientific research projects. The Jeffrey Epstein VI Foundation, based in the U.S. Virgin Islands, has helped fund NeuroTV, an online network that features interviews with academics and scientists.

Then and now

Both Nadia Marcinkova and Sarah Kellen changed their names after the scandal.

Marcinkova, 32, briefly became Marcinko. She visited Epstein more than 70 times when he was in Palm Beach custody. She went on to a career in real estate. And she is now an FAA-certified commercial pilot and flight instructor who goes by the name "Global Girl" on social media. (www.facebook.com/GlobalGirlAviation/)

Sarah Kellen, who used the name Kensington for a while, is now married to NASCAR driver Brian Vickers. The couple divides their time between homes in North Carolina, New York and Miami Beach.



NASCAR driver Brian Vickers and his wife, Sarah, take part in pre-race ceremonies in Sparta, Ky., on June 28, 2014. She was known as Sarah Kellen when she was an aide to Jeffrey Epstein. According to police, she scheduled visits of underage girls to Epstein's Palm Beach estate for massages that turned sexual. She was not charged with a crime. Will Schneekloth *GETTY IMAGES*

Maxwell, 56, transformed herself into an internationally known environmentalist. In 2012, she founded the TerraMar Project, a nonprofit environmental group that works to protect the world's oceans. In 2013, she gave a TED Talk on ocean conservation, discussing her diving expeditions around the world.

Dershowitz, 80, continues to lecture around the country. A professor emeritus at Harvard Law School, Dershowitz has been a frequent commenter on cable TV programs, often defending President Trump.

Prince Andrew, the Duke of York, 58, remained friends with Epstein, and in 2010, a photograph was taken of the two of them strolling in Manhattan. It was later revealed that Epstein had loaned the prince's ex-wife, Sarah Ferguson, $24,000 to pay off some debts. Ferguson later called the loan a "gigantic error of judgment."

Plain human beings

Crime victims' rights advocates have used the Epstein case to strengthen the federal law in recent years, adding more precise language mandating that prosecutors notify victims about plea bargains and allow victims to be heard at sentencing.

Because some statute-of-limitation laws set deadlines for filing civil and criminal sex crime cases, it's difficult to bring them years later, said Marci Hamilton, a University of Pennsylvania professor who is working to ease

those restrictions across the country.

Ghislaine Maxwell, daughter of a British press magnate and Jeffrey Epstein's close associate when he was inviting underage girls into his bedroom, leads a TED Talk on environmental issues.

But she points out that there has been no statute of limitations for federal sex crimes involving children since 2002.

Children who are sexually abused often take decades to reveal what happened to them, in part because their brains aren't wired at a young age to understand the trauma they've experienced, said Kenneth V. Lanning, a retired FBI agent who investigated and studied child sex crimes for 40 years.

"We want to hold children to some superhuman standard because they behave this way. In reality, police, prosecutors and judges have to understand that children are not all angels from heaven. They are just plain human beings who are emotionally immature so we have to protect them from their own decisions."

Wild, who continues to fight her federal case on behalf of all of Epstein's victims, said she hopes that the federal judge hearing the Crime Victims' Rights case will make a ruling soon, one that will send a message to prosecutors who fail to consider the rights of crime victims.

"Really if you think about this too hard, it's scary because this is our government that is supposed to protect us but has done everything to protect a pedophile," she said.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

Your digital subscription, starting at $0.99 for the first month, supports investigative journalism like this.

EXHIBIT 16

Miami Herald

An Epstein sex case is settled; Dershowitz denies latest allegation

BY JULIE K. BROWN

DECEMBER 19, 2018 8:30 PM, UPDATED DECEMBER 27, 2018 7:55 AM

Accused sex traffickers Jeffrey Epstein and Ghislaine Maxwell have settled a federal civil lawsuit filed by a woman who says she was ordered under threat of violence to have sex with them and other influential individuals when she was in her early 20s, sources confirmed Wednesday.

Sarah Ransome, who now lives in Barcelona, claimed that she was recruited and trafficked for sex by the pair in 2006 and 2007 — at the same time that Epstein, a wealthy New York hedge fund manager, was under federal investigation for molesting dozens of underage girls at his Palm Beach mansion.

Women who say they were victims of sexual abuse at the hands of Palm Beach multimillionaire Jeffrey Epstein want a judge to throw out his lenient plea deal. AP

According to a recent court transcript, among those people Ransome claims she was directed to have sex with was Epstein's lawyer, Alan Dershowitz, who helped negotiate a controversial plea

deal that gave the eccentric multimillionaire — and co-conspirators employed by Epstein — federal immunity in 2008.

Dershowitz, 80, told the Miami Herald that he has never met Ransome nor has he ever had sex with her. He accused Ransome's attorney, powerhouse lawyer David Boies, of inventing the story and using her and another woman, Virginia Roberts, to frame him. Roberts asserted in a federal court affidavit in 2015 that Epstein forced her to have sex with Dershowitz when she was 16 years old.

"I am the victim. David Boies and these women are the perpetrators," Dershowitz said. "They have willfully and deliberately concocted stories in order to make money — millions and millions of dollars. And I will not rest until the entire story comes out," said Dershowitz, a professor at Harvard Law School and frequent Fox news guest commentator.

Nowhere in the court case or the transcript does Ransome or anyone else allege that Ransome had sex with Dershowitz — only that she was directed to.

The Ransome settlement, which is confidential, comes two weeks after Epstein settled another lawsuit in Palm Beach, filed by an attorney who represented several women who said they were coerced into sex acts with Epstein when they were underage. As part of the settlement, Epstein, 65, issued an apology to Fort Lauderdale attorney Bradley Edwards, admitting that he leveled false claims in a lawsuit as part of an effort to intimidate Edwards into abandoning his aggressive advocacy for the women, who are now in their late 20s and early 30s.

The developments follow a series of stories published by the Miami Herald in late November that detailed how state and federal prosecutors worked with Epstein's lawyers to conceal the extent of Epstein's crimes, and secretly negotiated an unusual plea agreement that allowed him to escape federal sex trafficking charges that could have sent him to prison for life. The agreement, by design, was kept from his victims so that they could not appear at his sentencing.

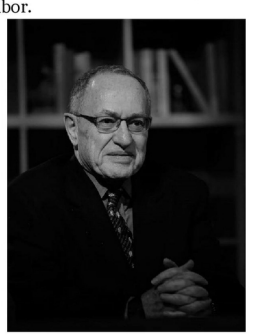
Last week, more than two dozen lawmakers in Washington demanded a federal investigation into that plea deal, which was negotiated, signed and sealed by former Miami U.S. Attorney Alexander Acosta, now President Donald Trump's secretary of labor.

Acosta has not commented on the Herald story or on the calls for a probe into how he handled the Epstein case.

This week, a decade after defending Epstein, Dershowitz once again found himself in the spotlight amid the new allegations, mentioned briefly in a court filing on Nov. 28, and first reported on Tuesday by the New York Daily News.

During a Nov. 7 hearing, Maxwell's lawyer, Laura Menninger, mentioned Dershowitz's name as among those "third parties" that Ransome claims she was instructed to have sex with, according to a transcript of the hearing obtained by the Herald.

On Tuesday, after the Daily News published its story, Dershowitz lashed out in dozens of posts on Twitter, denouncing Ransome as "delusional" and claiming that her lawyer, Boies, was retaliating against him because Dershowitz had filed a bar complaint against him.



Alan Dershowitz says he has never met the woman who alleges in a lawsuit she was ordered to have sex with influential men, including the famous lawyer. John Lamparski GETTY IMAGES/TNS

"Attorney David Boies threatened that unless I withdrew a bar complaint I had filed against him for falsely accusing me of sexual misconduct, he would find another woman to accuse me of similar misconduct. He has

now found an unbalanced woman who has delusions of having sex tapes of Donald Trump, Hillary Clinton, Bill Clinton and other prominent figures," Dershowitz said in a tweet.

Boies, best known for arguing on behalf of Vice President Al Gore in the 2000 Florida election recount, responded in an interview with the Herald:

"[Dershowitz's] charges are absurd. Either he has become totally unhinged or he thinks that if he says things that are loud enough and crazy enough it will distract attention from what he has done. There is no support — none — for what he says."

Ransome claimed that, in her early 20s, she was recruited to work as a masseuse for Epstein who, in exchange, promised he would help her get into fashion design in New York, according to her civil lawsuit, filed in January 2017. Epstein and Maxwell then kept her passport and threatened to ruin her life and physically harm her if she didn't have sex with them and others in 2006 and 2007, Ransome said in the complaint.

The complaint alleges that this all occurred at the same time as Epstein's lawyers were negotiating with Acosta and other federal prosecutors for a deal to avoid federal sex trafficking charges in connection with a scheme in which he lured underprivileged girls, mostly 13 to 16, to his home in Palm Beach under the pretense that he would pay them $200 to $300 for massages. Instead, police in Palm Beach found that he had been molesting and sexually abusing dozens of girls between 2001 and 2007.

In this photograph, Virginia Roberts socializes with Prince Andrew as Jeffrey Epstein associate Guislaine Maxwell stands in the background. Roberts claims she was effectively used as a sex slave by Epstein. In that capacity she had sex with the prince, Roberts says. The prince denied that. COURTESY OF VIRGINIA ROBERTS

Under the plea deal, known as a non-prosecution agreement, Epstein was allowed to plead guilty in state court to two prostitution charges. He served 13 months in a private wing of the Palm Beach County jail, where he was given liberal work release privileges. The deal also quashed an FBI investigation into whether Epstein was operating an international sex trafficking organization, the Herald found as part of its yearlong investigation.

"Even as [Epstein, Maxwell and other defendants] and their attorneys were busy arguing Epstein's innocence and publicly defaming his victims as liars...defendants merely changed their location" from Palm Beach to "other places in the U.S. [including the Southern District of New York] and abroad and brought them to Epstein's mansion in New York City and his private island in the Virgin Islands," Ransome's complaint alleged.

Dershowitz, in interviews with the Herald, and in recent public statements, said he has never met Ransome. He also said she initially tried to interest the New York Post in her story, but a reporter whom he said he spoke with told him Ransome was not credible. He said he has a trove of emails between Ransome and the reporter that prove she is a "lunatic."

"There are hundreds of emails in which she claimed to have sex with everybody in the world and also claimed she has video of Hillary Clinton, Bill Clinton, Donald Trump and others having sex with underage girls — but she never ever accused me in these emails," Dershowitz said.

The emails are under seal, he said, and therefore cannot be made public. Dershowitz said he has asked the court to unseal them but his efforts thus far have been unsuccessful.

In the recent court transcript, however, it is Maxwell's attorney, Laura Menninger — not Ransome or her attorneys — who named Dershowitz.

"[Ransome] has alleged not only that my client [Maxwell] ran a sex trafficking organization but she claims also that she was directed by my client and the Epstein defendants to have sex with third parties, including Alan Dershowitz, for example," Menninger said. "And so to the extent my client or Mr. Dershowitz or anyone else is going to be asked about their private sexual activity, I believe that would implicate their privacy rights..."

Roberts, who now lives in Australia, said that Epstein ordered her to have sex with Dershowitz six times, according to a 2015 affidavit, which was filed in connection with an unrelated Epstein federal lawsuit.

At that time, Dershowitz launched a media blitz on TV asserting that Roberts made up the story. He also called for Roberts' lawyers — Edwards and University of Utah law professor Paul Cassell — to be disbarred. The lawyers sued Dershowitz for defamation, and the case was settled last year.

Dershowitz publicly declared he was vindicated after a federal judge ordered Roberts' affidavit stricken from the court record. But the judge did not address the veracity of her sexual misconduct claims; he instead ruled that the affidavit was misplaced in a case not involving Dershowitz.

Boies, whose firm represented Roberts pro bono, addressed Dershowitz's longstanding contention that he had been exonerated.

"Anytime in a lawsuit where you were the defendant and you paid the plaintiff $900,000 to settle it — that's a strange kind of vindication," Boies said, asserting that Dershowitz paid that amount as part of the defamation settlement with Edwards and Cassell.

In 2016, Dershowitz released a statement following what he said was "an independent investigation" that had been conducted by former FBI Director Louis Freeh, who is now a private consultant.

"Our investigation found no evidence to support the accusations of sexual misconduct against Professor Dershowitz. In fact, in several instances, the evidence directly contradicted the accusations made against him," Freeh wrote.

Most of the court records in the Roberts case are sealed. In February, the Miami Herald filed a motion in the Southern District of New York, seeking access to documents. The motion, which was not opposed by Roberts, could shed more light on the full scope of Epstein's crimes and who was involved.

The motion was denied. The Herald is appealing.

https://www.miamiherald.com/latest-news/article223315075.html

EXHIBIT 3

Alan Dershowitz: 'I never had sex with Virginia Roberts' | Miami Herald

miamiherald.com/opinion/letters-to-the-editor/article222532470.html

In its series on the Jeffrey Epstein case, "Perversion of Justice," the Herald quotes an affidavit by Virginia Roberts — a woman I never met — claiming she had sex with me on Epstein's island, ranch, plane and mansion. It then simply says I "denied" it.

In fact, I disproved it. I produced my travel, phone, credit card and TV appearance records, conclusively proving that I could not have been and was not in any of these places during the time Roberts knew Epstein. The former FBI director, assisted by a former assistant U.S. attorney and a chief federal marshal, reviewed these records and the other evidence and concluded that, "The totality of the evidence found during the investigation refutes the allegations."

There is other evidence, currently under seal, that directly establishes my innocence. I am seeking to unseal emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons."

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There is also irrefutable evidence that Roberts lied about other people for money. She told a British tabloid that she met Al and Tipper Gore on Epstein's island and swore that she had dinner with Bill Clinton on the island. But Secret Service records prove that none of these people were on the island. Indeed, the Gores didn't even know Epstein.

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I have a tape recording of a conversation with Roberts' closest friend in which she says that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from a wealthy businessman, and that Roberts had never previously included me among the people with whom she claimed to have had sex.

Finally, one of Roberts' own lawyers has acknowledged in front of witnesses that her claims against me are "wrong" "simply wrong."

The evidence of my innocence is indisputable: I never met Roberts; I never had sex with her; she simply made up the entire story for money.

Roberts made her false claims against me in court documents that immunize her from being sued for defamation. I challenge her to repeat her false accusations out of court, so that I can sue her for defamation and let a jury decide — after seeing all the evidence,

including the suppressed emails and book manuscript — who is telling the truth and who is lying.

From: J [jeevacation@gmail.com]
Sent: 4/23/2019 9:55:44 AM
To: Steve Bannon [redacted]
Subject: Re: Netflix/Jeffrey Epstein

patterson book on my a flop and his work with clinton worse. hes old. but has a name. there is also john conally. hes on it as well

On Tue, Apr 23, 2019 at 11:54 AM Steve Bannon <[redacted]> wrote:
and Patterson's not!!

On Apr 23, 2019, at 5:53 AM, J <jeevacation@gmail.com> wrote:

berlinger is a bit of a hack. when you get a moment give me a call

On Tue, Apr 23, 2019 at 11:34 AM Steve Bannon <[redacted]> wrote:
Patterson , the Perversion of Justice Team , and the guy making the 'Ted Bundy' film --- sounds like a potential hagiography

On Apr 23, 2019, at 3:32 AM, J <jeevacation@gmail.com> wrote:

---------- Forwarded message ---------
From: **Peggy Siegal** <[redacted]>
Date: Tue, Apr 23, 2019 at 4:08 AM
Subject: Fw: Netflix/Jeffrey Epstein
To: Jeffrey Epstein <jeevacation@gmail.com>

Jeffrey....how much do you know about this?
When can I call you tomorrow? I know nothing but have friends at Netflix.

Eleanora Kennedy called me today....out of the blue...and told me the film makers wanted to talk to me. I know director Joe Berlinger, not well, but may have done a screening on one of his films. Would have to check.

I am around all day tomorrow.
xoxo Peggy

From: Timothy Jones <[redacted]>
Sent: Monday, April 22, 2019 4:16 PM
To: [redacted]
Subject: Netflix/Jeffrey Epstein

Dear Peggy,

My good friend Eleanora reached out to you on my behalf and I appreciate you wanting to hear more about this project.

I am a TV journalist who covered the Epstein story for several years and wrote a best selling book about him with James Patterson in 2016.

Jim Patterson and I are now consulting on a four hour Netflix documentary series tentatively set to air towards the end of the year.

The showrunner, Lisa Bryant, is working with director Joe Berlinger whose work I am sure you are familiar with, to produce a fair and balanced, in-depth recounting of the Epstein saga that, as you know, has every possible dramatic angle and is a story like no other.

We thought of you because of your remarkable reputation in the public relations and show business world and the fact that you were an acquaintance of Jeffrey Epstein.

The tawdry side of the story has been told...We hope you can give us some insight and context into who he was before his life fell apart.

I am sure that Lisa Bryant,Joe Berlinger and Jim Patterson would all make themselves available to get on a call with you this week.

Jim is in Florida,and Joe is traveling overseas for his Ted Bundy film.
Lisa is in New York and would be happy to meet you in person as would I.

Thanks for giving this your consideration.

Best,
Tim Malloy

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tain general jurisdiction over them, all claims asserted against those individual defendants are dismissed for lack of personal jurisdiction.

3. *Plaintiffs Are Entitled to Jurisdictional Discovery as to Privatbank's Investing Activities in the United States*

[37] Plaintiffs point out that Privatbank's website and its 2001 Annual Report state that Privatbank engages in transactions involving securities issued in the United States. (2001 Annual Report at 3, attached to Affidavit of Frances E. Bivens at Exhibit B). There is no allegation that transactions are related to the claims asserted here. Accordingly, they are only relevant to this Court's determination of whether the exercise of general jurisdiction over Privatbank is warranted pursuant to Rule 4(k)(2) for having such "continuous and systematic general business contacts" with the United States. *See Aerogroup Int'l, Inc.*, 956 F.Supp. at 439.

Because plaintiffs have identified a genuine issue of jurisdictional fact, the question of general jurisdiction cannot be resolved on the pleadings and affidavits alone. Thus, plaintiffs are entitled to jurisdictional discovery regarding the extent of defendant Privatbank's general business contacts with the United States in the years 1992—1998, a period that includes the relevant period in this action and five preceding years. *See In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 207–08; *see also, Metropolitan Life Ins. Co.*, 84 F.3d at 569–70 (holding that the time period relevant for determining extent of a defendant's contacts for general jurisdiction purpose should include a number of years prior to the events giving rise to the claims asserted).

IV. CONCLUSION

For the reasons set forth above, the Sovereign defendants' motion to dismiss is granted in part and denied in part. Plaintiffs' claims alleging takings in violation of international law, promissory estoppel, equitable estoppel, and unjust enrichment—counts seven, nine, and ten in the complaint—are hereby dismissed as against the Sovereign defendants. In addition, the motion of individual defendants Horath and Buchmann to dismiss the complaint for lack of personal jurisdiction is granted and all claims asserted against those defendants are hereby dismissed.

Because this Court finds that an issue of jurisdictional fact exists as to the existence of general jurisdiction pursuant to Rule 4(k)(2) as to corporate defendant Privatbank, its motion to dismiss is denied without prejudice to its renewal pending conclusion of jurisdictional discovery on that issue.

In re: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Burnett v. Al Baraka Inv. & Dev. Corp. Ashton v. Al Qaeda Islamic Army Tremsky v. Qsama Bin Laden Salvo v. Al Qaeda Islamic Army Burnett v. Al Baraka Inv. & Dev. Corp. Federal Insurance v. Al Qaida Barrera v. Al Qaeda Islamic Army Vigilant Insurance v. Kingdom of Saudi Arabia

Nos. 03 MDL 1570(RCC), 02 CIV. 1616, 02 CIV. 6977, 02 CIV. 7300, 03 CIV. 5071, 03 CIV. 5738, 03 CIV. 6978, 03 CIV. 7036, 03 CIV. 8591.

United States District Court,
S.D. New York.

Jan. 18, 2005.

Background: Survivors, family members, and representatives of victims of Septem-

ber 11, 2001 terrorist attacks, as well as insurance carriers, brought actions against al Qaeda, al Qaeda's members and associates, alleged state sponsors of terrorism, and individuals and entities who allegedly provided support to Al Qaeda, asserting causes of action under Torture Victim Protection Act (TVPA), Antiterrorism Act (ATA), Alien Tort Claims Act (ATCA), and Racketeer Influenced and Corrupt Organizations Act (RICO), as well as claims for aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery. Actions were consolidated by Multidistrict Litigation Panel. Various defendants filed motions to dismiss.

Holdings: The District Court, Casey, J., held that:

(1) jurisdictional discovery was warranted on issue whether Saudi Arabian bank was immune under Foreign Sovereign Immunities Act (FSIA);

(2) claims against Saudi Arabia and two of its officials based on alleged contributions to charities were not subject to commercial activities exception of FSIA;

(3) complaint alleging that Saudi Princes contributed to charities that supported al Qaeda failed to allege causal connection sufficient to satisfy New York standard for concerted action liability, for purposes of torts exception of FSIA;

(4) claims against Saudi Arabian Prince arising from alleged contributions to charities were barred by discretionary function exception to torts exception of FSIA;

(5) claims against Saudi Arabian Prince arising from alleged decisions regarding treatment of Taliban and al Qaeda leader were barred by discretionary function exception to torts exception of FSIA;

(6) claims against Saudi Arabia arising from alleged decisions to make charitable contributions were barred by discretionary function exception to torts exception of FSIA;

(7) survivors failed to make prima facie showing necessary to establish personal jurisdiction over Princes and others under New York's long-arm statute;

(8) modified due process standard appropriate for mass torts would not be applied to question of personal jurisdiction;

(9) allegations were insufficient to establish general personal jurisdiction over Princes;

(10) survivors failed to establish personal jurisdiction over founder of Saudi Arabian company;

(11) limited discovery would be permitted with regard to whether Saudi Arabian bank's contacts with United States were sufficient for exercise of personal jurisdiction;

(12) survivors failed to establish personal jurisdiction over director of charity;

(13) jurisdictional discovery was warranted to determine if Saudi Arabian construction company purposefully directed its activities at United States;

(14) jurisdictional discovery was warranted to determine which of charitable network's entities had presence in Virginia, for purposes of personal jurisdiction;

(15) survivors made prima facie showing of personal jurisdiction over bank chairman;

(16) survivors failed to state cause of action under RICO;

(17) attacks were extreme and outrageous, as required for intentional infliction of emotional distress;

HOUSE_OVERSIGHT_017831

(18) survivors failed to state cause of action under ATA against banks; and

(19) survivors stated cause of action against bank chairman under ATA.

Order accordingly.

1. Federal Courts ⟹157

Although district court would review and give deference to opinion issued by judge of another district court prior to transfer of case by Multidistrict Litigation Panel, district court was required to evaluate motions to dismiss on merits de novo, and was bound by Second Circuit law, not District of Columbia law, which was applied by the other district court. 28 U.S.C.A. § 1407; Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

2. International Law ⟹10.38

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction. 28 U.S.C.A. § 1602 et seq.

3. International Law ⟹10.31

The exceptions to immunity provided by the Foreign Sovereign Immunities Act (FSIA) provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities in federal court. 28 U.S.C.A. § 1602 et seq.

4. International Law ⟹7

A federal court must inquire at the threshold of every action against a foreign state whether the exercise of its jurisdiction is appropriate.

5. International Law ⟹10.38

On a motion to dismiss challenging subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), the defendant must first present a prima facie case that it is a foreign sovereign; in response, the plaintiff must present evidence that one of the statute's exceptions nullifies the immunity. 28 U.S.C.A. § 1602 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

6. International Law ⟹10.38

In challenging the District Court's subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA) on a motion to dismiss, the defendants retain the ultimate burden of persuasion. 28 U.S.C.A. § 1602 et seq.; Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

7. International Law ⟹10.38

The District Court must consult outside evidence if resolution of a proffered factual issue may result in the dismissal of a complaint, pursuant to the Foreign Sovereign Immunities Act (FSIA), for lack of jurisdiction. 28 U.S.C.A. § 1602 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

8. Federal Civil Procedure ⟹1264

A delicate balance exists between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign's agency's legitimate claim to immunity from discovery. 28 U.S.C.A. § 1602 et seq.

9. International Law ⟹10.38

In deciding whether a defendant is entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), the District Court gives great weight to any extrinsic submissions made by the foreign defendant regarding the scope of his official responsibilities. 28 U.S.C.A. § 1602 et seq.

10. International Law ⟹10.33

Director of Saudi Arabia's Department of General Intelligence (DGI) was immune from Antiterrorism Act (ATA) suit by survivors of victims of Septem-

ber 11, 2001 attacks for his official acts, notwithstanding that he was also Saudi Arabia's ambassador to United Kingdom, unless exception to Foreign Sovereign Immunities Act (FSIA) applied. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603.

11. International Law ⟹10.33

Saudi Arabia's Minister of Defense and Aviation, as third-highest ranking member of Saudi government, was immune from Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks for his official acts, unless exception to Foreign Sovereign Immunities Act (FSIA) applied. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603.

12. International Law ⟹10.34

Saudi Arabia's ownership of bank was required to be direct for bank to enjoy immunity, pursuant to Foreign Sovereign Immunities Act (FSIA), from Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks; that is, bank would not be immune as instrumentality of Saudi Arabia if its majority owner, known as Public Investment Fund (PIF), was agency, instrumentality, or organ of Saudi Arabia. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603(b)(2).

13. Federal Civil Procedure ⟹1264

Limited jurisdictional discovery was warranted, on Saudi Arabian bank's motion to dismiss Antiterrorism Act (ATA) suit filed by survivors of victims of September 11, 2001 attacks, on issue whether bank was immune under Foreign Sovereign Immunities Act (FSIA), where resolution of status of bank's majority owner was not determinable on current record, majority owner might qualify either as organ or political subdivision of Saudi Arabia, and parties' affidavits had not been subjected to cross examination and were self-serving. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1603(b)(2); Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

14. International Law ⟹10.33

In deciding whether to apply the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA), courts must inquire whether the foreign state's actions are the type of actions by which a private party engages in trade and traffic or commerce. 28 U.S.C.A. § 1605(a)(2).

15. International Law ⟹10.33

To extent that Antiterrorism Act (ATA) claims against Saudi Arabia and two of its government officials by survivors of victims of September 11, 2001 attacks were based on defendants' alleged contributions to charities, those alleged acts were not commercial and thus were not subject to commercial activities exception of Foreign Sovereign Immunities Act (FSIA), even if alleged acts constituted money laundering. 18 U.S.C.A. §§ 1956, 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

16. International Law ⟹10.33

For purposes of the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA), a commercial activity must be one in which a private person can engage lawfully. 28 U.S.C.A. § 1605(a)(2).

17. International Law ⟹10.33

Since money laundering is an illegal activity, it cannot be the basis for applicability of the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 1956; 28 U.S.C.A. § 1605(a)(2).

18. International Law ⟹10.33

Foreign Sovereign Immunities Act (FSIA) exception for state sponsors of terrorism did not apply to Antiterrorism Act (ATA) claims against Saudi Arabia and two of its government officials by survivors of victims of September 11, 2001 attacks,

HOUSE_OVERSIGHT_017833

where parties agreed that Saudi Arabia had not been designated state sponsor of terrorism. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(7)(A).

19. International Law ⟹10.33

Generally, acts are "discretionary," for purposes of the discretionary function exception to the torts exception of the Foreign Sovereign Immunities Act (FSIA), if the acts are performed at the planning level of government, as opposed to the operational level. 28 U.S.C.A. § 1605(a)(5).

See publication Words and Phrases for other judicial constructions and definitions.

20. International Law ⟹10.33

To fit within the torts exception of the Foreign Sovereign Immunities Act (FSIA), plaintiffs must come forward with evidence demonstrating that the defendants' tortious acts or omissions caused the plaintiffs' injuries. 28 U.S.C.A. § 1605(a)(5).

21. International Law ⟹10.33

To extent that Saudi Arabian Princes' alleged donations to charities that supported terrorist organizations were made in Princes' personal capacities, Antiterrorism Act (ATA) claims arising from such alleged donations, asserted by survivors of victims of September 11, 2001 attacks, were not subject to protection of torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(5).

22. Conspiracy ⟹1.1

Torts ⟹21

In New York, conspiracy and aiding and abetting are varieties of concerted action liability, for which there must be: (1) an express or tacit agreement to participate in a common plan or design to commit a tortious act; (2) tortious conduct by each defendant; and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort.

23. Conspiracy ⟹2

Under New York law, liability for conspiracy requires an agreement to commit a tortious act.

24. Torts ⟹21

Under New York law, aiding and abetting liability requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer.

25. International Law ⟹10.43

Antiterrorism Act (ATA) complaint by survivors of victims of September 11, 2001 attacks, alleging that Saudi Princes contributed to charities that supported al Qaeda, and that al Qaeda repeatedly and publicly targeted United States, failed to allege causal connection sufficient to satisfy New York standard for concerted action liability, for purposes of torts exception of Foreign Sovereign Immunities Act (FSIA), absent allegations from which it could be inferred that Princes knew charities were fronts for al Qaeda. 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(5).

26. International Law ⟹10.43

To allege a causal connection sufficient to invoke the torts exception of the Foreign Sovereign Immunities Act (FSIA), in connection with a defendant's contributions to organizations that are not themselves designated terrorists, there must be some facts presented to support the allegation that the defendant knew the receiving organization to be a solicitor, collector, supporter, front or launderer for such an entity; there must be some facts to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer. 28 U.S.C.A. § 1605(a)(5).

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27. International Law ⟹10.43

Plaintiffs may not circumvent the jurisdictional hurdle of the Foreign Sovereign Immunities Act (FSIA) by inserting vague and conclusory allegations of tortious conduct in their complaints, and then relying on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable substantive law. 28 U.S.C.A. § 1605(a)(5).

28. International Law ⟹10.33

In determining whether functions are discretionary, for purposes of the discretionary function exception to the torts exception of the Foreign Sovereign Immunities Act (FSIA), the District Court must decide whether the actions involved an element of choice or judgment based on considerations of public policy. 28 U.S.C.A. § 1605(a)(5).

29. International Law ⟹10.33

Alleged decisions to make charitable contributions to terrorist organizations, made by Saudi Arabian Prince, as chairman of Supreme Council of Islamic Affairs, which was charged with making recommendations to Council of Ministers regarding requests for aid from Islamic organizations located abroad, and as head of Special Committee of Council of Ministers, which was charged with deciding which grants should be made to Islamic charities, were discretionary, such that Antiterrorism Act (ATA) claims against Prince by survivors of victims of September 11, 2001 attacks arising from such alleged contributions were barred by discretionary function exception to torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

30. International Law ⟹10.33

Alleged decisions regarding treatment of Taliban and al Qaeda leader made by Saudi Prince, as head of Saudi Arabia's Department of General Intelligence (DGI), were discretionary, such that Antiterrorism Act (ATA) claims against Prince by survivors of victims of September 11, 2001 attacks arising from such alleged decisions were barred by discretionary function exception to torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

31. International Law ⟹10.33

Saudi Arabia's decisions to make charitable contributions to organizations that allegedly supported terrorism were discretionary, such that Antiterrorism Act (ATA) claims against Saudi Arabia by survivors of victims of September 11, 2001 attacks arising from contributions were barred by discretionary function exception to torts exception of Foreign Sovereign Immunities Act (FSIA). 18 U.S.C.A. § 2331 et seq.; 28 U.S.C.A. § 1605(a)(2).

32. International Law ⟹10.32

A waiver of Foreign Sovereign Immunities Act (FSIA) immunity must be explicit. 28 U.S.C.A. § 1602 et seq.

33. Federal Courts ⟹96

Because motions to dismiss for lack of personal jurisdiction were brought before discovery and decided without evidentiary hearing, plaintiffs were required only to make prima facie showing that personal jurisdiction existed in order to survive motions. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

34. Federal Courts ⟹96

In responding to motions to dismiss for lack of personal jurisdiction brought before discovery and decided without evidentiary hearing, plaintiffs could rely en-

HOUSE_OVERSIGHT_017835

tirely on factual allegations, and would prevail even if defendants made contrary arguments. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

35. Federal Courts ⇐96

In resolving motions to dismiss for lack of personal jurisdiction, the district court reads the complaints and affidavits in a light most favorable to the plaintiffs. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

36. Federal Courts ⇐96

In resolving a motion to dismiss for lack of personal jurisdiction, the district court will not accept legally conclusory assertions or draw argumentative inferences. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

37. Federal Courts ⇐417

A federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits. Fed.Rules Civ.Proc.Rule 4(k)(1)(A), 28 U.S.C.A.

38. Courts ⇐12(2.20)

For New York's long-arm statute to provide a basis for personal jurisdiction in a civil conspiracy action, the plaintiffs are not required to establish the existence of a formal agency relationship between the defendants and their putative co-conspirators. N.Y.McKinney's CPLR 302(a)(2).

39. Courts ⇐12(2.20)

The bland assertion of conspiracy is insufficient to establish personal jurisdiction under New York's long-arm statute. N.Y.McKinney's CPLR 302(a)(2).

40. Courts ⇐12(2.20)

To establish personal jurisdiction on a conspiracy theory under New York's long-arm statute, the plaintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York. N.Y.McKinney's CPLR 302(a)(2).

41. Courts ⇐12(2.20)

To warrant the inference that an out-of-state defendant was a member of a conspiracy, as required for a court to exercise personal jurisdiction under New York's long-arm statute on the basis of the acts of co-conspirators in New York, plaintiffs must show that: (1) the defendant had an awareness of the effects in New York of its activity; (2) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (3) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant. N.Y.McKinney's CPLR 302(a)(2).

42. Federal Courts ⇐94, 96

Allegations by victims' survivors, that various defendants, including Saudi Arabian Princes, conspired with al Qaeda terrorists to perpetrate September 11, 2001 attacks, failed to make prima facie showing necessary to establish personal jurisdiction as to Antiterrorism Act (ATA) claims under New York's long-arm statute, absent specific facts from which district court could infer that defendants directed, controlled, or requested al Qaeda to undertake its terrorist activities, or specific allegations of defendants' knowledge of or consent to those activities. 18 U.S.C.A. § 2331 et seq.; N.Y.McKinney's CPLR 302(a)(2).

43. Constitutional Law ⇐305(5)
Federal Courts ⇐76.5

For jurisdiction to exist under the rule establishing personal jurisdiction in any district court for cases arising under

federal law where the defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, there must be a federal claim, personal jurisdiction must not exist over the defendant in any state, and the defendant must have sufficient contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. U.S.C.A. Const.Amend. 5; Fed.Rules Civ. Proc.Rule 4(k)(2), 28 U.S.C.A.

44. Constitutional Law ⟹305(5)

To comply with the Due Process Clause, jurisdiction based on the Antiterrorism Act (ATA), or on the rule establishing personal jurisdiction in any district court for cases arising under federal law where the defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, requires minimum contacts with the United States, which may be established under a "personally directed" theory. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2334(a); Fed.Rules Civ.Proc.Rule 4(k)(2), 28 U.S.C.A.

45. Constitutional Law ⟹305(5)
Federal Courts ⟹76.25, 86

Modified due process standard appropriate for mass torts would not be applied to question whether district court had personal jurisdiction over Saudi Arabian Princes and other defendants in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, given questions as to defendants' contacts with forum and attenuated nature of their alleged involvement with al Qaeda. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2331 et seq.

46. Constitutional Law ⟹305(4.1)

Any exercise of personal jurisdiction must comport with the requirements of due process. U.S.C.A. Const.Amend. 5.

47. Constitutional Law ⟹305(4.1)

Depending on the basis for personal jurisdiction, due process under either the Fifth or Fourteenth Amendment applies. U.S.C.A. Const.Amends. 5, 14.

48. Courts ⟹12(2.5)

Personal jurisdiction under the New York long-arm statute requires minimum contacts with New York pursuant to the Fourteenth Amendment. U.S.C.A. Const. Amend. 14; N.Y.McKinney's CPLR 302(a)(2).

49. Constitutional Law ⟹305(5)

Pursuant to the Fifth Amendment, personal jurisdiction, under the rule establishing personal jurisdiction in any district court for cases arising under federal law where the defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, requires contacts with the United States as a whole. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 4(k)(2), 28 U.S.C.A.

50. Constitutional Law ⟹305(5)

The due process minimum contacts requirement is known as "fair warning," such that the defendant's contacts with the forum should be sufficient to make it reasonable to be haled into court there. U.S.C.A. Const.Amends. 5, 14.

51. Constitutional Law ⟹305(5)

The "fair warning" requirement of the Due Process Clause is satisfied if the defendant has purposefully directed his activities at the residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities. U.S.C.A. Const.Amends. 5, 14.

52. Constitutional Law ⟹305(5)
Federal Courts ⟹76.5, 76.10

For purposes of the minimum contacts inquiry required by the Due Process

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Clause, a distinction is made between specific and general jurisdiction, such that "specific jurisdiction" exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum, while "general jurisdiction" is based on the defendant's general business contacts with the forum; because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required for general jurisdiction. U.S.C.A. Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

53. Constitutional Law ⟹305(5)

In determining whether the exercise of personal jurisdiction is reasonable under the Due Process Clause, a court is to consider: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests in the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. U.S.C.A. Const.Amends. 5, 14.

54. Federal Courts ⟹86

In general, great care and reserve should be exercised when extending notions of personal jurisdiction into the international field.

55. Federal Civil Procedure ⟹1267.1

In evaluating jurisdictional motions, district courts enjoy broad discretion in deciding whether to order discovery.

56. Federal Civil Procedure ⟹1269.1

Courts are not obligated to subject a foreign defendant to discovery where the allegations of jurisdictional facts, construed in plaintiffs' favor, fail to state a basis for the exercise of jurisdiction or where discovery would not uncover sufficient facts to sustain jurisdiction.

57. Federal Courts ⟹94

Allegations that Saudi Royal Family members owned substantial assets in and did substantial business in United States, and used profits therefrom to fund international terrorist acts, including those leading to September 11 attacks, and that Saudi Arabian Prince was ex-officio Chairman of Board of Saudi Arabia Airlines, which did business in United States and internationally, were insufficient to establish general personal jurisdiction over Prince in Antiterrorism Act (ATA) action by survivors of victims of September 11 attacks. 18 U.S.C.A. § 2331 et seq.

58. Federal Courts ⟹94

Allegations that Saudi Arabian Prince aided and abetted terrorism, and that he donated to charities that he knew to be supporters of international terrorism, were insufficient to establish personal jurisdiction under "purposefully directed activities" theory in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks. 18 U.S.C.A. § 2331 et seq.

59. Federal Courts ⟹94

Allegations that Saudi Arabian Prince donated money to charities were insufficient to establish personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, absent specific factual allegations that he knew charities were funding money to terrorists. 18 U.S.C.A. § 2331 et seq.

60. Federal Courts ⟹86

Saudi Arabian Prince's alleged contacts with United States, during ten-year period prior to September 11, 2001 at-

tacks, consisting of one speech in United States, and handful of investments in United States through banks with which he was affiliated, were not sufficiently systematic and continuous for general personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of attacks. 18 U.S.C.A. § 2331 et seq.

61. Federal Courts ⟹76.20, 86

Even assuming that district court had personal jurisdiction over Saudi Arabian financial institutions in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, Saudi Arabian Prince's position as officer of such institutions was not basis for personal jurisdiction over him, where there was no allegation he had knowledge or involvement in any al Qaeda accounts at any banks he chaired. 18 U.S.C.A. § 2331 et seq.

62. Courts ⟹12(2.20)

The mere fact that a corporation is subject to jurisdiction in New York does not mean that individual officers may be hauled before New York courts without any showing that the individuals themselves maintained a presence or conducted business in New York.

63. Federal Courts ⟹96

Even assuming that name of founder of Saudi Arabian company appeared in "Golden Chain," which allegedly listed early direct donors to al Qaeda, such list was insufficient to establish personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, absent indications of who wrote list, when it was written, or for what purpose it was written. 18 U.S.C.A. § 2331 et seq.

64. Federal Courts ⟹96

Appearance of Saudi Arabian watch retailer's name in "Golden Chain," which allegedly listed early direct donors to al Qaeda, was insufficient to establish personal jurisdiction in Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, inasmuch as list did not establish his involvement in terrorist conspiracy culminating in attacks and did not demonstrate that he purposefully directed his activities at United States. 18 U.S.C.A. § 2331 et seq.

65. Federal Courts ⟹97

Limited discovery would be permitted, at dismissal stage of Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, with regard to whether Saudi Arabian bank's contacts with United States were sufficient for exercise of personal jurisdiction consistent with due process, inasmuch as contacts, including former presence of bank's branch office and subsidiary in United States, bank's instigation of lawsuit in United States, and its advertisements in United States publications, when taken together, might establish personal jurisdiction. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

66. Federal Courts ⟹94

Allegations of survivors of victims of September 11, 2001 attacks were insufficient to establish personal jurisdiction over director of charity in Antiterrorism Act (ATA) action, inasmuch as complaint did not contain any specific actions by director from which district court could infer that he purposefully directed his activities at United States, his affiliations with entities that were alleged to have United States contacts would not sustain jurisdiction, and his being shareholder in United States company was not sufficient for jurisdiction. 18 U.S.C.A. § 2331 et seq.

67. Federal Courts ⟹94

Allegations of survivors of victims of September 11, 2001 attacks were insuffi-

HOUSE_OVERSIGHT_017839

cient to establish personal jurisdiction in Antiterrorism Act (ATA) action over individuals allegedly affiliated with Saudi Arabian construction company, inasmuch as complaint did not contain any factual allegations from which district court could infer that they purposefully directed their activities at United States, that they were members of conspiracy pursuant to New York long-arm statute, or that they had any general business contacts with United States. 18 U.S.C.A. § 2331 et seq.; N.Y.McKinney's CPLR 302(a)(2).

68. Federal Courts ⟹97

Jurisdictional discovery was warranted, at dismissal stage of Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, to determine if Saudi Arabian construction company purposefully directed its activities at United States for purposes of personal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

69. Federal Courts ⟹97

Discovery would be permitted, at dismissal stage of Antiterrorism Act (ATA) action by survivors of victims of September 11, 2001 attacks, to determine which of charitable network's entities had presence in Virginia, and which entities transferred money to alleged al Qaeda operatives, for purposes of determining whether personal jurisdiction existed over network. Fed. Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

70. Federal Courts ⟹96

Survivors of victims of September 11, 2001 attacks made prima facie showing of personal jurisdiction over bank chairman in Antiterrorism Act (ATA) action, by alleging, inter alia, that Department of Treasury designated him as Specially Designated Global Terrorist, and that he was involved in United States operations of designated terrorist organization. 18 U.S.C.A. § 2331 et seq.

71. War and National Emergency ⟹50

To prove that defendants provided material support to terrorists, in violation of Antiterrorism Act (ATA), plaintiffs were required to present sufficient causal connection between that support and injuries suffered by plaintiffs; proximate cause would support such connection. 18 U.S.C.A. §§ 2339A(b), 2339B(g).

72. Conspiracy ⟹1.1

Torts ⟹21

To be liable for conspiracy or aiding and abetting under New York law, a defendant must know the wrongful nature of the primary actor's conduct, and the conduct must be tied to a substantive cause of action.

73. International Law ⟹10.11

Aircraft hijacking is generally recognized as violation of international law, for purposes of the requirement that an act be committed in violation of international law in order to be subject to the Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

74. Racketeer Influenced and Corrupt Organizations ⟹75

Survivors of victims of September 11, 2001 attacks failed to allege injury from defendants' alleged investment of racketeering income, and thus failed to state cause of action in complaint for violations of Racketeer Influenced and Corrupt Organizations Act (RICO) provision prohibiting receipt of income derived from pattern of racketeering activity. 18 U.S.C.A. § 1962(a).

75. Racketeer Influenced and Corrupt Organizations ⟹50

A defendant must have had some part in directing the operation or management of the enterprise itself to be liable under the Racketeer Influenced and Corrupt Organizations Act (RICO) provision prohibit-

ing participation in the conduct of an enterprise's affairs through a pattern of racketeering activity. 18 U.S.C.A. § 1962(c).

76. Racketeer Influenced and Corrupt Organizations ⟹50

Allegations of complaint filed by survivors of victims of September 11, 2001 attacks, including that bank and charitable network may have assisted al Qaeda, failed to state cause of action under Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy provision, or provision prohibiting participation in conduct of enterprise's affairs through pattern of racketeering activity, in that allegations did not include anything approaching active management or operation. 18 U.S.C.A. § 1962(c, d).

77. International Law ⟹10.11

Only individuals may be sued under the Torture Victim Protection Act (TVPA). 28 U.S.C.A. § 1350 note.

78. International Law ⟹10.11

Survivors of victims of September 11, 2001 attacks failed to state cause of action in complaint against two individuals under Torture Victim Protection Act (TVPA), where there were no allegations individuals acted under color of law. 28 U.S.C.A. § 1350 note.

79. War and National Emergency ⟹50

To adequately plead the provision of material support under the Antiterrorism Act (ATA), a plaintiff has to allege that the defendant knew about the terrorists' illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities. 18 U.S.C.A. § 2333(a).

80. Conspiracy ⟹7, 18

To state cause of action under Antiterrorism Act (ATA) pursuant to conspiracy theory, survivors of victims of September 11, 2001 attacks were required to allege that defendants were involved in agreement to accomplish unlawful act and that attacks were reasonably foreseeable consequence of that conspiracy; survivors did not have to allege that defendants knew specifically about attacks or that they committed any specific act in furtherance of attacks. 18 U.S.C.A. § 2333(a).

81. Death ⟹31(3.1)

Survivors of victims of September 11, 2002 attacks could state claims for wrongful death and survival under New York law if they were personal representatives of victims and sufficiently alleged that defendants supported, aided and abetted, or conspired with September 11 terrorists. N.Y.McKinney's EPTL 5–4.1, 11–3.2(b).

82. Assault and Battery ⟹21

Limitation of Actions ⟹31

The statute of limitations for assault and battery and intentional infliction of emotional distress claims under New York law is one year. N.Y.McKinney's CPLR 215(3).

83. Damages ⟹57.22

In actions for intentional infliction of emotional distress under New York law, courts are to determine whether the alleged conduct is sufficiently extreme and outrageous enough to permit recovery.

84. Damages ⟹57.25(1)

Attacks of September 11, 2001 were extreme and outrageous, as required for liability for intentional infliction of emotional distress under New York law.

85. Trespass ⟹30

To extent that survivors of victims of September 11, 2001 attacks sufficiently pled that defendants acted in concert with September 11 hijackers, they stated cause

HOUSE_OVERSIGHT_017841

of action for trespass under New York law pursuant to concerted action theory.

86. Damages ⇐57.14, 57.27

In New York, a plaintiff may establish negligent infliction of emotional distress under the bystander or direct duty theory.

87. Damages ⇐57.27

Under the bystander theory for proving negligent infliction of emotional distress under New York law, a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff, and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence.

88. Damages ⇐57.14

Under the direct duty theory for proving negligent infliction of emotional distress under New York law, a plaintiff suffers emotional distress caused by defendant's breach of a duty which unreasonably endangered the plaintiff's own physical safety.

89. Negligence ⇐202

To establish a claim for negligence under New York law, a plaintiff must show that the defendant owed the plaintiff a cognizable duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a proximate cause of that breach.

90. Negligence ⇐210

The most basic element of a negligence claim under New York law is the existence of a duty owed to plaintiffs by defendants.

91. Banks and Banking ⇐100

Under New York negligence law, banks do not owe non-customers a duty to protect them from the intentional torts of their customers.

92. Damages ⇐57.18
Negligence ⇐210

Survivors of victims of September 11, 2001 attacks failed to state causes of action in complaint against alleged supporters of terrorists for negligence and negligent infliction of emotional distress, inasmuch as they failed to allege or identify duty owed to them by defendants.

93. War and National Emergency ⇐50

In light of extreme nature of charge of terrorism, fairness required extra-careful scrutiny of allegations by survivors of victims of September 11, 2001 attacks as to any particular defendant, to ensure that he, or it, had fair notice of claims, including claims under Antiterrorism Act (ATA). 18 U.S.C.A. § 2331 et seq.

94. Banks and Banking ⇐226

Allegations in complaint by survivors of victims of September 11, 2001 attacks, that Saudi Arabian bank aided and abetted terrorists by donating to charities and acting as bank for charities, failed to state cause of action under Antiterrorism Act (ATA) against bank, in that survivors offered no facts to support conclusion that bank knew of charities' alleged support for terrorism, and failed to allege relationship between Hamas, with which bank allegedly had ties, and September 11 terrorists. 18 U.S.C.A. § 2331 et seq.

95. Conspiracy ⇐1.1
Torts ⇐21

Under New York law, concerted action liability, pursuant to a conspiracy or aiding and abetting theory, requires general knowledge of the primary actor's conduct.

96. Banks and Banking ⚷226

Allegations in complaint by survivors of victims of September 11, 2001 attacks, that bank based in Rihadh, Saudi Arabia provided material support to al Qaeda, failed to state cause of action under Antiterrorism Act (ATA) against bank, absent allegations that bank knew that anything relating to terrorism was occurring through services it provided. 18 U.S.C.A. § 2331 et seq.

97. Banks and Banking ⚷226

Allegations in complaints by survivors of victims of September 11, 2001 attacks, that bank headquartered in Egypt provided financial services and other material support to terrorist organizations including al Qaeda, failed to state cause of action under Antiterrorism Act (ATA) against bank, in that complaints did not include facts to support inference that bank knew or had to know that it was providing material support to terrorists by providing financial services to charities or by processing wire transfers in Spain. 18 U.S.C.A. § 2331 et seq.

98. Brokers ⚷106

War and National Emergency ⚷50

Allegations in complaints by survivors of victims of September 11, 2001 attacks failed to state cause of action under Antiterrorism Act (ATA) against investment company based in Jeddah, Saudi Arabia or against Saudi Arabian bank founder, in that majority of allegations regarding investment company actually concerned another entity, survivors alleged that company supported charity but did not allege that company knew that charity was supporting terrorism, and allegation that employee of other entity's subsidiary financially supported two hijackers did not translate into allegation that bank founder provided material support to terrorism or aided and abetted those who provided material support. 18 U.S.C.A. § 2331 et seq.

99. Federal Civil Procedure ⚷1269.1

Limited jurisdictional discovery was warranted, on Saudi Arabian bank's motion to dismiss Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks, as to issue whether bank was immune from suit as instrumentality of Saudi Arabia, and as to whether District Court could exercise personal jurisdiction over bank. 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(2, 6), 28 U.S.C.A.

100. Federal Civil Procedure ⚷1269.1

Limited jurisdictional discovery was warranted, on Saudi Arabian construction company's motion to dismiss Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks, as to issue whether company purposefully directed its activities at United States, for purposes of personal jurisdiction. 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

101. Federal Civil Procedure ⚷1269.1

Limited jurisdictional discovery was warranted, on charitable network's motion to dismiss Antiterrorism Act (ATA) suit by survivors of victims of September 11, 2001 attacks, as to which entities were subject to District Court's personal jurisdiction and whether entities transferred money to terror fronts. 18 U.S.C.A. § 2331 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(2, 6), 28 U.S.C.A.

102. War and National Emergency ⚷50

Allegations of complaint filed by survivors of victims of September 11, 2001 attacks stated cause of action against bank chairman under Antiterrorism Act (ATA), in that allegations and his designation by Department of Treasury as Specially Designated Global Terrorist were sufficient to

HOUSE_OVERSIGHT_017843

permit inference that he provided support to al Qaeda. 18 U.S.C.A. § 2331 et seq.

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Opinion and Order

CASEY, District Judge.

On September 11, 2001, nineteen members of the al Qaeda terrorist network hijacked four United States passenger airplanes and flew them into the twin towers of the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and—due to passengers' efforts to foil the hijackers—an open field in Shanksville, Pennsylvania. Thousands of people on the planes, in the buildings, and on the ground were killed in those attacks, countless others were injured, and billions of dollars of property was destroyed.

Pursuant to 28 U.S.C. § 1407, on December 9, 2003 the Multidistrict Litigation Panel centralized six then-pending September 11–related cases before this Court "for coordinated or consolidated pretrial proceedings." Additional actions, that are not the subject of this opinion, have since been filed. Plaintiffs in these consolidated actions are more than three thousand survivors, family members, and representatives of victims, and insurance carriers seeking to hold responsible for the attacks the persons and entities that supported and funded al Qaeda. The complaints al-

HOUSE_OVERSIGHT_017844

lege that over two hundred defendants directly or indirectly provided material support to Osama bin Laden and the al Qaeda terrorists. Generally, these defendants fall into one of several categories: al Qaeda and its members and associates; state sponsors of terrorism; and individuals and entities, including charities, banks, front organizations, terrorist organizations, and financiers who provided financial, logistical, and other support to al Qaeda.[1] *See, e.g., Ashton* Complaint ¶ 5; *Burnett* Complaint "Introduction"; *Federal* Complaint ¶¶ 42–66. The complaints assert subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.;* and causes of action under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note; the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.;* the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.;* theories of aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery.

[1] Several motions to dismiss are pending before the Court. At the suggestion of counsel, the Court scheduled oral arguments in groups organized generally by grounds for dismissal. On September 14, 2004, the Court heard oral argument on the motions to dismiss for lack of subject matter jurisdiction under the FSIA by HRH Prince Sultan bin Abdulaziz Al–Saud ("Prince Sultan"), HRH Prince Turki Al–Faisal bin Abdulaziz Al–Saud ("Prince Turki"),[2] and the National Commercial

1. According to Plaintiffs, Osama bin Laden formed al Qaeda, which means "the Base" or "the Vanguard," into an international terrorist organization with the aim of violently opposing non-Islam governments and Islamic states too beholden to the West. *See, e.g., Burnett* Complaint at 275.

2. Before the Multidistrict Panel transferred *Burnett v. Al Baraka Inv. & Dev. Corp.,* 02 Civ. 1616, to this Court, Judge Robertson of the United States District Court for the District of Columbia dismissed the claims against Prince Sultan relating to acts performed in his official capacity for lack of subject matter jurisdiction. *Burnett v. Al Baraka Inv. & Dev. Corp.,* 292 F.Supp.2d 9, 23 (D.D.C.2003) (hereinafter *"Burnett II"*). Finding that the court lacked personal jurisdiction over Prince Sultan, Judge Robertson dismissed without prejudice the allegations concerning acts taken in his personal, as opposed to official, capacity. *Id.* Judge Robertson dismissed the complaint against Prince Turki for lack of subject matter jurisdiction as well. *Id.*

Prince Sultan and Prince Turki both move to dismiss the complaints against them in *Ashton v. Al Qaeda Islamic Army,* 02 Civ. 6977 (S.D.N.Y.); *Barrera v. Al Qaeda Islamic Army,* 03 Civ. 7036 (S.D.N.Y.); *Burnett v. Al Baraka Inv. & Dev. Corp.,* 02 Civ. 1616 (D.D.C.); *Burnett v. Al Baraka Inv. & Dev. Corp.,* 03 Civ. 5738 (S.D.N.Y.); *Salvo v. Al Qaeda Islamic Army,* 03 Civ. 5071 (S.D.N.Y.); and *Tremsky v. Osama bin Laden,* 02 Civ. 7300 (S.D.N.Y.). Plaintiffs in these cases filed consolidated responses to Prince Sultan's and Prince Turki's motions. In Plaintiffs' words, the New York *Burnett* action is materially identical to the D.C. *Burnett* action and was filed as a "prophylactic" measure in the event the D.C. court found that it lacked subject matter jurisdiction. *Burnett* Complaint at 265. Additionally, at Plaintiffs' counsel request, this Court ordered the *Barrera* action consolidated with the *Ashton* case on December 6, 2004.

Prince Sultan and Prince Turki have each also filed a separate motion to dismiss in *Federal Insurance v. Al Qaida,* 03 Civ. 6978 (S.D.N.Y.), both of which are fully submitted and are resolved in this opinion. The *Federal Insurance* Plaintiffs are forty-one insurance companies that have paid and reserved claims in excess of $4.5 billion as a result of the September 11 attacks.

The *Burnett* Plaintiffs filed a motion for reconsideration in conjunction with Prince Sultan's and Prince Turki's motions to dismiss certain consolidated complaints. While this Court reviews and gives deference to Judge Robertson's thoughtful opinion, it must evaluate Prince Sultan's and Prince Turki's

HOUSE_OVERSIGHT_017845

Bank ("NCB").[3] On October 12, 2004 the Court heard oral argument from Defendants who filed motions to dismiss for lack of personal jurisdiction, including Prince Sultan, HRH Prince Mohamed Al–Faisal Al–Saud ("Prince Mohamed"),[4] the estate of Mohammad Abdullah Aljomaih,[5] Sheikh Hamad Al–Husani,[6] NCB, Abdulrahman bin Mahfouz,[7] the Saudi Binladin Group, Tariq Binladin, Omar Binladin, and Bakr Binladin.[8] Although their counsel did not argue on that day, motions to dismiss by the African Muslim Agency, Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar–Jac Investments, Inc., Mena Corporation, Reston Investments, Inc., Safa Trust, Sana–Bell Inc., Sterling Charitable Gift Fund, Sterling Management Group, Inc., and York Foundation, (hereinafter collectively referred to as the "SAAR Network"),[9] Prince Turki, and Adel A.J. Batterjee,[10] also raised personal jurisdiction defenses. On October 14, 2004 the Court heard oral argument from certain Defendants arguing Plaintiffs had failed to state a claim, including Al Rajhi Banking & Investment Corporation (hereinafter "Al Rajhi Bank"),[11] the Saudi American Bank,[12] Arab Bank,[13] NCB, the SAAR Network, Prince Mohamed, Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel,[14] Abdulrahman bin Mahfouz, the Saudi Binladin Group, and Adel A.J. Batterjee. Finally, the last of this group of motions was entertained on

motions on the merits de novo. *See In re Grand Jury Proceedings (Kluger),* 827 F.2d 868, 871 n. 3 (2d Cir.1987) ("A transfer under 28 U.S.C. § 1407 'transfers the action lock, stock, and barrel. The transferee district court has the power and the obligation to modify or rescind any orders in effect in the transferred case which it concludes are incorrect.' ") (internal citations omitted). The Court bears in mind that it is bound by Second Circuit precedent while Judge Robertson applied D.C. Circuit law. *Menowitz v. Brown,* 991 F.2d 36, 40–41 (2d Cir.1993) (explaining transferee court is to apply its interpretation of federal law, not that of the transferor circuit); *In re Air Crash at Belle Harbor, New York,* No. 02 Civ. 8411(RWS), 2003 WL 124677, at *3 (S.D.N.Y. Jan. 15, 2003) (applying Second Circuit law after 28 U.S.C. § 1407 transfer from a district court in the Fifth Circuit).

3. NCB moves to dismiss the complaints against it in *Ashton* and *Burnett.*

4. Prince Mohamed moves to dismiss the complaints against him in *Ashton* and *Federal Insurance.*

5. The estate of Mohammad Abdullah Aljomaih moves to dismiss the complaint in *Burnett.*

6. Sheikh Hamad Al–Husani moves dismiss the complaint in *Burnett.*

7. Abdulrahman bin Mahfouz moves to dismiss the complaint in *Burnett.*

8. The Saudi Binladin Group moves to dismiss the complaints against it in *Burnett* and *Ashton.* Tariq Binladin, Omar Binladin, and Bakr Binladin move to dismiss the *Burnett* complaint.

9. The SAAR Network moves to dismiss the *Federal Insurance* complaint.

10. Adel A.J. Batterjee moves to dismiss the complaint in *Burnett.*

11. Al Rajhi Bank renews its motion to dismiss the *Burnett* complaint. Judge Robertson denied its original motion and permitted it to serve a Rule 12(e) request on the *Burnett* Plaintiffs. *Burnett v. Al Baraka Invest. & Dev. Corp.,* 274 F.Supp.2d 86, 110 (D.D.C.2003) (hereinafter *"Burnett I"*).

12. Saudi American Bank moves to dismiss the *Ashton* and *Burnett* complaints.

13. Arab Bank moves to dismiss the *Burnett* and *Federal Insurance* complaints.

14. Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel move to dismiss the *Ashton* and *Burnett* complaints.

November 5, 2004, when the Court heard oral argument from the Kingdom of Saudi Arabia in its motion to dismiss the *Federal Insurance* complaint.[15]

I. Subject Matter Jurisdiction Under the FSIA

[2–4] Under the FSIA, a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); 28 U.S.C. §§ 1602–1607. The FSIA's exceptions to immunity provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities in federal court. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 138 (2d Cir.2001). Federal courts must inquire at the "threshold of every action" against a foreign state whether the exercise of its jurisdiction is appropriate. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

A. Standard of Review

[5, 6] In a Rule 12(b)(1) motion to dismiss challenging subject matter jurisdiction under the FSIA, "the defendant must first 'present a prima facie case that it is a foreign sovereign.'" *Virtual Countries v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir.2002) (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.1993)). In response, the plaintiff must present evidence that one of the statute's exceptions nullifies the immunity. *Virtual Countries*, 300 F.3d at 241 ("Determining whether this burden is met involves a 'review of the allegations in the complaint, the undisputed facts, if any, placed before the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of fact.'") (citing *Robinson*, 269 F.3d at 141); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F.Supp.2d 277, 287 (S.D.N.Y.2001) (explaining plaintiff may "rebut the presumption of immunity ... by proffering evidence of record that the defendant undertook certain activities that fall within the scope" of one of the statutory exceptions) (citing *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari*, 12 F.3d 317, 325 (2d Cir. 1993)). In challenging this Court's subject matter jurisdiction, the moving Defendants retain the ultimate burden of persuasion. *Virtual Countries*, 300 F.3d at 241 (citing *Cargill*, 991 F.2d at 1016); *Robinson*, 269 F.3d at 141 n. 8 (noting defendant's burden must be met with a preponderance of the evidence).

[7] Defendants may "challenge either the legal or factual sufficiency of the plaintiff's assertion of jurisdiction, or both." *Robinson*, 269 F.3d at 140 (citations omitted). "If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Id.* (internal quotations and citations omitted); *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir.2000). "But where evidence relevant to the jurisdictional question is before the court, 'the district court ... may refer to that evidence.'" *Robinson*, 269 F.3d at 140 (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000)); *see also Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932

15. The parties have agreed that resolution of this motion will also apply to *Vigilant Insurance v. Kingdom of Saudi Arabia*, 03 Civ. 8591(RCC).

HOUSE_OVERSIGHT_017847

(2d Cir.1998) (explaining, where there are factual disputes regarding the immunity question, the court may not "accept the mere allegations of the complaint as a basis for finding subject matter jurisdiction"). Thus, "on a 'challenge to the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits.' " *Filetech*, 157 F.3d at 932 (explaining a court should consider all the submissions of the parties and may, if necessary, hold an evidentiary hearing to resolve the jurisdictional question) (quoting *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir.1991)). The court must consult outside evidence if resolution of a proffered factual issue may result in the dismissal of the complaint for lack of jurisdiction. *Robinson*, 269 F.3d at 141 n. 6. Defendants here challenge both the legal and factual sufficiency of Plaintiffs' claims. The Court will consider the affidavits submitted by the parties as necessary.

[8] Before turning to the allegations against the Defendants claiming immunity, the Court notes it is keenly aware of the "delicate balanc[e] 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign's agency's legitimate claim to immunity from discovery.' " *First City, Texas–Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir.1998) (ordering full discovery against defendant over whom court already had subject matter jurisdiction because such discovery would provide plaintiff an opportunity to obtain jurisdictional discovery regarding potentially sovereign alter ego co-defendant without further impinging that defendant's immunity) (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.1992) ("At the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.")). The Second Circuit has instructed "that generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until [plaintiff] has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." *First City*, 150 F.3d at 176–77 (quoting *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990)). Still, the Plaintiffs must allege sufficient facts to warrant jurisdictional discovery. *Robinson*, 269 F.3d at 146 (citing *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir.1998) (refusing jurisdictional discovery where plaintiffs' allegations lacked factual specificity to confer jurisdiction)); *see also Burnett II*, 292 F.Supp.2d at 15 (denying Plaintiffs' request for discovery from Prince Turki where "suggestions of [his] individual activity are only conclusory").

B. Allegations Against Defendants Asserting Foreign Sovereign Immunity

1. Prince Sultan

Prince Sultan has been Saudi Arabia's Minister of Defense and Aviation and Inspector General of its Armed Forces since 1962. *Ashton* Complaint ¶ 265; *Burnett* Complaint ¶ 352; *Federal* Complaint ¶ 427; William H. Jeffress, Jr. Decl. ¶ 4 at Notice of HRH Prince Sultan Bin Abdulaziz Al–Saud's Motion to Dismiss Consolidated Complaint (hereinafter "Consolidated Jeffress Decl."); Andrea Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss Consolidated Complaints Ex. 1, Sultan Bio, *available at http://saudiembassy.net/Country/Government/SultanBio.asp.* In 1982, his brother King Fahd bin Abdulaziz Al–Saud named him Second Deputy President of Saudi Arabia's Council of Ministers, the Kingdom's governing body. Nizar Bin

HOUSE_OVERSIGHT_017848

Obaid Nadani Decl. ¶ 2 at Notice of HRH Prince Sultan Bin Abdulaziz al-Saud's Motion to Dismiss Certain Consolidated Complaints Ex. 1 (hereinafter "Nadani Decl."); Consolidated Jeffress Decl. ¶ 4; *Federal* Complaint ¶ 427; Sultan Bio. As such, he is the third-highest ranking member of the Saudi government.

Especially relevant here, Prince Sultan is the Chairman of the Supreme Council of Islamic Affairs, which was established in 1995 and is responsible for the Kingdom's Islamic policy abroad. Consolidated Jeffress Decl. ¶ 5; *Ashton* Complaint ¶ 265; *Federal* Complaint ¶ 427. Prince Sultan disagrees with Plaintiffs' claim that the Supreme Council monitors and approves domestic and foreign charitable giving on behalf of the Kingdom. Prince Sultan prefers the characterization that the Supreme Council "carr[ies] out the foreign policy of Saudi Arabia as determined by the Council of Ministers." Abdulaziz H. Al-Fahad Decl. ¶ 5, at Sara E. Kropf Decl. Ex. 2. Finally, Prince Sultan, as the head of the Special Committee of the Council of Ministers, which is a foreign policy advisory resource for King Saud, exercises authority over disbursements by the Special Committee. Consolidated Jeffress Decl. ¶ 6. In the past, these disbursements, which are government funded, have included grants to Islamic charities. *Id.* at ¶ 6.

The various complaints make substantially similar accusations against Prince Sultan. *See* Consolidated Jeffress Decl. Ex. C (summarizing allegations against Prince Sultan in consolidated complaints). Prince Sultan is alleged to have met with Osama bin Laden after Iraq invaded Kuwait in the summer of 1990. *Ashton* Complaint ¶ 253; *Burnett* Complaint ¶ 340. At that meeting, which Prince Turki also attended, bin Laden purportedly offered his family's support to Saudi military forces. *Ashton* Complaint ¶ 253. Plaintiffs allege that, at the time of the Gulf War, Prince Sultan "took radical stands against western countries and publicly supported and funded several Islamic charities that were sponsoring Osama bin Laden and al Qaeda operations." *Ashton* Complaint ¶ 266; *Burnett* Complaint ¶ 353. After the attacks of September 11, Prince Sultan allegedly advocated against granting the United States use of Saudi military bases to stage attacks against Afghanistan. *Ashton* Complaint ¶ 273; *Burnett* Complaint ¶ 356.

Prince Sultan allegedly made personal contributions, totaling $6,000,000 since 1994, to various Islamic charities that Plaintiffs claim sponsor or support al Qaeda. *Ashton* Complaint ¶ 269; *Burnett* Complaint ¶ 359; *Federal* Complaint ¶ 430. The specific charities that Prince Sultan donated to include Defendants International Islamic Relief Organization ("IIRO"),[16] Al Haramain,[17] Muslim World League ("MWL"),[18] and the World Assembly of Muslim Youth ("WAMY").[19] *Ashton* Com-

16. IIRO is allegedly an al Qaeda front that has been tied to the 1993 World Trade Center attack and the 1998 embassy bombings. *See, e.g., Burnett* Complaint ¶¶ 156, 240, 242.

17. Beginning in 2002, certain branches of Al Haramain were designated by the United States as terrorist organizations. *See* Exec. Order No. 13224, 31 C.F.R. 595, *available at http://www.treas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf* (hereinafter "Exec. Order No. 13224"). Judge Robertson denied Al Haramain's motion to dismiss the *Burnett* action. *Burnett I,* 274 F.Supp.2d at 107.

18. MWL is the parent of IIRO. *See, e.g., Burnett* Complaint ¶ 236.

19. WAMY is a suspected al Qaeda front, allegedly "preaching good . . . while plotting evil," connected to charity Defendant Benevolence International Foundation ("BIF"). BIF is now a designated terrorist, but it previously concealed its relationship with Osama bin

HOUSE_OVERSIGHT_017849

plaint ¶¶ 269–272; *Burnett* Complaint ¶¶ 354, 359; *Federal* Complaint ¶ 430. According to Plaintiffs, with respect to his alleged donations, "[a]t best, Prince Sultan was grossly negligent in the oversight and administration of charitable funds, knowing they would be used to sponsor international terrorism, but turning a blind eye. At worse, Prince Sultan directly aided and abetted and materially sponsored al Qaeda and international terrorism." *Burnett* Complaint ¶ 363; *Federal* Complaint ¶¶ 429–31 (alleging Prince Sultan knew and intended that the contributions he made to various charities would be used to fund al Qaeda and international terrorism).[20]

2. Prince Turki

Prince Turki is currently the Kingdom of Saudi Arabia's ambassador to the United Kingdom. *Ashton* Complaint ¶ 263. From 1977 until August 2001, he was the Director of Saudi Arabia's Department of General Intelligence ("DGI," also known by its Arabic name, Istakhbarat). *Ashton* Complaint ¶ 255; *Burnett* Complaint ¶ 343; *Federal* Complaint ¶ 445. As such, Plaintiffs allege he was or should have been aware of the terrorist threat posed by Osama bin Laden, al Qaeda, and the Taliban. *Ashton* Complaint ¶ 256; *Burnett* Complaint ¶ 343. Prince Turki allegedly met with Osama bin Laden five times in the mid–1980s and mid–1990s. *Ashton* Complaint ¶ 257; *Burnett* Complaint ¶ 344. At one of those meetings, which Prince Sultan also attended, bin Laden allegedly offered the Saudis the use of his family's engineering equipment and suggested bolstering Saudi military forces with militants. *Ashton* Complaint ¶ 253. Prince Turki is alleged to have close ties with an al Qaeda financier, Mr. Zouaydi, and is allegedly implicated in Mr. Zouaydi's financial support of al Qaeda. *Ashton* Complaint ¶ 241; *Burnett* Complaint ¶ 345. Further, Plaintiffs claim Prince Turki met with members of the Taliban and, in 1995, gave the Taliban financial and material support. *Ashton* Complaint ¶ 257; *Federal* Complaint ¶¶ 447–48 (alleging that, at the time Prince Turki provided support, the Taliban maintained a symbiotic relationship with al Qaeda and thus Prince Turki knew al Qaeda would benefit from the Kingdom's support). In July 1998, Prince Turki is alleged to have met with members of the Taliban and representatives of bin Laden and agreed to not extradite bin Laden or close terrorist camps in exchange for bin Laden's protection of the

Laden and al Qaeda. *See, e.g., Burnett* Complaint ¶¶ 160, 205, 229, 362; Exec. Order 13224.

20. Prince Sultan denies making any grants to Al Haramain and MWL and argues that contributions made to IIRO and WAMY were made strictly in his official capacity on behalf of the Saudi government. Further, he claims the four charities searched their records and confirmed that Prince Sultan did not make any personal contributions. These transmittal letters and government checks were included in Prince Sultan's motion to dismiss the D.C. *Burnett* action. Judge Robertson found these documents had "limited probative value, [as they] lack[ed] proper foundations to establish that the affiants could have known the actual source of the moneys they received." *Burnett II*, 292 F.Supp.2d at 16. This Court has reviewed these affidavits and agrees with Judge Robertson's assessment. For example, one declarant who provided information regarding alleged contributions relied on his personal knowledge of a charity's records, yet he had only been in his position for two months. *See* Decl. of Saleh Abdullah Al Saykhan ¶ 2, at Decl. of Sara E. Kropf in Support of Prince Sultan's Motion to Dismiss the D.C. *Burnett* action. As Judge Robertson pointed out, "the value of plaintiffs' showing that Prince Sultan did give money to these organizations in his personal capacity, however, is no greater." *Burnett II*, 292 F.Supp.2d at 16 (referring to Saudi press reports of Prince Sultan's contributions).

Saudi Royal family. *Ashton* Complaint ¶ 261; *Burnett* Complaint ¶ 348. Plaintiffs allege Prince Turki facilitated money transfers from wealthy Saudis to the Taliban and al Qaeda. *Ashton* Complaint ¶ 259; *Federal* ¶ 451. Additionally, the *Federal* Plaintiffs claim that, while Prince Turki was the head of DGI, Saudi Arabian intelligence officers allegedly trained a member of the al Qaeda Spanish cell in explosives and provided material support to two of the September 11 hijackers. *Federal* Complaint ¶ 449. The *Federal* complaint also alleges that Prince Turki made personal contributions to Saudi-based charities that he knew were sponsors of al Qaeda, including IIRO, MWL, WAMY, BIF, the Saudi High Commission, Saudi Joint Relief Committee for Kosovo and Chechnya ("SJRC"), and Al Haramain. *Federal* Complaint ¶¶ 451–52.

[9] Prince Turki denies the allegations against him in a declaration prepared in concert with his motion to dismiss the D.C. *Burnett* action. In reviewing this declaration, the Court gives "great weight to any extrinsic submissions made by the foreign defendant[ ] regarding the scope of [his] official responsibilities." *Leutwyler,* 184 F.Supp.2d at 287 (internal quotation marks omitted). Prince Turki explains that the DGI "is involved in the collection and analysis of foreign intelligence and in carrying out foreign operations." Decl. of HRH Prince Turki ¶ 5, at HRH Prince Turki's Motion to Dismiss Certain Consolidated Complaints Ex. 1 (hereinafter "Prince Turki Decl."). He was active in Saudi Arabia's efforts to combat terrorism generally and the threat posed by Osama bin Laden and al Qaeda specifically, and served on a joint information-sharing committee with the United States beginning in 1997. *Id.* ¶¶ 6, 10. He states that all of his interactions with Osama bin Laden and the Taliban were part of his official functions. *Id.* ¶ 5. In June 1998, King Fahd sent Prince Turki to Kandahar to meet with the Taliban and to relay the official Saudi request that Osama bin Laden be extradited to Saudi Arabia for trial. *Id.* ¶ 11. The Taliban denied the Saudi request and Saudi Arabia subsequently suspended diplomatic relations with the Taliban in September 1998. *Id.* ¶ 13. Prince Turki denies facilitating money transfers to Osama bin Laden or al Qaeda, he denies offering material assistance to Osama bin Laden, his representatives, or al Qaeda in return for their not attacking Saudi Arabia, he denies promising or providing oil or financial assistance to the Taliban, and denies ever hearing of the Syrian financier Mr. Zouaydi, with whom he is alleged to have ties. *Id.* ¶¶ 14, 16, 17.

3. Kingdom of Saudi Arabia

The *Federal* Plaintiffs claim that "[m]ore than any other factor, al Qaida's phenomenal growth and development into a sophisticated global terrorist network were made possible by the massive financial, logistical and other support it received from the Kingdom of Saudi Arabia, members of the Saudi Royal family, and prominent members of Saudi society." *Federal* Complaint ¶ 398. Further, the *Federal* Plaintiffs allege September 11 was "a direct, intended and foreseeable product of the Kingdom of Saudi Arabia's participation in al Qaida's jihadist campaign." *Id.* ¶ 425. Specifically, the Kingdom allegedly maintained and controlled several of the charities within al Qaeda's infrastructure. *Id.* ¶ 399. The *Federal* Plaintiffs claim Saudi Arabia knew the threat that these charities posed particularly to the United States, and did nothing to stop it. *Id.* ¶¶ 400–02. The Kingdom allegedly used its relationship with the Taliban to sustain al Qaeda in the mid–1990s. *Id.* ¶¶ 403, 407. To the extent the *Federal* Plaintiffs rely on actions by members of the Saudi Royal family as allegations against the Kingdom, they

HOUSE_OVERSIGHT_017851

make no claim that these individuals were acting on behalf of or at the behest of the Kingdom. *See, e.g., id.* ¶ 420 (claiming that in January 1999 Princess Haifa made payments to Al-Bayoumi, a Defendant alleged to have paid rent on behalf of two of the hijackers). Finally, Plaintiffs allege that members of the Saudi Royal family provided support to al Qaeda in their official capacities as members of the Supreme Council of Islamic Affairs. *Federal* Complaint ¶¶ 426–464.

4. National Commercial Bank

NCB was established in 1950 by Salim bin Mahfouz, the father of Defendant Khalid bin Mahfouz, as the first commercial bank of Saudi Arabia. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88. The *Ashton* Plaintiffs allege that the bin Mahfouz family controlled NCB until 1999 when the Saudi government bought a majority of its shares. *Ashton* Complaint ¶ 573.[21] The *Ashton* and *Burnett* Plaintiffs claim that NCB has a wholly-owned subsidiary in New York, SNCB Securities, Ltd., through which it operates an international banking business. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88.

Plaintiffs claim Osama bin Laden and al Qaeda used NCB as "a financial arm, operating as a financial conduit for [their] operations." *Ashton* Complaint ¶ 564; *Burnett* Complaint ¶ 89. In 1986, Khalid bin Mahfouz became NCB's President and CEO and remained so until 1999. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88. Also in 1986, Khalid bin Mahfouz became the Chief Operating Officer and a major shareholder of the Bank of Credit and Commerce International ("BCCI"). *Ashton* Complaint ¶¶ 564, 566; *Burnett* Complaint ¶¶ 89, 91. He was subsequently indicted in New York state in connection with his involvement in BCCI's fraudulent practices, which also implicated NCB. *Ashton* Complaint ¶¶ 564, 566; *Burnett* Complaint ¶¶ 89, 91.

Plaintiffs claim both NCB and BCCI supported international terrorism. *Ashton* Complaint ¶¶ 564–68; *Burnett* Complaint ¶¶ 91–93. Specifically, a "1999 United States Senate Report on the BCCI scheme detailed the role of [NCB] in hiding assets, money laundering, the cover-up and obstruction of a Senate investigation, and sponsoring international terrorism." *Burnett* Complaint ¶ 89. Additionally, a 1998 NCB bank audit revealed irregularities involving direct donations to several charities and that $74 million had been funneled by the bank's Zakat Committee to IIRO.[22] *Ashton* Complaint ¶¶ 569–71; *Burnett* ¶¶ 94, 95. NCB also allegedly made loans to charitable organizations without the knowledge of the Zakat Committee. *Id.* Plaintiffs allege "direct donations were received through NCB facilities to the Red Crescent Committee, [IIRO], and the Muwaffaq Foundation," all Defendants in these actions. *Ashton* Complaint ¶ 570; *Burnett* Complaint ¶ 95. Muwaffaq allegedly provided Osama bin Laden with $3 million in 1998. *Ashton* Complaint ¶ 573. Plaintiffs claim NCB knew or should have known it was materially supporting al Qaeda, Osama bin Laden, and international terrorism. *Ashton* Complaint ¶ 570; *Burnett* Complaint ¶ 95.

C. Defendants' Status as Foreign States for FSIA Purposes

The Court must first determine if the moving Defendants are "foreign states" for

21. The Ashton Plaintiffs moved to amend this allegation to claim that the Public Investment Fund ("PIF"), not the Saudi government, purchased a majority of NCB shares in 1999. *Ashton* Docket ## 137, 138.

22. Zakat is required almsgiving by all Muslims. *See, e.g., Burnett* Complaint at 275; *id.* ¶ 40.

purposes of the FSIA. A "foreign state" is statutorily defined:

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity -
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603. There is no dispute that the Kingdom of Saudi Arabia is a foreign state. The status of each of the Princes and NCB are discussed below.

1. Prince Sultan and Prince Turki

Several courts have recognized that "[i]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities [since] '[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.' "[23] *Bryks v. Canadian Broad. Corp.*, 906 F.Supp. 204, 210 (S.D.N.Y.1995) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir.1990) ("Nowhere in the text or legislative history does Congress state that individuals are not encompassed within 28 U.S.C. § 1603(b).")); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398–99 (4th Cir.2004) (collecting cases extending FSIA immunity to individuals sued in their official capacities); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir.1999) (acknowledging the FSIA protects individuals to the extent they act within their official duties); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C.Cir.1996) (dismissing claims against government officials since they were sued in their official capacities); *Leutwyler*, 184 F.Supp.2d at 286–87 ("[I]t has been generally recognized that individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities.") (citing *Bryks*, 906 F.Supp. at 210); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 11 n. 3 (D.D.C.1998) (noting favorable practice of applying FSIA to individuals). Thus, this Court finds that immunity may be available to Prince Sultan, as the third-highest ranking member of the Saudi government, and to Prince Turki, as the Director of Saudi Arabia's Department of General Intelligence, to the extent their alleged actions were performed in their official capacities.

[10] The *Federal* Plaintiffs argue that the FSIA cannot apply to Prince Turki because, as of September 10, 2003 when the complaint was filed, Prince Turki was the Saudi ambassador to the United Kingdom, a position the *Federal* Plaintiffs allege is not entitled to immunity under the FSIA. In support of this argument, the *Federal* Plaintiffs cite *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), in which the Supreme Court held that instrumentality status is determined at the time of the filing of the complaint.

23. The FSIA is silent on the subject. Neither the Supreme Court nor the Second Circuit has specifically addressed the issue.

HOUSE_OVERSIGHT_017853

[11] The Court disagrees with this reliance on *Dole Food*. The Supreme Court resolved two questions in *Dole Food*. "The first [was] whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary. The second question [was] whether a corporation's instrumentality status is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time the suit is filed." *Id.* at 471, 123 S.Ct. 1655. The Supreme Court held that a foreign state's ownership of an entity must be direct for the entity to be considered an instrumentality. *Id.* at 474, 123 S.Ct. 1655. The Supreme Court also ruled that ownership must be determined as of the date on which the complaint was filed. *Id.* at 480, 123 S.Ct. 1655. Neither of these points of law speaks, however, to the circumstances under which an individual is covered by the FSIA. Indeed, numerous other courts that have addressed this issue have held that the relevant inquiry for individuals is simply whether the acts in question were undertaken at a time when the individual was acting in an official capacity. *See, e.g., Velasco*, 370 F.3d at 398–99; *Byrd*, 182 F.3d at 388; *Bryks*, 906 F.Supp. at 210. This Court considers that precedent to be more consistent with the FSIA and unaltered by the decision in *Dole Food*. Thus, it deems Prince Turki the equivalent of the foreign state inasmuch as the complaints allege actions taken in his official capacity as the head of the DGI. Accordingly, both Prince Sultan and Prince Turki are immune from suit for their official acts unless an exception under the FSIA applies.

2. National Commercial Bank

NCB submits that it is an instrumentality of the Kingdom of Saudi Arabia and therefore immune from suit. *See* Decl. of Nizar Bin Obaid Madani, Assistant Minister of Foreign Affairs of Kingdom of Saudi Arabia ¶ 2, at Berger Decl. Ex. 7 ("It is the position of the Ministry of Foreign Affairs that NCB is a government instrumentality of the Kingdom of Saudi Arabia."). To enjoy immunity from suit under the FSIA, NCB must demonstrate that it is an agency or instrumentality, or a political subdivision of the Kingdom. 28 U.S.C. § 1603(a). As explained above, the FSIA defines an "agency or instrumentality" as (1) "a separate legal person, . . .(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) a non-U.S. citizen. 28 U.S.C. § 1603(b). Accordingly, NCB claims that (1) it is a separate legal person, (2) at the time the suit was filed a majority of its shares were owned by an administrative unit of the Saudi Ministry of Finance, the Public Investment Fund ("PIF"),[24] and (3) it is not a citizen of the United States

24. After the parties submitted their briefs and argued the FSIA issue, the *Ashton* Plaintiffs filed supplemental affidavits, without leave of the Court, to contest, for the first time, the timing of the PIF's majority ownership. *See* 03 MD 1570 Docket # 455. The parties agree that the PIF bought 50% of NCB shares in May 1999. *See* John Fawcett Sept. 23, 2004 Supplemental Affidavit at Ex. 1 ("Fawcett Supp. Aff."). Later in 1999, the PIF sold 10% of its shares to the General Organization for Social Insurance. Fawcett Supp. Aff. at Ex. 2. Late in 2002 the PIF agreed to buy 30% of the remaining shares from the bin Mahfouz family, but Plaintiffs claim the purchase was not completed until January 2003, after the lawsuit was filed on September 4, 2002. *See* Fawcett Supp. Aff. at Ex. 3 & 4 (news accounts of sale). For the reasons that will be explained below, the Court finds it unnecessary to resolve this dispute at this time.

HOUSE_OVERSIGHT_017854

or created under the laws of a third country.

[12] In *Dole Food*, the Supreme Court held "that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" outlined in § 1603(b). 538 U.S. at 474, 123 S.Ct. 1655. Accordingly, the Kingdom of Saudi Arabia's ownership of NCB must be direct for NCB to enjoy immunity under the FSIA. That is, NCB will not be deemed an instrumentality of the Kingdom if the PIF, its majority owner, is determined to be an agency, instrumentality, or organ of the Kingdom. *See* § 1603(b)(2) (stating agency or instrumentality is entity whose majority ownership interest is held by either the foreign state or a political subdivision thereof); *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir.2004) (holding an organ's ownership of two banks did not, in turn, make the banks organs or instrumentalities of foreign state); *see also In re Ski Train Fire in Kaprun, Austria*, 198 F.Supp.2d 420, 426 (S.D.N.Y.2002) (holding ski resort owner, which was owned in part by instrumentality of Austrian government, was not instrumentality because it was not owned directly by the state or a subdivision thereof); *Hyatt Corp. v. Stanton*, 945 F.Supp. 675, 688 (S.D.N.Y.1996) (concluding "that corporations a majority of whose shares are owned by agencies or instrumentalities of foreign states are not themselves agencies or instrumentalities"). Thus, NCB must demonstrate that the PIF is the equivalent of the Kingdom of Saudi Arabia or a political subdivision thereof.

The PIF was established by Royal Decree with the sole function of "financing ... investments in productive projects of a commercial nature whether they belong to the Government or the industrial lending institutions connected to it or to its public corporations and whether these projects are undertaken independently or in partnership between these administrative parties and private institutions." PIF Charter ¶ 2, at Berger Aff. Ex. 4B ("PIF Charter"); Affidavit of Abdallah Bin Hamad Al-Wohaibi ¶ 3, the Director of the Legal Department of the Ministry of Finance, at Berger Aff. Ex. 4 ("Al-Wohaibi Aff."). Its board of directors are all Saudi officials named in its charter, its employees are civil servants, and the Ministry of Finance is responsible for its costs. *Id.* ¶¶ 4, 8, 10; *see also* PIF Charter ¶¶ 4, 7. Its board must submit an annual report to Saudi Arabia's Council of Ministers summarizing its financial position and major operations. Al-Wohaibi Aff. ¶ 10. It has no separate legal status from the Ministry of Finance. *Id.* ¶ 4. The PIF holds shares of corporations and operational assets, "generally ... on behalf of the Ministry of Finance." *Id.* ¶ 9. It may be sued as a department of the Ministry of Finance, and as such, the Ministry of Finance would be named as the defendant. *Id.* ¶ 12. It funds investments on behalf of the Kingdom and it provides financing terms for projects that commercial lenders do not. *Id.* ¶ 5; Supplemental Al-Wohaibi Aff. ¶¶ 8-10 (hereinafter "Supp. Al-Wohaibi Aff.").

a. Status of the PIF

In *Filler v. Hanvit Bank*, a case with facts very similar to those presented here, the Second Circuit reiterated *Dole Food's* requirement of direct ownership for instrumentality status. Two defendants were commercial banks majority-owned by the Korean Deposit Insurance Corporation ("KDIC"), a "governmental institution" run by the Korean Ministry of Finance and the Economy of the Republic of Korea. *Filler*, 378 F.3d at 215-16. In determining if KDIC was an organ of Korea, the court considered several factors:

HOUSE_OVERSIGHT_017855

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217 (citing *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–47 (5th Cir.2000) (alteration in original)). The Second Circuit held that the KDIC was an organ of Korea because it was formed by statute and presidential decree; it performs the governmental functions of protecting depositors and promoting financial stability; its directors are appointed by the Ministry of Finance and Economy; its president is appointed by the President of the Republic of Korea; and many of its operations are overseen by the Ministry of Finance and Economy. *Id.*

The banks argued that once the court determined KDIC was an organ of the foreign state, the banks automatically became instrumentalities or agencies of the state because KDIC owned a majority of their stock. *Id.* The Second Circuit rejected this argument, finding such a holding would "permit an infinite number of subsidiaries to enjoy sovereign immunity, ... would be incompatible with the purpose of the FSIA, which is to grant governmental, not private corporate immunity, and ... would reflect infidelity to the Supreme Court's reasoning in *Dole Food.*" *Id.* at 218. Accordingly, it reiterated that "'a subsidiary of an instrumentality is not itself entitled to instrumentality status' ... and that 'only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.'" *Id.* (quoting *Dole Food*, 538 U.S. at 473–74, 123 S.Ct. 1655).

The Second Circuit determined the KDIC was an organ of Korea by considering whether it was created and supervised by a foreign state and whether public employees were performing public functions. *Id.* at 217. Under its reasoning, it would appear the PIF is also an organ. It was created by royal decree, it is supervised by the Kingdom's Council of Ministers and staffed with government employees. *See* PIF Charter.

Yet, under the "legal characteristics" test, the PIF could qualify as a political subdivision. *See Hyatt*, 945 F.Supp. at 680. In *Hyatt*, a court in this district reasoned that a statutory requirement of an agency or instrumentality, as opposed to a political subdivision, is that it is a "separate legal person ... that can function independent of the state." *Id.* at 684. If an entity could sue and be sued, own property, and contract in its own name, it would be considered an agency or instrumentality and not a political subdivision. *Id.* at 685. NCB submits the PIF sues and is sued as, and generally holds property on behalf of, the Ministry of Finance. Al–Wohaibi Aff. ¶¶ 9, 12.

NCB argues the Court should employ the "core functions" test outlined in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C.Cir.1994), to find that the PIF is the equivalent of the Kingdom. Under this test, if the entity's core functions are governmental, it is considered the state itself. *Id.* at 153. If its functions are commercial in nature, it is considered an instrumentality. *Id.* This Court is governed by Second Circuit precedent and finds *Filler* and *Hyatt* to be controlling. Even if it were to adopt *Transaero*, however, the Court finds on the record before it that the PIF's emphasis on commercial projects precludes a finding that its core functions are governmental in nature. *See* PIF Charter ¶ 2 (noting the PIF's primary

function of "financing ... investments in productive projects of a commercial nature").

NCB also urges that *O'Connell Machinery Co. v. M.V. "Americana,"* 734 F.2d 115 (2d Cir.1984), mandates the finding that the PIF is a political subdivision of the Kingdom. In *O'Connell*, the Second Circuit reasoned that the legislative history of the FSIA indicated that "political subdivisions" were intended to include "all governmental units beneath the central government." *Id.* (quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in*, 1976 U.S.C.C.A.N. 6604, 6613). Given the PIF's position under the Ministry of Finance, *O'Connell* could lead to the conclusion that the PIF is a political subdivision of the Kingdom of Saudi Arabia. *Id.; but see In re Ski Train Fire*, 198 F.Supp.2d at 425 n. 9 (distinguishing *O'Connell* on grounds that the court based its holding on a finding that the Italian government double-tiered its administrative agencies); *Hyatt*, 945 F.Supp. at 683–84 (finding definition of "political subdivision" in *O'Connell* too broad and suggesting the case should be limited to its facts and not applied widely). In the twenty years since *O'Connell* was decided, however, courts have been inclined to limit the FSIA's grant of immunity. *See, e.g., Dole Food*, 538 U.S. at 473–74, 123 S.Ct. 1655; *Filler*, 378 F.3d at 218. Accordingly, the Court will not rely on *O'Connell* here.

b. Limited Jurisdictional Discovery is Warranted

[13] The Court finds that resolution of the PIF's and thereby NCB's status is not determinable on the current record and, therefore, limited jurisdictional discovery is warranted. As explained above, the PIF could qualify either as an organ or political subdivision of the Kingdom of Saudi Arabia. Additionally, the affidavits on which the parties ask the Court to rely have not been subjected to cross examination and are rather self-serving. The parties should have the opportunity to take discovery of the jurisdictionally relevant facts. *First City*, 150 F.3d at 177; *see also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir.2003) (instructing district court to permit discovery before granting motion to dismiss based on fact-sensitive, multi-factor test). Accordingly, NCB's motion to dismiss for lack of subject matter jurisdiction based on the FSIA is denied without prejudice. Limited jurisdictional discovery will be permitted to explore PIF's function, organizational structure, and place within the Kingdom of Saudi Arabia.

D. Application of FSIA Exceptions to the Princes and Kingdom of Saudi Arabia

Three exceptions to foreign sovereign immunity are implicated in these motions—the commercial activities exception, 28 U.S.C. § 1605(a)(2), the state sponsor of terrorism exception, 28 U.S.C. § 1605(a)(7), and the torts exception, 28 U.S.C. § 1605(a)(5).

1. Commercial Activities Exception

[14] Section 1605(a)(2) states:

> A foreign state shall not be immune ... in any case ... in which the action is based ... upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The statute defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act.

HOUSE_OVERSIGHT_017857

The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The Supreme Court has explained, "when a foreign government acts, not as a regulator of the market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover,* 504 U.S. at 614, 112 S.Ct. 2160. Courts must inquire whether the foreign state's actions "are the type of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal citations omitted).

[15] Judge Robertson determined that the commercial activity exception did not apply to the *Burnett* Plaintiffs' claims against Prince Sultan and Prince Turki because "the act of contributing to a foundation is not within our ordinary understanding of 'trade and traffic or commerce' nor, apparently was it within the contemplation of ... Congress." *Burnett II,* 292 F.Supp.2d at 18 (citing H.R.Rep. No. 94–1487, at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6615). Thus, the consolidated Plaintiffs do not assert that the commercial activities exception is applicable to any of the Defendants raising FSIA defenses here. This Court adopts Judge Robertson's reasoning. To the extent any Plaintiffs' claims are based on a Defendant's contributions to charities, those acts cannot be considered commercial.

[16, 17] The *Federal* Plaintiffs allege that the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki financed terrorism by contributing to or supporting charities known to support terrorist activities. In these Plaintiffs' view, this is essentially money laundering and, therefore, a commercial activity. *See, e.g.,* Federal Plaintiffs' Opp. to Motion to Dismiss of Prince Sultan at 18 (citing *U.S. v. Goodwin,* 141 F.3d 394, 399 (2d Cir.1997)). The Second Circuit noted in *Goodwin* that "[m]oney laundering is a quintessential economic activity," 141 F.3d at 399, but that statement has no bearing here. In *Goodwin* the court was not deciding whether money laundering is a commercial activity for purposes of the FSIA. *Id.* (analyzing constitutionality of criminal money laundering statute). The Second Circuit has made very clear that, for purposes of the FSIA, a commercial activity must be one in which a private person can engage lawfully. *Letelier v. Republic of Chile,* 748 F.2d 790, 797–98 (2d Cir.1984); *see also Saudi Arabia v. Nelson,* 507 U.S. 349, 360–62, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (holding detaining and torturing plaintiff is not commercial activity since it "is not the sort of action by which private parties can engage in commerce"). Since money laundering is an illegal activity, *see* 18 U.S.C. § 1956 (criminalizing money laundering), it cannot be the basis for applicability of the commercial activities exception. *See Letelier,* 748 F.2d at 798 (holding alleged participation in an assassination is not a lawful activity and therefore not a commercial activity for purposes of the FSIA). Accordingly, the Court finds that the commercial activities exception outlined in § 1605(a)(2) is inapplicable to the allegations contained in the *Federal* complaint against the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki.

2. State Sponsor of Terrorism

[18] Subsection (a)(7) lifts immunity in cases:

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act ... *except* that the

> court shall decline to hear a claim under this paragraph
>
> (A) if the foreign state was not designated as a state sponsor of terrorism
>
> . . . .

28 U.S.C. § 1605(a)(7) (emphasis added). The parties agree that the Kingdom of Saudi Arabia has not been designated a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7)(A) (explaining there is no jurisdiction if "the foreign state was not designated as a state sponsor of terrorism under . . . the Export Administration Act of 1979 . . . or . . . the Foreign Assistance Act of 1961"). Thus, this exception does not provide an exception to immunity for any of the Defendants raising the FSIA defense here.

3. Torts Exception

In relevant part, the torts exception deprives a foreign sovereign of immunity in actions:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this [exception] shall not apply to -
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

28 U.S.C. § 1605(a)(5). Second Circuit law instructs that district courts must determine whether the defendant's alleged acts were tortious under the laws of New York and, if so, whether the defendant's acts were discretionary. *Robinson*, 269 F.3d at 142 ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5)."). In the event that the act is tortious and the acts were not discretionary, the alleged tortfeasor is subject to suit under the FSIA.

[19] The FSIA's discretionary function exception replicates the discretionary function exception found in the Federal Tort Claims Act. *See* 28 U.S.C. § 2680(a). Courts have found both exceptions are "intended to preserve immunity for 'decisions grounded in social, economic, and political policy.'" *Marchisella v. Gov't of Japan*, No. 02 Civ. 10023(DC), 2004 WL 307248, at *2 (S.D.N.Y. Feb. 17, 2004) (citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (interpreting FTCA)). Generally, acts are discretionary if they are performed at the planning level of government, as opposed to the operational level. *Kline v. Kaneko*, 685 F.Supp. 386, 392 (S.D.N.Y.1988) (finding decision to expel plaintiff from Mexico was product of enforcement of immigration laws and therefore a discretionary function); *Marchisella*, 2004 WL 307248, at *2 (finding decision regarding placement of a water hose on a ship was an operational function and therefore not discretionary and not protected by the FSIA); *Napolitano v. Tishman Constr. Corp.*, No. 96 Civ. 4402(SJ), 1998 WL 102789, at *4 (E.D.N.Y. Feb. 26, 1998) (finding purchasing consulate buildings and hiring contractor to renovate is a planning function and therefore discretionary).

Defendants argue that the Court should not even consider the torts exception for two reasons. First, they claim that for this exception to apply, the entire tort must have occurred in the United States, which Defendants argue is not the case here. Second, Defendants claim that Plaintiffs impermissibly seek to contort a

HOUSE_OVERSIGHT_017859

§ 1605(a)(7) state sponsor of terrorism claim into a § 1605(a)(5) tort claim.

With respect to Prince Sultan's and Prince Turki's arguments that the entire tort, meaning both the tortious conduct and the injury, must occur in the United States, Judge Robertson disagreed and stated the FSIA "preserves immunity for tort claims unless injury *or* death occurs in the United States." *Burnett II,* 292 F.Supp.2d at 19 n. 4 (quoting *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774, 775 (D.C.Cir.1984)) (Edwards, J., concurring) (some emphasis omitted). Courts in the Second Circuit seem to take the opposite approach. "Although cast in terms that may be read to require that only the injury rather than the tortious acts occur in the United States, the Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States.' " *Cabiri v. Gov't of the Republic of Ghana,* 165 F.3d 193, 200 n. 3 (2d Cir.1999) (quoting *Amerada Hess,* 488 U.S. at 441, 109 S.Ct. 683); *see also Hirsh v. State of Israel,* 962 F.Supp. 377, 383–84 (S.D.N.Y.1997) (citing legislative history stating both the tort and injury must occur within the United States for the exception to apply and dismissing complaint where plaintiffs failed to allege specific tort or place tort occurred); *Kline,* 685 F.Supp. at 391 (finding tort exception inapplicable where victim was abducted in Mexico City and brought to the United States because "the entire tort must be committed in the United States").

Plaintiffs allege that the Kingdom, Prince Sultan, and Prince Turki tortiously aided and abetted the September 11 terrorists by supporting charities that, in turn, supported al Qaeda and international terrorism. Plaintiffs also claim that, in return for protection of the Kingdom, these Defendants essentially willfully ignored the threat that Osama bin Laden and al Qaeda posed to the United States. Plaintiffs do not claim that the Kingdom or the Princes undertook any of their alleged acts in the United States. Yet, in the Plaintiffs' view, the operative torts for the Court's consideration are the attacks of September 11, which did take place in the United States. *See Burnett II,* 292 F.Supp.2d at 19 n. 4 (noting death and injuries occurred in United States). Further, Plaintiffs claim it would be unjust to allow foreign nations to escape liability for tortious acts performed in the United States if they could show that some act of planning the tort took place outside the United States.

Additionally, Defendants submit that, since the allegations are precisely those outlined in § 1605(a)(7)—that is, "personal injury or death that was caused by an act of ... extrajudicial killing, aircraft sabotage ... or the provision of material support or resources ... for such an act"—none of the other exceptions should be read to apply in its place.[25] Defendants

25. Judge Robertson recognized the same difficulty. Although he did consider Plaintiffs's claims under the tort exception, he found that the language of the state sponsor of terrorism exception buttressed his ultimate conclusion that the tortious acts exception would not provide subject matter jurisdiction over Prince Sultan and Prince Turki. Unlike (a)(7), the tort exception "makes no mention of the 'provision of material support.' " *Burnett II,* 292 F.Supp.2d at 20 n. 5. After reviewing canons of statutory construction counseling that Congress acts intentionally when it includes particular language in one section of a statute but omits it from another, Judge Robertson concluded that Congress's omission of 'provision of material support' from (a)(5) should be treated as intentional. *Id.; see also HCSC–Laundry v. United States,* 450 U.S. 1, 6, 101 S.Ct. 836, 67 L.Ed.2d 1 (1980) (per curiam) ("[I]t is a basic principle of statutory construction that a specific statute ... controls over a general provision ..., particularly when the two are interrelated and closely positioned.").

HOUSE_OVERSIGHT_017860

argue the Court's adjudication of Plaintiffs' claims would interfere with the executive branch's discretion to designate state sponsors of terror. *See* 28 U.S.C. § 1605(a)(7)(A) (listing statutes that give Secretary of State authority to designate countries as sponsors of terrorism). Finally, Defendants submit the purpose of(a)(5) was "to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Amerada Hess,* 488 U.S. at 439–40, 109 S.Ct. 683; *Burnett II,* 292 F.Supp.2d at 19 (stating "the legislative history [of the FSIA] counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law").

Plaintiffs respond that if Congress intended (a)(5) and (a)(7) to be mutually exclusive or intended that (a)(5) never apply in the terrorism context, Congress would have said so. Indeed, Congress did so very explicitly with respect to (a)(5) and (a)(2) and between (a)(7) and (a)(2). *See* § 1605(a)(5) (explaining exception can only be used in situations "not otherwise encompassed in paragraph (2)"); § 1605(a)(7) (same). To further buttress their argument, Plaintiffs note the two exceptions have been interpreted to encompass different situations. Subsection (a)(7) covers acts of terrorism committed abroad by a state sponsor of terrorism, while subsection (a)(5) governs tortious acts, including terrorism, performed in the United States. *See Flatow v. Islamic Republic of Iran,* 999 F.Supp. 1, 15 (D.D.C.1998) (finding (a)(7) applied to conduct outside the United States and stating "28 U.S.C. § 1605(a)(5) already provides jurisdiction over state-sponsored terrorist acts in the United States, . . . the state sponsored terrorism exception would be redundant if it were held to apply only within the United States"). Again, Plaintiffs argue that Defendants' argument of exclusivity would lead to absurd results, such that if a foreign sovereign not designated a state sponsor of terror was involved in a car accident stemming from negligence it would not be immune; but if it undertook a deliberate act of violence it would enjoy immunity from suit.

The Court understands Plaintiffs' desire to find a legal remedy for the horrible wrongs committed on September 11, 2001. If appropriate, however, these Defendants are entitled to immunity from litigating these gravely serious claims in this forum. Congress made a policy decision that the Executive branch, and not the courts, have the authority to label a foreign nation a terrorist. *See* 28 U.S.C. § 1605(a)(7)(A). But when it drafted the state sponsor of terror exception it did not include mutually exclusive language that would preclude the application of the torts exception here. It did include such language with respect to the commercial activities exception. *See* 28 U.S.C. § 1605(a)(7) ("A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case—not otherwise covered by paragraph (2) above."); *see also* 28 U.S.C. § 1605(a)(5) ("A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case—not otherwise encompassed in paragraph (2) above."). Particularly in a case such as this where interests of sovereignty, comity, international relations, and separation of powers are implicated, the Court must be vigilant to exercise discipline to apply the law only as it is written. While there are certainly obstacles to (a)(5)'s application—and the Court is not convinced the Plaintiffs have or can overcome them—the Court will not rule as a matter of law that subsections (a)(7) and (a)(5) are mutually exclusive. Accordingly, the Court will consider Plaintiffs' evidence

HOUSE_OVERSIGHT_017861

demonstrating the torts exception outlined in (a)(5) provides a basis for subject matter jurisdiction here.

[20] To fit within the exception outlined in § 1605(a)(5), the Plaintiffs must come forward with evidence demonstrating the Princes' or Kingdom's tortious acts or omissions caused Plaintiffs' injuries.[26] 28 U.S.C. § 1605(a)(5); *Virtual Countries,* 300 F.3d at 241; *Cargill,* 991 F.2d at 1016. "Any terrorist act, including the September 11 attacks, might have been the natural and probable consequence of knowingly and intentionally providing financial support to al Qaeda, given [the complaints'] allegations that, prior to September 11, al Qaeda and Osama bin Laden had proclaimed their intentions to commit murderous terrorist activities against the United States and its citizens, . . . and had accompanied these words with actions by implementing, and publicly acknowledging responsibility for, such terrorist schemes as the 1993 bombing of the World Trade Center, the 1998 attack of the U.S. embassies in Kenya and Tanzania, and the 2000 attack of the U.S.S. Cole in Yemen." *Burnett I,* 274 F.Supp.2d at 105; *see also Ashton* Complaint ¶¶ 105–108 (1993 World Trade Center attack), 130–136 (embassy bombings), 152–55 (Cole attack); *Federal* Complaint ¶ 77 (alleging Osama Bin Laden established al Qaeda to wage war with the United States).

a. Prince Sultan and Prince Turki

[21] Both Princes are alleged to have tortiously aided and abetted terrorism through their contributions to, and support of, Islamic charities that they knew or should have known were supporting terrorist organizations such as al Qaeda.[27] Additionally, Plaintiffs allege Prince Turki aided and abetted the terrorists by attempting to deflect their activities away from Saudi Arabia and by serving as a "facilitator of Osama bin Laden's network of charities." *Ashton* Complaint ¶ 261; *Burnett* Complaint ¶ 350. Plaintiffs allege both Princes must have known that the United States would have been al Qaeda's target, making the attacks on September 11 a foreseeable result of the Princes' actions.

[22–24] Pursuant to the Second Circuit's instruction, the Court must first determine whether the Princes' acts are tortious under New York law. *Robinson,* 269 F.3d at 142. In New York, conspiracy and aiding and abetting are varieties of concerted action liability. *Pittman v. Grayson,* 149 F.3d 111, 122 (2d Cir.1998). There must be "(1) an express or tacit agreement to 'participate in a common plan or design to commit a tortious act,' (2) tortious conduct by each defendant, and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort.'" *Id.* (quoting

26. Plaintiffs argue that Judge Robertson held them to an unnecessarily stringent theory of causation and submit that the D.C. Circuit's subsequent decision in *Kilburn v. Socialist People's Libyan Arab Jamahiriya,* 376 F.3d 1123 (D.C.Cir.2004), effectively overrules the holding in *Burnett II. See Kilburn,* 376 F.3d at 1129 (evaluating a claim under § 1605(a)(7) and holding the requirement for jurisdictional causation was proximate cause). This Court does not read *Burnett II* as requiring but-for causation and Defendants agreed at oral argument that the proper inquiry at this stage of the litigation is the presence of proximate causation. *See* Sept. 14, 2004 Tr. at 121.

27. To the extent that the consolidated Plaintiffs and the *Federal* Plaintiffs allege that Prince Sultan and Prince Turki made donations in their personal capacities, *see, e.g., Ashton* Complaint ¶ 269 (Prince Sultan); *Federal* Complaint ¶¶ 451–52 (Prince Turki), those claims are not subject to the FSIA's protection. The Court will determine whether it has personal jurisdiction over Prince Sultan and Prince Turki in Part II.

HOUSE_OVERSIGHT_017862

Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 295, 582 N.Y.S.2d 373, 591 N.E.2d 222 (1992)). Conspiracy "requires an agreement to commit a tortious act." *Id.* at 122–23. Aiding and abetting "requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer." *Id.* at 123. "[U]nder either theory, the defendant must know the wrongful nature of the primary actor's conduct." *Id.* (finding no concerted action liability where airline had no knowledge mother was removing daughter from country without father's approval).

i. Causation

Judge Robertson found his consideration of Prince Sultan's and Prince Turki's FSIA defenses did not present an opportunity for a general discourse on causation since Plaintiffs' theory would stretch causation to "terra incognita." *Burnett II*, 292 F.Supp.2d at 20. This Court agrees with Judge Robertson's conclusion, but it undertakes the causation analysis because a similar review will be necessary in its consideration of the Defendants' motions for failure to state a claim. *See* Part III below.

Plaintiffs place great reliance on *Halberstam v. Welch*, 705 F.2d 472 (D.C.Cir.1983) and *Boim v. Quranic Literacy Institute. & Holy Land Foundation for Relief & Development*, 291 F.3d 1000, 1023 (7th Cir.2002) ("*Boim II*"). Neither of these cases concern the tortious activity exception to the FSIA, but they do explain liability under the ATA and for aiding and abetting and conspiracy.[28] In *Halberstam*, the defendant was found liable as a joint venturer for a killing that occurred during a burglary at which she was not present. *Halberstam*, 705 F.2d at 488; *see also Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1536 (S.D.N.Y.1985) ("[T]hose who aid or abet or conspire in tortious conduct are jointly and severally liable with other participants in the tortious conduct, regardless of the degree of their participation or culpability in the overall scheme."). The court found that the defendant's intimate relationship with the burglar and her assistance in his other illegal ventures "defie[d] credulity that [she] did not know that something illegal was afoot." *Halberstam*, 705 F.2d at 486.

In *Boim*, the district court had denied a motion to dismiss by U.S.-based charities alleged to have aided and abetted international terrorism. *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 127 F.Supp.2d 1002, 1018 (N.D.Ill.2001) ("*Boim I*"). The Seventh Circuit affirmed the decision and held that the parents of a yeshiva student killed in 1996 in Israel by members of the military wing of Hamas could prove that the defendants aided and abetted their son's murder under the ATA if they could demonstrate that the charities "knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." *Boim II*, 291 F.3d at 1023. The court explained that "[f]oreseeability is the cornerstone of

28. The court in *Halberstam* outlined the elements of aiding and abetting as: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam*, 705 F.2d at 477. It described the elements of civil conspiracy as: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Id.*

HOUSE_OVERSIGHT_017863

proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions." *Id.* at 1012. Plaintiffs submit the court's decision in *Boim*—that the ATA was designed "to extend liability to all points along the causal chain of terrorism"—supports the finding that Prince Sultan's and Prince Turki's conduct caused the attacks on September 11, 2001. *Id.* at 1011.

Plaintiffs exert much effort outlining the connections between al Qaeda and the Defendant charities that Prince Sultan and Prince Turki supported. Plaintiffs argue that the indirect nature of the Princes' contributions to al Qaeda is not fatal to their claims since they allegedly knew that funds they donated to the Defendant charities were being diverted to al Qaeda. *See* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 1–24. The Court has reviewed the exhibits on which Plaintiffs rely and finds only a handful relate to Plaintiffs' arguments.

Exhibit 11 is a report allegedly prepared for the President of the U.N. Security Council regarding a Saudi connection to terror financing. The report mentions Prince Sultan once in his role as the head of the Supreme Council of Islamic Affairs and does not conclude or suggest that he had any knowledge that charities to which he allegedly donated were funneling money to al Qaeda.

Exhibit 12 is a statement by the former French Minister of the Interior in which he claims to have met with Prince Sultan, Prince Turki, and other members of the Saudi Royal family in November 1994 and to have raised the "question of financial aid furnished by Saudi charitable organizations enjoying state support ... to Islamist movements or terrorist groups." The only charity he names in his statement is the World Islamic League, not one of the charities to which the Princes allegedly donated.

Exhibits 21–24 are excerpts from *The Muslim World* regarding Prince Sultan's donations to IIRO and the Joint Saudi Committee for Relief of Kosovar Refugees ("JSCR"). There is no indication in these exhibits that IIRO or JSCR was funneling donations to al Qaeda. Even construing these allegations and exhibits in the light most favorable to Plaintiffs, and drawing all inferences in their favor, none of these exhibits amount to admissible evidence that Prince Sultan or Prince Turki knew the charities they supported were fronts for al Qaeda.

Alternatively, Plaintiffs argue that, since Osama bin Laden and al Qaeda made no effort to hide their hatred for the United States, Prince Sultan and Prince Turki had to have been aware that the United States was a target, making the atrocities of September 11, 2001 a foreseeable result of their actions. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 2–10, 14, 15, 18, 20 (including reports and fatwas summarizing Osama bin Laden's and al Qaeda's repeated public threats to and denouncement of the United States). There is no question that in the years leading up to the September 11 attacks, Osama bin Laden and al Qaeda were increasingly vocal in their hatred of the United States and its interests. The question remains, however, whether Plaintiffs have adequately alleged that Prince Sultan's and Prince Turki's specific acts aided and abetted those terrorists.

Both Prince Sultan and Prince Turki claim Plaintiffs cannot demonstrate their alleged tortious activity caused Plaintiffs' injuries. They argue that Plaintiffs ignore that Osama bin Laden also targeted the Saudi Royal family. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to

Dismiss, Ex. 16 (Prince Turki, "Allied Against Terrorism," September 17, 2002, *Washington Post*, editorial in which Prince Turki explains the Saudis' practice of sharing information regarding Osama bin Laden and al Qaeda with the CIA and states that al Qaeda also targeted the Kingdom); Exs. 3, 5, 6 (fatwas issued by Osama bin Laden and Sheikh Omar Abdel Rahman targeting Americans and expressing extreme bitterness toward the Saudi Royal family). Prince Sultan argues that Plaintiffs blur the distinction between charities he is on record of supporting, IIRO and WAMY, and those he is not, Al Haramain and MWL. *See supra* note 20. Both Princes also distinguish the instant case from *Boim* and other cases cited by the Plaintiffs on the basis that groups that they are alleged to have supported were not designated as terrorist organizations by the United States government. *See Boim II*, 291 F.3d at 1002 (noting Hamas was designated a terrorist organization by President Clinton in 1995 and by the Secretary of State in 1997); *see also* Consolidated Plaintiffs' Opp. to Prince Sultan's Motion to Dismiss at 16–17 (citing *Flatow*, 999 F.Supp. at 18 (holding Iran, a state sponsor of terrorism, liable as provider of material support to terrorist organization Palestine Islamic Jihad pursuant to 18 U.S.C. § 1605(a)(7)); *Smith v. Islamic Emirate of Afghanistan*, 262 F.Supp.2d 217, 232 (S.D.N.Y.2003) (granting default judgment against Iraq, a designated state sponsor of terror, after plaintiffs demonstrated it provided material support to Osama bin Laden and al Qaeda)); Consolidated Plaintiffs' Opp. to Prince Turki's Motion to Dismiss at 8 (same).

Although they did not involve New York law, the Court agrees that *Halberstam* and *Boim* are instructive. In *Halberstam*, the defendant enjoyed an extravagant lifestyle made entirely possible by her long-term live-in boyfriend's regular burglaries. The court concluded that she had to know of his criminal activities because she acted as a money launderer for her boyfriend's stolen metals business. *Halberstam*, 705 F.2d at 486–88. The court found the defendant was so close to the illegal activity that she had to be aware of her role in it. *Id.* at 486. In *Boim*, the court denied the defendants' motion to dismiss because the complaint contained specific factual allegations tying the defendants to Hamas. For example, one defendant entity allegedly employed an individual designated as a terrorist affiliated with Hamas, another entity admitted providing funds to Hamas, two individual defendants had documented and admitted ties to Hamas, and numerous links existed between the individual terrorist defendants and the entity defendants. *Boim I*, 127 F.Supp.2d at 1006–1008. Unlike Hamas in *Boim*, none of the organizations the Princes are alleged to have supported in an official capacity were designated a sponsor of terrorism at the time of the alleged contributions. In fact, only BIF and certain branches of Al Haramain have since been designated. *See* Exec. Order No. 13224 (designating BIF (November 19, 2002) and branches of Al Haramain (Bosnia, Somalia on March 11, 2002; Indonesia, Kenya, Pakistan, Tanzania on January 22, 2004; Afghanistan, Albania, Bangladesh, Ethiopia, the Netherlands on June 2, 2004)). Thus, pursuant to *Boim*, the Plaintiffs would have to allege specific facts showing that the Princes knew or should have known that the charities they supported were actually fronts for al Qaeda. *See Burnett I*, 274 F.Supp.2d at 106.

[25–27] Plaintiffs have pleaded al Qaeda's repeated, public targeting of the United States. They have not, however, pleaded facts to support an inference that the Princes were sufficiently close to the terrorists' illegal activities to satisfy *Halber-*

HOUSE_OVERSIGHT_017865

stam or New York law. Similarly, Plaintiffs have not pleaded facts to suggest the Princes knew they were making contributions to terrorist fronts and provided substantial assistance or encouragement to the terrorists to satisfy *Boim* or New York law. The Court has reviewed the complaints in their entirety and finds no allegations from which it can infer that the Princes knew the charities to which they donated were fronts for al Qaeda. The Court is not ruling as a matter of law that a defendant cannot be liable for contributions to organizations that are not themselves designated terrorists. But in such a case, there must be some facts presented to support the allegation that the defendant knew the receiving organization to be a solicitor, collector, supporter, front or launderer for such an entity. There must be some facts to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer. Here, there are no such factual bases presented, there are only conclusions. *See Robinson*, 269 F.3d at 146 ("[W]e note that the conclusory nature of [plaintiff's] allegations alone would give us pause before we would allow them to sustain jurisdiction.") (citing *Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir.2000) (finding, in context of FSIA 12(b)(1) motion, conclusory allegations in plaintiffs affidavit insufficient to sustain jurisdiction)). The law does not permit Plaintiffs

> to circumvent the jurisdictional hurdle of the FSIA by inserting vague and conclusory allegations of tortious conduct in their complaints—and then ... rely on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable substantive law. This is at odds with the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction.

Robinson, 269 F.3d at 146.

ii. Discretionary Function

Plaintiffs argue that there is no discretion to conduct illegal activities and the so-called discretionary function exception to the tortious act exception should not apply to Prince Sultan or Prince Turki. *See, e.g., Liu v. Republic of China*, 892 F.2d 1419, 1421, 1431 (9th Cir.1989) (finding no discretion to violate Chinese law prohibiting murder where gunmen acting on direction of China's Director of Defense Intelligence Bureau killed plaintiff's husband); *Birnbaum v. United States*, 588 F.2d 319, 329–30 (2d Cir.1978) (finding in FTCA case that the CIA had no authority and therefore no discretion to open U.S. first class mail departing for and arriving from the Soviet Union); *Glickman v. United States*, 626 F.Supp. 171, 175 (S.D.N.Y.1985) (finding in FTCA case that CIA agent's secret administration of LSD to plaintiff was not discretionary function); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C.1980) (holding no discretion to order or aid assassination of former Chilean ambassador and foreign minister). Prince Sultan insists that any recommendation of government grants to Islamic charities was a discretionary function. Prince Turki makes a similar argument regarding his actions as the head of DGI and urges the Court to find that all of his alleged actions should be subsumed by the discretionary function exception.

[28] The Court finds the discretionary function exception independently bars Plaintiffs' claims against Prince Sultan and Prince Turki. Both Princes are accused of donating money or recommending government grants to charities that allegedly supported al Qaeda. As the head of DGI,

Prince Turki is also alleged to have attempted to protect Saudi Arabia from terrorism and to have implemented the Kingdom's foreign relations with the Taliban and Osama bin Laden. In determining whether these were discretionary functions, the Court must decide whether the actions involved an element of choice or judgment based on considerations of public policy. *See Callahan v. United States*, 329 F.Supp.2d 404, 408 (S.D.N.Y.2004) (interpreting FTCA); *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) (construing FTCA).

[29, 30] There can be little doubt that, as the chairman of the Supreme Council of Islamic Affairs, charged with making recommendations to the Council of Ministers regarding requests for aid from Islamic organizations located abroad, and as the head of the Special Committee of the Council of Ministers, charged with deciding which grants should be made to Islamic charities, Prince Sultan's decisions were made at the planning level of government, *Kline*, 685 F.Supp. at 392, and "grounded in social, economic, and political policy," *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755. Similarly, as the head of DGI, Prince Turki's decisions regarding the treatment of the Taliban and Osama bin Laden were judgments based on considerations of public policy. *See Callahan v. United States*, 329 F.Supp.2d at 408; *see also Burnett II*, 292 F.Supp.2d at 20–21 ("[T]his conclusion would be nearly self-evident: Prince Turki, as director of intelligence, taking acts to protect Saudi Arabia from terrorism, and Prince Sultan, as chairman of the Supreme Council, making recommendations to the Council of Ministers about requests for assistance from Islamic organizations outside Saudi Arabia or, as head of the Special Committee, deciding what disbursements should be made to Islamic charitable organizations, were clearly making 'decisions grounded in social, economic, and political policy.' ") (quoting *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755).

Accordingly, to the extent that Plaintiffs allege acts Prince Sultan and Prince Turki performed in their official capacities, Prince Sultan's and Prince Turki's motions to dismiss the certain consolidated complaints [29] and the *Federal* complaint are granted. The Court denies Plaintiffs' request for jurisdictional discovery because Plaintiffs have not presented any factual basis for believing that discovery might reasonably be expected to result in evidence that would overcome the discretionary function exception. *See* 28 U.S.C. § 1605(a)(5)(A) (exception not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.") The Court will consider the appropriateness of exercising personal jurisdiction over Prince Sultan's and Prince Turki's personal acts in Part II below.

b. Kingdom of Saudi Arabia

There is no dispute that the Kingdom of Saudi Arabia is a foreign state within the meaning of the FSIA. *Federal* Complaint ¶ 63. The *Federal* Plaintiffs have the "burden of going forward with evidence that, under exceptions to the FSIA, immunity should not be granted." *Virtual Countries*, 300 F.3d at 241 (internal quotations omitted). As explained above, the only possible applicable exception is the torts exception under 28 U.S.C. § 1605(a)(5).

[31, 32] The *Federal* Plaintiffs' allegations arise "predominantly from miscon-

29. The consolidated complaints are *Ashton*, *Barrera*, *Burnett*, *Salvo*, and *Tremksy*.

HOUSE_OVERSIGHT_017867

duct of ostensible charities under the Kingdom's control." Federal Opp. to Motion to Dismiss of the Kingdom of Saudi Arabia at 1.[30] Thus, the *Federal* Plaintiffs claim the Kingdom of Saudi Arabia aided and abetted the terrorists through these charities. In attempting to overcome the presumption of the Kingdom's sovereign immunity, the *Federal* Plaintiffs argue the merits of their claims against the charities.[31] Based on news accounts that the Kingdom has dissolved its international charities and terrorist financing reports that implicate certain charities, the *Federal* Plaintiffs urge the Court to find that the Kingdom had previously willfully ignored the charities' support for terrorism. *See, e.g.,* Federal Opp. to Kingdom of Saudi Arabia Motion to Dismiss Ex. 2 ("Terrorist Financing, Report of an Independent Task Force Sponsored by the Council on Foreign Relations"), Ex. 3 (CNN.com June 2, 2004 "Saudis reform charities as antiterror measure" (mentioning only Al Haramain Islamic Foundation)), Ex. 5 (Senate Subcommittee Testimony, July 31, 2003 by Steven Emerson with Jonathan Levin, "Terrorism Financing: Origination, Organization, and Prevention: Saudi Arabia, Terrorist Financing and the War on Terror").

In response, the Kingdom argues that Plaintiffs ignore Osama bin Laden's public targeting of the Kingdom. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Ex. 3 & 4; *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States,* 48, 373 (July 2004) (hereinafter "*9/11 Report*"). The Kingdom also submits it has worked with the United States to share information in the fight against terrorism. *9/11 Report,* at 115–22; Prince Turki Decl. ¶¶ 7, 8, 10. The U.S. State Department has not designated the Kingdom a state sponsor of terrorism. Additionally, the presidentially-appointed September 11 commission found no evidence of the Kingdom's funding or support for the September 11 terrorists. *9/11 Report,* at 171 ("[W]e have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization.").

The Court finds the Plaintiffs' allegations cannot overcome the discretionary function exception to the tortious acts exception. *Marchisella v. Gov't of Japan,* 2004 WL 307248, at *2 (explaining acts performed at the planning, as opposed to operational, level of government are protected by immunity); *Robinson,* 269 F.3d at 146 (noting conclusory nature of allega-

30. The *Federal* Plaintiffs allege that each of the following charities, which are all named as Defendants and represented by counsel in these actions, are agencies, instrumentalities, arms or organs of the Kingdom: MWL, IIRO, WAMY, Al Haramain Islamic Foundation, Saudi High Commission for Relief to Bosnia and Herzegovina, SJRC, Rabita Trust, Saudi Red Crescent, and BIF. The Kingdom disputes the instrumentality status of MWL, IIRO, WAMY, Al Haramain Islamic Foundation, Rabita Trust, and BIF. These Plaintiffs request discovery as to the instrumentality status of these charities. The request is denied at this time and may be more appropriate when the Court considers each of the charities' motions to dismiss.

31. Rather than pleading specific facts showing that the Kingdom caused Plaintiffs' injuries, the *Federal* Plaintiffs focus predominantly on the charities' actions. For example, these Plaintiffs argue that the Kingdom has waived the defense of sovereign immunity because certain charities, which have not been designated as instrumentalities of the Kingdom and which are represented by separate counsel, did not raise the FSIA defense in their motions to dismiss. The Court is not convinced by this argument because the waiver of FSIA immunity must be explicit. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F.3d 255, 261 (2d Cir.2003).

HOUSE_OVERSIGHT_017868

tions would not sustain jurisdiction). Saudi Arabia's treatment of and decisions to support Islamic charities are purely planning level "decisions grounded in social, economic, and political policy." *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755; *see also Kline,* 685 F.Supp. at 392. The *Federal* Plaintiffs have not met their burden of demonstrating an exception to the FSIA applies to negate the Kingdom's immunity. "[S]overeign immunity under the FSIA is immunity from suit, not just from liability." *Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (5th Cir.1994). Because there were no factual disputes raised in the Court's resolution of this motion, no jurisdictional discovery is necessary. *See Filetech S.A. v. France Telecom S.A.,* 304 F.3d 180, 183 (2d Cir.2002). The Kingdom of Saudi Arabia's motion to dismiss the *Federal* complaint for lack of subject matter jurisdiction is granted.

II. Personal Jurisdiction

[33–36] To avoid dismissal for lack of personal jurisdiction under Rule 12(b)(2), Plaintiffs must establish personal jurisdiction over each Defendant. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir.1999). Because these motions are brought before discovery and decided without an evidentiary hearing, Plaintiffs need only make a prima facie showing that personal jurisdiction exists. *PDK Labs, Inc. v. Friedlander,* 103 F.3d 1105, 1108 (2d Cir.1997); *A.I. Trade Finance, Inc. v. Petra Bank,* 989 F.2d 76, 79 (2d Cir.1993). Plaintiffs may rely entirely on factual allegations, *Jazini v. Nissan Motor Co.,* 148 F.3d 181, 184 (2d Cir. 1998), and they will prevail even if Defendants make contrary arguments, *A.I Trade,* 989 F.2d at 79. In resolving the motions, the Court will read the complaints and affidavits in a light most favorable to Plaintiffs. *PDK Labs,* 103 F.3d at 1108. It will not, however, accept legally conclusory assertions or draw "argumentative inferences." *Mende v. Milestone Tech., Inc.,* 269 F.Supp.2d 246, 251 (S.D.N.Y.2003) (citing *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1994)).

A. Bases for Personal Jurisdiction

1. New York Long–Arm Statute

[37] "In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules if the federal statute does not specifically provide for national service of process." *PDK Labs,* 103 F.3d at 1108. Similarly, a federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits pursuant to Federal Rule of Civil Procedure 4(k)(1)(A). *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 124 (2d Cir.2002). In such cases, courts must determine if New York law would confer jurisdiction through its long-arm statute, and then decide if the exercise of such jurisdiction comports with the requisites of due process under the Fourteenth Amendment. *Id.* (citing *Bank Brussels,* 171 F.3d at 784); *Bensusan Rest. Corp. v. King,* 126 F.3d 25, 27 (2d Cir.1997).

a. Conspiracy Theory

Plaintiffs claim that New York's long-arm statute provides a basis for personal jurisdiction. Rule 302(a)(2) of New York's Civil Practice Law & Rules states in part: "(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent ... (2) commits a tortious act

HOUSE_OVERSIGHT_017869

within the state ...." N.Y. C.P.L.R. § 302(a)(2) (McKinney 2002). Courts have defined "agent" to include a defendant's co-conspirators "under certain circumstances." *Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1266 (S.D.N.Y.1991) (citing *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F.Supp. 798, 806–07 (S.D.N.Y.1975), *aff'd*, 527 F.2d 87 (2d Cir.1975)). Thus, "acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under C.P.L.R. 302(a)(2)." *Chrysler Capital Corp.* 778 F.Supp. at 1266.

[38–40] Plaintiffs are not required to establish the existence of a "formal agency relationship" between the Defendants and their putative co-conspirators. *Daventree Ltd. v. Republic of Azerbaijan*, 349 F.Supp.2d 736, at 759, 2004 WL 2997881, at *18 (S.D.N.Y.2004). Yet, "the bland assertion of conspiracy ... is insufficient to establish jurisdiction for the purposes of section 302(a)(2)." *Lehigh Valley Indus. Inc.*, 527 F.2d at 93–94; *Lamarr v. Klein*, 35 A.D.2d 248, 315 N.Y.S.2d 695, 697–98 (1st Dep't 1970) (holding that conclusory statements about defendant's role in conspiracy were insufficient to establish jurisdiction under the co-conspirator doctrine). To establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York. *Chrysler Capital Corp.*, 778 F.Supp. at 1266 (citing *Singer v. Bell*, 585 F.Supp. 300, 302 (S.D.N.Y.1984)).

[41] "To plead a valid cause of action for conspiracy under New York law, a plaintiff must allege the primary tort and four elements: '(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury.'" *Chrysler Capital Corp.* 778 F.Supp. at 1267 (quoting *Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir.1986)). To warrant the inference that a defendant was a member of the conspiracy, Plaintiffs must show that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control' or 'at the request of or on behalf of' the out-of-state defendant." *Chrysler Capital Corp.*, 778 F.Supp. at 1268–69 (quoting *Dixon v. Mack*, 507 F.Supp. 345, 350 (S.D.N.Y.1980)).

"Whether an alleged conspiracy ... existed is 'a mixed question of law and fact.'" *Daventree*, 349 F.Supp.2d 736, at 760, 2004 WL 2997881, at *19 (quoting *Mario Valente Collezioni Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 36 (2d Cir.2001)). Accordingly, the Court cannot accept "conclusory assertions on those issues; instead it must resolve such questions based upon an independent examination of the factual allegations while mindful of its duty to draw all factual inferences in plaintiffs' favor." *Id.* (rejecting conspiracy theory of personal jurisdiction without permitting jurisdictional discovery).

[42] Plaintiffs claim that all Defendants in these actions conspired with the al Qaeda terrorists to perpetrate the attacks of September 11. *See, e.g., Ashton* Complaint ¶ 296; *Federal* Complaint ¶¶ 66, 72–74. Without supporting factual allegations, such a statement is insufficient to establish an agency relationship. *Lehigh Valley Indus. Inc.*, 527 F.2d at 93–94; *Daventree*, 349 F.Supp.2d 736 at 762–63, 2004

HOUSE_OVERSIGHT_017870

WL 2997881, at *22 (citing *First Capital Asset Mgmt. v. Brickellbush, Inc.* 218 F.Supp.2d 369, 395 (S.D.N.Y.2002)). As will be highlighted below, the complaints do not allege any specific facts from which the Court could infer that Prince Sultan, Prince Turki, Mohammed Abdullah Aljomaih, Sheikh Hamad Al–Husani, or Abdulrahman bin Mahfouz directed, controlled, or requested al Qaeda to undertake its terrorist activities. Nor are there any specific allegations of their knowledge of, or consent to those activities. *See Daventree,* 349 F.Supp.2d 736 at 762–63, 2004 WL 2997881, at *22 (finding no personal jurisdiction under a conspiracy theory because there was no basis from which the court could impute to defendants the conduct of their putative co-conspirators); *Chrysler Capital Corp.,* 778 F.Supp. at 1266 (requiring specific facts warranting the inference that the defendant was a member of the conspiracy). Accordingly, for Prince Sultan, Prince Turki, Mohammed Abdullah Aljomaih, Sheik Hamad Al–Husani, and Abdulrahman bin Mahfouz, personal jurisdiction cannot be based on a New York long-arm conspiracy theory. The Court will examine the possibility of exercising conspiracy theory personal jurisdiction over the remaining moving Defendants when it examines the specific claims against each of them below.

2. Federal Rule of Civil Procedure 4(k)

Under Federal Rule of Civil Procedure 4(k)(1)(D), service of process will establish personal jurisdiction over a defendant when so authorized by a federal statute.[32] Here, the ATA contains a nationwide service of process provision, such that proper service will confer personal jurisdiction.[33] 18 U.S.C. § 2334(a) (providing for nationwide service of process and venue); *Burnett I,* 274 F.Supp.2d at 95–96. Courts asked to analyze personal jurisdiction under the ATA's national service of process provision have concluded that a plaintiff "must demonstrate that the defendant has sufficient minimum contacts to satisfy a traditional due process analysis." *Estates of Ungar v. Palestinian Auth.,* 153 F.Supp.2d 76, 95 (D.R.I.2001); *see also Biton v. Palestinian Interim Self–Gov't Auth.,* 310 F.Supp.2d 172, 179 (D.D.C. 2004) (dismissing complaint pursuant to 18 U.S.C. § 2333 because individual defendants lacked contacts with the United States). "The relevant inquiry under such circumstances is whether the defendant has minimum contacts with the United States as a whole [to satisfy Fifth Amendment due process requirements], rather than . . . with the particular state in which the federal court sits." *Ungar,* 153 F.Supp.2d at 87. Many of the moving

32. Although the Court does not have subject matter jurisdiction over any of the moving Defendants pursuant to the FSIA, that statute also provides for personal jurisdiction if service is proper and subject matter jurisdiction has been established. 28 U.S.C. § 1330(b) ("[P]ersonal jurisdiction over a foreign defendant shall exist as to every claim for relief of which the district courts have jurisdiction . . . where service has been made under section 1608 of this title."); *Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F.Supp. 325, 329–330 (E.D.N.Y.1998).

33. The *Federal* Plaintiffs pursue claims under RICO, which some courts outside the Second Circuit have held also provides for nationwide service of process and jurisdiction. *See* 18 U.S.C. § 1965; *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 942 (11th Cir.1997) (finding 18 U.S.C. § 1965(d) provides for nationwide jurisdiction); *cf. PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.,* 138 F.3d 65, 71 (2d Cir.1998) (finding " § 1965 does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter where the defendant is found"). The *Federal* Plaintiffs do not use their RICO claims as a basis for personal jurisdiction and the Court focuses on the ATA.

HOUSE_OVERSIGHT_017871

Defendants either dispute the manner in which they were served or were not served in the United States. Accordingly, the Court must consider an alternative basis for personal jurisdiction.

[43] If the New York long-arm statute or the ATA does not establish personal jurisdiction, the Court will engage in a Rule 4(k)(2) analysis. Rule 4(k)(2) states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed.R.Civ.P. 4(k)(2). Rule 4(k)(2) "fill[s] a gap in the enforcement of federal law" for courts to exercise personal jurisdiction over defendants with sufficient contacts with the United States generally, but insufficient contacts with any one state in particular. Fed.R.Civ.P. 4(k)(2) advisory committee's note; *United States v. Int'l Bhd. of Teamsters*, 945 F.Supp. 609, 616–17 (S.D.N.Y.1996). For jurisdiction under Rule 4(k)(2), there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. *Int'l Bhd. of Teamsters*, 945 F.Supp. at 617.

a. Purposefully Directed Activities Theory

Personal jurisdiction based on Rule 4(k) requires minimum contacts with the United States to satisfy Fifth Amendment due process requirements. Plaintiffs claim these requirements are met because Defendants purposefully directed their activities at the United States. *Burger King v. Rudzewicz*, 471 U.S. 462, 472, 479, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (explaining jurisdiction is appropriate if defendant "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities" and finding minimum contacts existed since dispute arose from a contract with substantial contacts with the forum) (internal quotations and citations omitted); *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (finding personal jurisdiction appropriate over non-resident defendants who "expressly aimed" intentionally tortious conduct at residents of forum state, even where defendants were never physically present in forum); *see also Daventree*, 349 F.Supp.2d 736 at 762–63, 2004 WL 2997881, at *22 (finding exercise of personal jurisdiction under Rule 4(k)(2) is appropriate if defendants "purposefully directed their activities at residents of the forum, and the litigation results from alleged injuries that arise out of or related to those activities"). Pursuant to the holdings in *Burger King*, *Calder*, and three recent terrorism cases—*Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325 (E.D.N.Y.1998), *Daliberti v. Republic of Iraq*, 97 F.Supp.2d 38 (D.D.C. 2000), and *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F.Supp.2d 54 (D.D.C.2003)—Plaintiffs submit that the moving Defendants knew that the primary target of Osama bin Laden's and al Qaeda's campaign of terror was the United States and that by providing assistance to these terrorists, who Plaintiffs claim were Defendants' co-conspirators, Defendants aimed their conduct at the United States.

In *Rein*, the court denied defendants' motions to dismiss for lack of subject matter and personal jurisdiction in a case aris-

ing from the bombing of Pan Am Flight 103 over Lockerbie, Scotland. The court found it had subject matter jurisdiction over defendant Libya, a designated state sponsor of terror, pursuant to § 1605(a)(7) of the FSIA. *Rein,* 995 F.Supp. at 329–30. Noting that the FSIA provides for personal jurisdiction as long as subject matter jurisdiction exists and proper service was effected, the court turned to Libya's contacts with the United States. *Id.* at 330 (citing *Burger King,* 471 U.S. at 472, 105 S.Ct. 2174). It found that Libya's contacts with the United States were sufficient because its allegedly "intentional, tortious actions [were] ... 'expressly aimed at' the United States," and included "destruction of a United States flag aircraft ... while en route to the United States ... with 189 United States nationals on board." *Id.* (citing *Calder,* 465 U.S. at 789, 104 S.Ct. 1482). The court concluded that its exercise of personal jurisdiction was appropriate since "[a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in the United States." *Id.*

Similarly, in *Daliberti* the court found it had subject matter jurisdiction over defendant Iraq, a designated state sponsor of terror, in a case stemming from the alleged torture of several United States citizens who were working in Kuwait. *Daliberti,* 97 F.Supp.2d at 46. Iraq argued that exercising personal jurisdiction over it would offend constitutional due process since the FSIA "abrogates the minimum contacts requirement." *Id.* at 52. The court disagreed and explained that "Congress expressly addressed the minimum contacts requirement in enacting the FSIA by providing that '[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction.' " *Id.* (citing 28 U.S.C. § 1330(b); *Shapiro v. Republic of Bolivia,* 930 F.2d 1013, 1020 (2d Cir.1991)). The court acknowledged that the foreign state's contacts with the United States might be more attenuated in the context of the state sponsor of terrorism exception than in the FSIA's other exceptions, but concluded "in the context of this statute, the purpose for which it was enacted, and the nature of the activity toward which it is directed, ... it is reasonable that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. citizens anywhere." *Id.* at 54. Finally, it noted that the "detention of these three plaintiffs had a direct effect in the United States and was consciously designed to affect United States policy ... Iraq cannot now claim surprise at the assertion of jurisdiction by this Court." *Id.*

Most recently, in *Pugh,* representatives of passengers killed in the bombing of a French airliner in Africa survived a motion to dismiss by the individual defendants. The court found it had subject matter jurisdiction over seven Libyan officials, including Muammar Qadhafi, pursuant to the state sponsor of terrorism exception of the FSIA outlined in § 1605(a)(7). *Pugh,* 290 F.Supp.2d at 58. In its personal jurisdiction analysis, the court concluded that the individuals had sufficient contacts with the United States to satisfy due process since they had "conspired to sabotage" a flight, which was scheduled to "stop in several nations," thus making it foreseeable that "passengers of many nationalities would be on board." *Id.* at 59. From their actions, the defendants could have expected to be haled into "the courts of those nations whose citizens would die." *Id.* Given the number of passengers on the plane, it was also foreseeable that Ameri-

HOUSE_OVERSIGHT_017873

cans would be on board. *Id.* Finally, the court reasoned that the "interest of the United States in preventing and punishing international terrorism has been a matter of worldwide common knowledge for years." *Id.* (citing statutes criminalizing terrorist acts). "It logically follows that if federal courts may constitutionally exercise criminal jurisdiction over such individuals, the Constitution should be no bar to those same federal courts, in a civil action ... exercising civil *in personam* jurisdiction over those same individuals for the same acts." *Id.*

[44] The courts in *Rein*, *Daliberti*, and *Pugh* properly exercised personal jurisdiction over each of the defendants in those cases pursuant to the FSIA, which specifically provides that personal jurisdiction exists where proper service and subject matter jurisdiction have been established. 28 U.S.C. § 1330(b); *Rein*, 995 F.Supp. at 329–30; *Daliberti*, 97 F.Supp.2d at 52; *Pugh*, 290 F.Supp.2d at 58. While the FSIA is not the basis for personal jurisdiction here, jurisdiction based on the ATA or Rule 4(k)(2) also requires minimum contacts with the United States. Accordingly, Plaintiffs may rely on their "purposefully directed" theory to establish these minimum contacts. But as existed in *Burger King*, *Calder*, and the three terrorism cases, Plaintiffs must allege some personal or direct involvement by the Defendants in the conduct giving rise to their claims. *See, e.g.*, *Daliberti*, 97 F.Supp.2d at 41 (explaining that defendant Iraq had held and tortured plaintiffs and that three of four plaintiffs were released only after U.S. officials' explicit negotiations with their Iraqi counterparts); *Pugh*, 290 F.Supp.2d at 56 (noting that seven individual Libyan defendants were sued in the United States after extensive official French investigation and that these defendants were deemed to be responsible for the bombings in both civil and criminal proceedings); *see also In re Magnetic Audiotape*, 334 F.3d at 208 (2d (stating a "court may exercise personal jurisdiction over defendant consistent with due process when defendant is primary participant in intentional wrongdoing—albeit extraterritorially—expressly directed at forum") (citing *Calder v. Jones*, 465 U.S. at 789–90, 104 S.Ct. 1482)); *Time, Inc. v. Simpson*, No. 02 Civ. 4917(MBM), 2003 WL 23018890, at *5 (S.D.N.Y. Dec. 22, 2003) (finding *Calder* turned on "personal involvement of the individual defendants in the particular conduct that gave rise to the plaintiff's claim" and granting motion to dismiss because plaintiff had not demonstrated that defendant had had any personal involvement in the events giving rise to the lawsuit). Accordingly, regardless of whether personal jurisdiction is based on the ATA's nationwide service of process provision or Rule 4(k)(2), to satisfy the Fifth Amendment's due process requirements, Plaintiffs must make a prima facie showing of each Defendant's personal or direct participation in the conduct giving rise to Plaintiffs' injuries.

3. Mass Torts Theory

[45] In addition to the arguments articulated above, the *Federal* Plaintiffs submit that the Court should utilize a modified due process standard appropriate for mass torts. *See, e.g.*, Federal Prince Turki Opp. at 23; Federal Prince Mohammed Opp. at 12; SAAR Network Opp. at 12–13. Courts in the Eastern District of New York have outlined the modified standard in products liability cases as follows: the state's interests in the litigation replace contacts with the forum as the constitutional touchstone and the "reasonableness" inquiry is replaced with a hardship analysis. *Simon v. Philip Morris*, 86 F.Supp.2d 95, 129 (E.D.N.Y.2000); *In re DES Cases*, 789 F.Supp. 552, 587 (E.D.N.Y.1992). The

HOUSE_OVERSIGHT_017874

Court declines to adopt this standard. There was no question that, at a minimum, the defendants in these products liability actions had substantial contacts with the forum, in these cases being New York, and were involved in the sale or production of the products at issue. *In re DES Cases*, 789 F.Supp. at 559; *Simon*, 86 F.Supp.2d at 99–100. Here, however, there are questions as to the Defendants' contacts with the forum, whether it be the United States generally or New York specifically, and the Defendants' alleged involvement with al Qaeda is much more attenuated.

B. Due Process Requirements

[46–49] Any exercise of personal jurisdiction must comport with the requirements of due process. "The due process test for personal jurisdiction has two related components: the 'minimum contacts' inquiry and the 'reasonableness' inquiry." *Metro. Life Ins. Co. v. Robertson–Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996). Depending on the basis for personal jurisdiction, due process under either the Fifth or Fourteenth Amendment applies. "[T]he due process analysis is basically the same under both the Fifth and Fourteenth Amendments. The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered." *Chew v. Dietrich*, 143 F.3d 24, 28 n. 4 (2d Cir.1998). Here, personal jurisdiction under the New York long-arm statute requires minimum contacts with New York pursuant to the Fourteenth Amendment. The exercise of personal jurisdiction under Rule 4(k) requires contacts with the United States as a whole pursuant to the Fifth Amendment.

1. Minimum Contacts

[50, 51] Minimum contacts are required so "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *see also World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The minimum contacts requirement is also known as "fair warning," such that the defendant's contacts with the forum should be sufficient to make it reasonable to be haled into court there. *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174. The " 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at the residents of the forum ... and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* (internal citations omitted); *see also World–Wide Volkswagen*, 444 U.S. at 297–98, 100 S.Ct. 559 (finding purposefully directed activities where defendant delivered products into stream of commerce with expectation they would be purchased by residents of forum); *Calder*, 465 U.S. at 789–90, 104 S.Ct. 1482 (finding publishing activities outside of forum were calculated to cause injury to plaintiff in forum where she lived and which also had the highest subscription rate). "Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174 (quoting *World–Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. 559). In every case, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting

HOUSE_OVERSIGHT_017875

Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

[52] For purposes of the minimum contacts inquiry, a distinction is made between specific and general jurisdiction. Specific jurisdiction exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum. *Metro. Life Ins.* 84 F.3d at 567–68. General jurisdiction is based on the defendant's general business contacts with the forum; because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required.[34] *Id.* at 568.

2. Reasonableness

[53] In determining whether the exercise of personal jurisdiction is reasonable, a court is to consider:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests in the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Metro. Life, 84 F.3d at 568 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–16, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)). "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477, 105 S.Ct. 2174.

[54] There obviously are competing policy considerations at play here. In general, "'great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal Indus.*, 480 U.S. at 115, 107 S.Ct. 1026 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting)). "[T]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114, 107 S.Ct. 1026. On the other hand, "[t]here is some merit ... to the plaintiffs' argument that no foreign terrorist today can fairly assert a lack of 'fair warning' that it could be 'haled into court' in [this forum.]" *Biton v. Palestinian Interim Self-Government*, 310 F.Supp.2d 172, 178 (D.D.C.2004).

C. Jurisdictional Discovery

[55, 56] Plaintiffs urge the Court to deny Defendants' motions and order jurisdictional discovery. In evaluating jurisdictional motions, district courts enjoy broad discretion in deciding whether to order discovery. *See, e.g., APWU v. Potter*, 343 F.3d 619, 627 (2d Cir.2003) (noting a court may "devis[e] the procedures [to] ferret out the facts pertinent to jurisdiction"); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir.1981) (noting a court has considerable procedural leeway in deciding whether discovery would assist resolution of motion to dismiss for lack of personal jurisdiction); *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 93–94 (2d Cir.1975) (finding no abuse of discretion in denying discovery where the complaint failed to plead sufficient facts to establish

34. At oral argument, Plaintiffs focused on specific jurisdiction, *see* Oct. 12, 2004 Transcript at 44, but Plaintiffs include general jurisdiction arguments in many of their opposition briefs, *see, e.g.*, Ashton Opp. to Prince Mohamed at 22–24; Burnett Opp. to Aljomaih at 11. The Court considers all arguments.

HOUSE_OVERSIGHT_017876

jurisdiction). "If a plaintiff has identified a genuine issue of jurisdictional fact, jurisdictional discovery is appropriate even in the absence of a prima facie showing as to the existence of jurisdiction." *Daventree*, 349 F.Supp.2d 736 at 761, 2004 WL 2997881, at *20 (citing *In re Magnetic Audiotape*, 334 F.3d at 207–08). Courts are not obligated to subject a foreign defendant to discovery, however, where the allegations of jurisdictional facts, construed in plaintiffs' favor, fail to state a basis for the exercise of jurisdiction or where discovery would not uncover sufficient facts to sustain jurisdiction. *Id.* (citing *Jazini*, 148 F.3d at 183–85 (granting motion to dismiss and denying jurisdictional discovery where complaint was described as "sparse" and "conclusory")); *see also Cornell v. Assicurazioni Generali S.p.A., Consolidated*, Nos. 97 Civ. 2262, 98 Civ. 9186(MBM), 2000 WL 284222, at *2 (S.D.N.Y. Mar. 16, 2000) (granting motion to dismiss and denying request for jurisdictional discovery where the complaint stated, without any supporting facts, that the defendant "participates in a 'multinational insurance arrangement' present in the State of New York"); *In re Ski Train Fire in Kaprun, Austria*, 230 F.Supp.2d at 410–413 (granting motion to dismiss and denying jurisdictional discovery where complaint only contained conclusory allegations).

D. Application of Plaintiffs' Theories to Moving Defendants

1. Prince Sultan

The Court outlined the allegations against Prince Sultan in Part I.B.1. With respect to Prince Sultan's contacts with the United States, Plaintiffs allege that "Saudi Royal family members own substantial assets in the United States of America, and do substantial business in the United States of America, the profits of which in part, are used to fund international terrorist acts, including those which led to the murderous attacks of September 11, 2001." *See Ashton* Complaint ¶ 296. There is no indication of whether these unspecified members of the Royal family include Prince Sultan. Most Plaintiffs also claim Prince Sultan is the ex-officio Chairman of the Board of Saudi Arabia Airlines, "which does business in the United States and internationally." *Burnett* Complaint ¶ 340; *Ashton* Complaint ¶ 253; *Barrera* Complaint ¶ 255; *Salvo* Complaint ¶ 245; *Tremsky* Complaint ¶ 180. The *Federal* Plaintiffs do not make a similar allegation.

[57] To the extent these allegations are an attempt to establish general jurisdiction over Prince Sultan, they are insufficient. *See In re Baan Co. Sec. Litig.*, 245 F.Supp.2d 117, 130 (D.D.C.2003) (refusing to hold that control status in foreign corporation with United States office is sufficient for personal jurisdiction over individual); *Cornell*, 2000 WL 284222, at *2 (granting motion to dismiss where complaint contained one conclusory statement regarding jurisdiction); *Family Internet, Inc. v. Cybernex, Inc.*, No. 98 Civ. 0637(RWS), 1999 WL 796177, at *4 (S.D.N.Y. Oct. 6, 1999) (holding that personal jurisdiction must be individually established over corporate officers even when the court has personal jurisdiction over the corporation itself).

[58] Proceeding under the purposefully directed activities theory of personal jurisdiction, Plaintiffs argue that Prince Sultan knew or should have known the organizations to which he donated were funneling money to al Qaeda and that al Qaeda's primary target was the United States. Consol. Plaintiffs' Opp. at 23. Prince Sultan argues that his alleged actions cannot satisfy the minimum contacts requirement since the Second Circuit's recent description of *Calder* requires "primary participa[tion] in intentional wrongdoing." *See*

HOUSE_OVERSIGHT_017877

In re Magnetic Audiotape, 334 F.3d at 208.

Judge Robertson dismissed without prejudice the claims against Prince Sultan in his personal capacity for lack of personal jurisdiction. *Burnett II*, 292 F.Supp.2d at 21–22. He rejected Plaintiffs' argument that Prince Sultan had purposefully directed his alleged activities at the United States. *Id.* at 22–23. Judge Robertson found that the complaint's claims that Prince Sultan donated money to foundations that allegedly funded al Qaeda "stop[ ] well short of alleging Prince Sultan's actions were 'expressly aimed' or 'purposefully directed' at the United States." *Id.* at 23 (citing *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)). Judge Robertson also denied Plaintiffs' request for discovery because they did not provide an "outline of how their showing of minimum contacts might be enhanced by jurisdictional discovery." *Id.* at 22.

This Court's record, which Plaintiffs claim is more extensive than that before Judge Robertson, contains many examples of Osama bin Laden's and al Qaeda's public targeting of the United States. *See* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 1–24. The complaints also contain conclusory allegations that Prince Sultan aided and abetted terrorism. *See, e.g., Burnett* Complaint ¶ 363; *Federal* Complaint ¶¶ 429–31. But Plaintiffs do not offer any facts to lend support to their allegation that Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism. *See* Exec. Order 13244 (designating certain branches of Al Haramain in 2002 and later). "[L]egal conclusions done up as factual allegations are not facts and cannot substitute for facts." *Cornell*, 2000 WL 284222, at *2 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). Plaintiffs have note provided an "outline of how their showing of minimum contacts might be enhanced by jurisdictional discovery." *Burnett II* 292 F.Supp.2d at 22. Accordingly, Prince Sultan's motions to dismiss the certain consolidated and *Federal* complaints for lack of personal jurisdiction over the claims concerning his personal acts are granted. Plaintiffs' request for jurisdictional discovery with respect to Prince Sultan is denied. *Daventree*, 349 F.Supp.2d 736, at 761, 2004 WL 2997881, at *20 (finding jurisdictional discovery is not necessary where the allegation of jurisdictional facts fails to state a basis for the exercise of personal jurisdiction).

2. Prince Turki

[59] The allegations against Prince Turki are outlined in Part I.B.2. Because the consolidated Plaintiffs do not allege any acts taken by Prince Turki in his personal capacity, the Court only considers the *Federal* Plaintiffs' claim that Prince Turki made personal donations to certain Saudi charities. *See Federal* Complaint ¶ 452. The *Federal* complaint does not make any specific jurisdictional allegations against Prince Turki. Rather, these Plaintiffs rely on *Calder, Rein, Daliberti, Pugh*, and the modified due process standard for mass torts to argue that the September 11 attacks were a foreseeable result of Prince Turki's alleged support of certain Saudi charities. *See* Federal Opp. to Prince Turki's Motion to Dismiss at 22–23.

The *Federal* Plaintiffs have not presented any specific facts from which this Court could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda. Conclusory allegations that he donated money to charities, without specific factual allega-

tions that he knew they were funneling money to terrorists, do not suffice. *See Burnett II*, 292 F.Supp.2d at 23 (citing *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 774–75, 104 S.Ct. 1473); *see also* Exec. Order 13244 (designating certain branches of Al Haramain and BIF in 2002). Accordingly, Prince Turki's motion to dismiss the *Federal* complaint for lack of personal jurisdiction is granted. Jurisdictional discovery is not appropriate with respect to Prince Turki because Plaintiffs have not identified any genuine issue of jurisdictional fact. *Daventree*, 349 F.Supp.2d 736, at 761, 2004 WL 2997881, at *20.

3. Prince Mohamed

The *Ashton* and *Federal* Plaintiffs allege that Prince Mohamed is or was the chairman or chief executive officer of three financial institutions in Saudi Arabia: Dar al Maal al Islami ("DMI"), Islamic Investment Company of the Gulf–Bahrain EC ("IICG"), and Faisal Islamic Bank–Sudan ("FIBS"), which are all shareholders of Defendant Al Shamal Islamic Bank.[35] *Ashton* Complaint ¶¶ 51, 54; *Federal* Complaint ¶¶ 307, 309, 473. They claim that Prince Mohamed knew or should have known that each of these financial institutions "acted as an aider and abettor and material sponsor of al Qaeda, Bin Laden, and international terrorism." *Ashton* Complaint ¶ 276; *Federal* Complaint ¶ 472 (alleging Prince Mohamed "has long provided material support and resources to al Qaeda"). The *Ashton* Plaintiffs claim that Prince Mohamed is "heavily involved in the sponsorship of terror through Faisal Islamic Bank–Sudan," since at some point al Qaeda allegedly had an account there. *Ashton* Complaint ¶¶ 65, 66, 255, 274; *see also* Ashton Opp. to Prince Mohamed's Motion to Dismiss at 25 (arguing that al Qaeda operative Jamal Ahmed Al Fadl used an account at Al Shamal Islamic Bank to transfer $250,000 for Osama bin Laden). These Plaintiffs also claim that Prince Mohamed has financial ties with alleged al Qaeda financier Muhammed Zouaydi. *Ashton* Complaint ¶ 258. The *Federal* Plaintiffs claim that Prince Mohamed made personal contributions to Saudi-based charities that he knew or should have known sponsored the terrorist activities of al Qaeda. These charities include IIRO, MWL, WAMY, BIF, the Saudi High Commission, SJRC, and Al Haramain. *Federal* Complaint ¶¶ 475–76

The *Ashton* complaint contains an unspecific allegation regarding the Saudi Royal family's ownership of property in the United States. *Ashton* Complaint ¶ 296. The *Ashton* Plaintiffs argue that general jurisdiction is appropriate because Prince Mohamed attended college and business school in the United States, gave two interviews in a New York apartment in 1978, gave a speech at Harvard in 1999, and made investments in American businesses through the banks he chairs in 2001. Ashton Opp. to Prince Mohamed Motion to Dismiss at 22–23. Plaintiffs assert jurisdictional discovery is likely to expose further contacts between Prince Mohamed and the United States.

If general jurisdiction is not established through Prince Mohamed's contacts with the United States, the *Ashton* and *Federal* Plaintiffs claim that jurisdiction exists under either the New York long-arm conspiracy theory or the purposefully directed activities theory. Ashton Opp. to Prince Mohamed Motion to Dismiss at 17–22; Federal Opp. to Prince Mohamed Motion to Dismiss at 6–12. Specifically, the *Ash-*

35. Osama bin Laden allegedly capitalized Al Shamal Islamic Bank with $50 million. *Burnett* Complaint ¶ 70. Several al Qaeda operatives, including Osama bin Laden, held accounts there. *Id.* ¶ 79.

HOUSE_OVERSIGHT_017879

ton Plaintiffs bolster their arguments for personal jurisdiction by citing to paragraphs in the complaint in support of each of the requirements for conspiracy. *See Chrysler Capital Corp.*, 778 F.Supp. at 1268–69 (outlining cause of action for conspiracy).

Plaintiffs claim that Prince Mohamed and al Qaeda agreed to injure the United States through acts of international terrorism. *Ashton* Complaint ¶¶ 5, 23 (all defendants are co-conspirators), 51, 105–08 (February 1993 World Trade Center bombing), 120 (February 1998 fatwa), 130–36 (1998 embassy bombings), 152–55 (U.S.S. Cole attack), 188, 255, 274–76, 580 (September 11, 2001 attacks); *see also Federal* Complaint ¶¶ 66, 72–74 (listing defendants who have "aided and abetted, conspired with, and provided material support and resources to, defendant al Qaeda and/or affiliated FTOs, associations, organizations or persons."). Next they claim the September 11 attacks were perpetrated in furtherance of that common scheme. *Ashton* Complaint ¶¶ 23, 188, 610. According to Plaintiffs, Prince Mohamed participated in the conspiracy by providing funding, financial support, and banking services through FIBS. *Id.* ¶¶ 48–54, 63–66, 255, 274–276, 387, 580, 582. Specifically, Plaintiffs claim:

- On October 17, 1983, Prince Mohamed became CEO of DMI. Under Prince Mohamed's chairmanship, DMI developed banking, investment and insurance activities in approximately twenty offices across the world. DMI was founded in 1981 to foster the spread of Islamic banking across the Muslim world and its Board of Directors included Haydar Mohamed bin Laden, a half-brother of Osama bin Laden. *Id.* ¶ 274.
- Faisal Islamic Bank Sudan was one of the five main founders of Al Shamal Islamic Bank .... Al Shamal Islamic Bank is an instrumental bank in bin Laden's financial support network. Bin Laden used Al Shamal Bank for the funding of his al Qaeda network leading up to the 1998 United States embassy bombings in Africa. Defendant Faisal Islamic Bank was implicated during Al Fadl's May 2001 United States trial testimony regarding the bombings as holding and managing bank accounts for al Qaeda operatives. *Id.* ¶¶ 274–75.
- As the head of DMI, Prince Mohamed knew or should have known of these and other activities and acted as an aider and abettor and material sponsor of al Qaeda, bin Laden, and international terrorism. *Id.* ¶ 276.
- U.S. designated terrorists Wa'el Julaidan and Yassin Kadi had accounts in a DMI subsidiary. Ashton Opp. at 25.

Finally, Plaintiffs allege the that attacks in question caused many deaths, a fact that no one disputes. *Ashton* Complaint ¶¶ 23, 610.

In response, Prince Mohamed argues that Plaintiffs have failed to demonstrate that he is "present" in the United States for general personal jurisdiction purposes. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411–12, 416–18, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir.1975) (buying and selling American securities is insufficient to establish that defendant was "doing business" in the United States). Prince Mohamed submits that some of the contacts on which Plaintiffs rely are too far removed in time from September 2001 to be considered by the Court. *See Metro. Life*, 84 F.3d at 569 (holding courts should examine a defendant's contacts with the forum for a reasonable period prior to the date on which the lawsuit was filed, and finding that six

HOUSE_OVERSIGHT_017880

years was reasonable). Prince Mohamed correctly submits that his position as an officer of DMI, IICG, and FIBS would not be a basis for jurisdiction over him even if the Court had personal jurisdiction over these entities. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."). Finally, Prince Mohamed argues that the conclusory allegation that he participated in a terrorist conspiracy, without specific facts, is insufficient to create personal jurisdiction over him.

[60] The Court agrees that Plaintiffs have not presented a prima facie case of general jurisdiction over Prince Mohamed. In the ten years before the attacks, Prince Mohamed's contacts with the United States consist of one speech and a handful of investments in the United States through the banks with which he is affiliated. These contacts are not sufficiently "systematic and continuous" to maintain general jurisdiction over a defendant in this action.[36] *See Helicopteros*, 466 U.S. at 416, 104 S.Ct. 1868 (holding that purchasing in forum, sending personnel for training in forum, and negotiating a contract in forum were not sufficient to establish general jurisdiction).

[61, 62] Plaintiffs have alleged that DMI and FIBS might have been involved in the financing of terrorism. *See, e.g., Ashton* Complaint ¶¶ 274–75; Ashton Opp. at 25. Even assuming that the Court has personal jurisdiction over these entities, "[t]he mere fact that a corporation is subject to jurisdiction . . . does not mean that individual officer may be hauled before New York courts without any showing that the individuals themselves maintained a presence or conducted business in New York." *Family Internet*, 1999 WL 796177, at *4. Plaintiffs have not alleged that Prince Mohamed had any knowledge or involvement in any al Qaeda accounts at any of the banks he chaired. FIBS' relationship with Al Shamal Islamic Bank, which purportedly knowingly opened accounts for al Qaeda operatives, including Osama bin Laden, is too remote in time and proximity to implicate Prince Mohamed. To make a prima facie case of personal jurisdiction, Plaintiffs must either allege personal acts by Prince Mohamed by which he purposefully directed his activities at the United States by supporting Osama bin Laden, al Qaeda, or their terrorist agenda, or demonstrate that the acts of the banks he chaired can be imputed to him. Plaintiffs have not met their burden. Thus, Prince Mohamed's motions to dismiss the *Ashton* and *Federal* complaints as against him for lack of personal jurisdiction are granted.

4. Estate of Mohammad Abdullah Aljomaih

On May 2, 2003 by Second Addition and Removal of Defendants Pursuant to Case Management Order No. 1 imposed by Judge Robertson, the *Burnett* Plaintiffs added a defendant "Mohammed Bin Abdullah Al-Jomaith." To date, no specific allegations have been added to the complaint with respect to Mr. Aljomaih.

In anticipation of what the claims against him might be, before his death Mr. Aljomaih prepared a declaration in support of his motion to dismiss. He was born in Saudi Arabia in 1915 and lived in Riyadh for most of his life. Aljomaih Decl. ¶ 3. He and his family began a company in the 1940s that now supplies automobiles, soft drinks, construction equipment, and other

36. There is no allegation that Prince Mohamed's investments in the United States are related to any alleged conspiracy or to al Qaeda's activities.

HOUSE_OVERSIGHT_017881

goods and services to large portions of Saudi Arabia. *Id.* ¶ 4. In the past ten years he visited the United States three times for medical reasons. *Id.* ¶¶ 5–6. Prior to these medical visits, he took a short trip to New York City in 1964. *Id.* ¶ 7. He owned no property, held no bank accounts, and conducted no business in this country. *Id.* ¶ 10.

Mr. Aljomaih's estate argues that there were problems with his service. He was served pursuant to Judge Robertson's March 25, 2003 approving service by publication. Under that order, Plaintiffs published a list of defendants in two publications, *The International Herald Tribune* and *Al Quds Al Arabia.* The notice in *The International Herald Tribune* contained Mr. Aljomaih's name in English, a language he could not read. *Id.* ¶ 11. *Al Quds Al Arabi* is published in Arabic, but is not circulated in Saudi Arabia and the list did not include Mr. Aljomaih's name. Even if service was proper, however, the estate of Mr. Aljomaih claims the Court does not have personal jurisdiction over it.

Plaintiffs submit that Mr. Aljomaih is implicated by the "Golden Chain." Plaintiffs' Opp. at 9. The "Golden Chain" is a group of documents that was discovered by Bosnian authorities searching the offices of charity Defendant BIF in March 2002. Plaintiffs claim the "Golden Chain" contains a list of early direct donors to al Qaeda. Plaintiffs' Opp. at 9; *see also* Bierstein Aff. in Opp. to Al–Husani Motion to Dismiss, Ex. 2 ("Golden Chain" document). It includes the entry "Al–Jumaih. Jeddah (S.A.)." Plaintiffs do not dispute that "for more than sixty years [Mr. Aljomaih] lived in Rihadh," not Jeddah, Aljomaih Decl. ¶ 3, yet they insist the document identifies him as a direct donor to al Qaeda. Additionally, Plaintiffs claim that Mr. Aljomaih's company donated money to charity Defendant IIRO. Plaintiffs assert there are sufficient allegations against Mr. Aljomaih in the form of general allegations against all Defendants to put him on notice of the claims against him. They claim that jurisdiction over Mr. Aljomaih's estate is proper because he "purposefully directed" his activities at the United States by supporting al Qaeda. Plaintiffs also submit that Mr. Aljomaih's company does business with General Motors and Shell Corporation and that, therefore, he must have had contacts with the United States. *See* Opp. at 11; Statement of Jamie L. Paye attached to Plaintiffs' Opp.

[63] The Court finds the Plaintiffs have not established a prima facie case of jurisdiction over Mr. Aljomaih to defeat his motion or warrant jurisdictional discovery. Their theory of jurisdiction rests almost entirely on a document with serious foundational flaws. Even assuming, as the Court must, that the "Golden Chain" refers to Mr. Aljomaih, with no indication of who wrote the list, when it was written, or for what purpose, the Court cannot make the logical leap that the document is a list of early al Qaeda supporters. Mr. Aljomaih's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is accordingly granted.

5. Sheikh Hamad Al–Husani

The posture of the *Burnett* Plaintiffs' case against Sheikh Hamad Al–Husani is similar to that against Mr. Aljomaih. Mr. Al–Husani was also added to a list of defendants to be served by publication and the complaint contains no specific allegations against him. Al–Husani Decl. ¶ 10. He is a watch retailer residing in Saudi Arabia. *Id.* ¶¶ 3–4, 7. Mr. Al–Husani has never visited the United States, owns no real property here, holds no bank accounts or investments in the United States, and does not engage in transactions with any businesses in the United States. *Id.* ¶¶ 3,

5–7. He has never supported any person or organization that he has known to participate in any terrorist attacks. *Id.* ¶ 9. Mr. Al–Husani submits that Plaintiffs cannot cure the lack of allegations in the complaint in its motion papers. *Wright v. Ernst & Young, LLP,* 152 F.3d 169, 178 (2d Cir.1998) (explaining a party is not permitted to amend its complaint through allegations made in motion papers).

Mr. Al–Husani also claims that he was not properly served because *The International Herald Tribune* has a circulation of only 199 in Saudi Arabia and is published in English, and *Al Quds Al Arabia* is a London-based paper banned in the Kingdom. Even if service was proper, however, Mr. Al–Husani submits this Court does not have personal jurisdiction over him.

The *Burnett* Plaintiffs claim that Mr. Al–Husani is also implicated by the "Golden Chain," and thus an early supporter of al Qaeda. Plaintiffs' Opp. to Al–Husani Motion to Dismiss at 10; Bierstein Aff. at Ex. 2 (document listing "Hamad Al Husaini," without indicating when list was written, by whom, or for what purpose). The Plaintiffs place great weight on the United States' inclusion of the "Golden Chain" in its proffer of evidence in *United States v. Arnaout,* the government's case against an executive of Defendant charity BIF. *See* Bierstein Aff. at Ex. 1 (proffer). The court presiding over that case, however, ruled that the document was inadmissible hearsay. *United States v. Arnaout,* No. 02 Cr. 892, 2003 WL 255226, at *1–2 (N.D.Ill. Feb. 4, 2003). Nevertheless, by supporting al Qaeda, Plaintiffs assert Mr. Al–Husani purposefully directed his activities toward the United States, making the exercise of personal jurisdiction appropriate. *See, e.g.* Bierstein Aff. Exs. 9–15 (detailing al Qaeda's hatred for and actions against the United States). Additionally, Plaintiffs claim that one of Mr. Al–Husani's companies is a supporter of Al–Waqf al-Islami Foundation, a Dutch entity whose seminars "have drilled extremist messages into the heads of thousands of young Muslims." "Radical Foundation: In 'Law' Seminars, A Saudi Group Spreads Extremism," *Wall St. J.,* Apr. 15, 2003, at Bierstein Aff. Ex. 6.

[64] Plaintiffs have not established a prima facie showing of jurisdiction over Mr. Al–Husani to survive his motion to dismiss or warrant jurisdictional discovery. The "Golden Chain" does not say what the Plaintiffs argue it says. It is only a list of names found in a charity's office. It does not establish Mr. Aljomaih's involvement in a terrorist conspiracy culminating in the September 11 attacks and it does not demonstrate that he purposefully directed his activities at the United States. Accordingly, Mr. Al–Husani's motion to dismiss the *Burnett* complaint against him is granted.

6. NCB

The Court outlined the *Ashton* and *Burnett* Plaintiffs' claims against NCB in Part I.B.4. For purposes of the personal jurisdiction analysis, the Court will assume at this point that the FSIA does not provide for subject matter and personal jurisdiction over NCB. Accordingly, the Plaintiffs will have to make a prima facie showing to survive NCB's motion to dismiss. In that vein, Plaintiffs argue that NCB purposefully directed its activities at the United States and participated in a conspiracy that culminated in the attacks of September 11.

Plaintiffs submit NCB has many contacts with the United States, including a wholly-owned subsidiary in New York City through which it operates an international banking business. *See, e.g.,* Aff. of John Fawcett in Support of Ashton Plaintiffs' Opp. to NCB's Motion to Dismiss (hereinafter "Fawcett Aff.") ¶ 3, Exs. 2 & 3. NCB

HOUSE_OVERSIGHT_017883

has been a party to lawsuits in the Southern District of New York, both as a plaintiff and defendant. Fawcett Aff. ¶ 7. *The Muslim World League Journal*, a monthly publication distributed in American mosques, ran solicitations from 1998 to 2001 for the Islamic Solidarity Fund & Waqf for the Organization of the Islamic Conference and the Khair Funds of the Muslim World League that provided NCB account numbers to which donors could contribute directly. *Id.* ¶ 8, Ex. 5. Plaintiffs request jurisdictional discovery to explore further contacts.

NCB argues that none of Plaintiffs' submissions satisfy the constitutionally required showing of minimum contacts. NCB closed its New York City branch office in 1992. Decl. of Jorge Juco ("Juco Decl.") ¶ 5, at Berger Aff. in Support of NCB's Motion to Dismiss *Ashton* and *Burnett*, Ex. 5. NCB's second-tier subsidiary, SNCB Securities Inc., dissolved in February 2001. *Id.* (citing Ex. A of Juco Decl., the certified copy of the Certificate of Dissolution); *see also Schenker v. Assicurazioni Generali, S.P.A.*, No. 98 Civ. 9186(MBM), 2002 WL 1560788, at * 4 (S.D.N.Y. July 15, 2002) (finding no personal jurisdiction over parent corporation where New York subsidiary was sold two months prior to commencement of action). NCB submits its involvement in lawsuits is equally unavailing because both were terminated prior to the filing of this action. *See* docket *Logan Feed v. Nat'l Commercial Bank*, No. 92 Civ. (S.D.N.Y.) (NCB terminated July 24, 1995); docket *Nat'l Commercial Bank v. Morgan Stanley Asset Mgmt., Inc.*, No. 94 Civ. 3167 (S.D.N.Y.) (closed Feb. 17, 1998). It contends that its consent to personal jurisdiction in one case does not open the door to personal jurisdiction in future cases. *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 n. 5 (2d Cir.1991); *Andros Compania Maritima, S.A. v. Intertanker Ltd.*, 714 F.Supp. 669, 675 (S.D.N.Y.1989) (holding lawsuits in the forum do not establish general personal jurisdiction). NCB argues that there is no indication it placed the advertisements in *The Muslim World League Journal*, or that any donations were deposited into NCB accounts.

In arguing its absence of contacts with the United States, NCB reiterates that it is not domiciled, organized, or maintaining an office in New York. Juco Decl. ¶ 3. It is not registered or licensed to do business in the United States and has no property in the United States. *Id.* ¶ 8. Shares of NCB stock are not sold in the United States, there are no NCB employees or telephone numbers in the United States, and the company does not advertise or solicit business in the United States. *Id.* ¶ 11. Its website is accessible from United States, but only NCB account holders may access the inter-active services. *Id.* The Saudi Arabian Monetary Agency requires that NCB's account holders be Saudi citizens or residents, Saudi government entities, or business or charity entities with lawful status in Saudi Arabia. Juco Decl. ¶ 10.

NCB claims the rare contacts it does have with the United States do not satisfy the requirements of due process. Although it maintains correspondent banking relationships with U.S. commercial banks, Juco Decl. ¶ 12, NCB argues such relationships are insufficient to establish personal jurisdiction over NCB. *Semi Conductor Materials, Inc. v. Citibank Int'l PLC*, 969 F.Supp. 243, 244 (S.D.N.Y.1997) (holding foreign bank's correspondent banking relationship with New York bank is not sufficient for personal jurisdiction); *Casio Computer Co. v. Sayo*, No. 98 Civ. 3772(WK), 2000 WL 1877516, at *26 (S.D.N.Y. Oct. 13, 2000) (holding defendant bank's wire transfers to U.S. bank accounts does not create minimum contacts); *Leema Enters., Inc. v. Willi*, 575 F.Supp.

1533, 1537 (S.D.N.Y.1983) (holding correspondent banking relationships insufficient to create general personal jurisdiction). NCB offers its customers the opportunity to open accounts directly with United States-based securities broker-dealers, but NCB does not act as a broker-dealer for securities sold in the United States and is not so licensed. Juco Decl. ¶ 14; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir.1975) (finding Canadian securities broker not "doing business" in New York when it arranges for its Canadian customers to buy and sell U.S. securities through U.S. broker). In 2002, less than 2% of the securities NCB traded for its own account were issued by U.S. entities. Juco Decl. ¶ 15; *Schenker*, 2002 WL 1560788, at *3–5 (finding that a single bank account in the United States, constituting small fraction of defendant's total assets, is insufficient to form the basis for personal jurisdiction).

[65] Taken individually, NCB's contacts with the United States would not satisfy due process requirements. However, when they are examined as a whole—the presence of a branch office until 1992, a subsidiary until 2001, taking advantage of the privilege of its presence in New York by instigating a lawsuit in this forum, advertisements in U.S. publications—the Court finds that they may, with the help of limited jurisdictional discovery, comport with due process. NCB's motion to dismiss is therefore denied without prejudice.

7. Abdulrahman bin Mahfouz

Abdulrahman bin Mahfouz is a Defendant in the *Burnett* action. He is the son of Defendant Khalid bin Mahfouz and a director of the Defendant charity Blessed Relief Society, also known as Muwaffaq. *Burnett* Complaint ¶¶ 331; 445. Blessed Relief is a branch of the Human Concern International Society, which Osama bin Laden identified as a supporter in 1995. *Id.* ¶ 333. He is a shareholder and the CEO of former Defendant Nimir, LLC, also known as Nimir Petroleum Ltd. *Id.* ¶ 443.[37] Finally, Plaintiffs claim that Mr. bin Mahfouz was a member of the board and Vice Chairman of the Executive Management Committee of Defendant National Commercial Bank. *Id.* ¶ 445.

Plaintiffs base their personal jurisdiction arguments on their claim that Mr. bin Mahfouz was a participant in the conspiracy of terror that purposefully directed its conduct at the United States and included the September 11 hijackers. Plaintiffs also claim that he has business interests in the United States. Specifically he is a shareholder in U.S.-based companies, and his company, Al Murjan, allegedly has dealings with the American phone company Hughes Technologies, Inc.

Mr. bin Mahfouz disputes the manner in which he was served. His name appeared in Plaintiffs' notice by publication in *The International Herald*, which only has circulation of 199 in the entire Kingdom of Saudi Arabia, and *Al Quds al-Arabia*, which is banned in the Kingdom. He submits that he has no personal contacts with the United States and there is no basis for exercising personal jurisdiction over him.

[66] The *Burnett* complaint does not contain any specific actions by Mr. bin Mahfouz from which the Court could infer that he purposefully directed his activities at the United States. His affiliations with entities that are alleged to have U.S. contacts will not sustain jurisdiction. *Family Internet*, 1999 WL 796177, at *4. Finally, being a shareholder in a United States

37. The *Burnett* Plaintiffs voluntarily dismissed their claims against Nimir LLC. *See* Mem. in Supp. of Motion to Dismiss Ex. 1.

HOUSE_OVERSIGHT_017885

company is not sufficient to establish general personal jurisdiction over Mr. bin Mahfouz. *Bersch*, 519 F.2d at 998; *see also Schenker*, 2002 WL 1560788, at *3–5 (finding single bank account in United States constituting small fraction of defendant's total assets is not a sufficient basis for personal jurisdiction). Mr. bin Mahfouz's motion to dismiss the *Burnett* complaint as against him for lack of personal jurisdiction is accordingly granted.

8. Saudi Binladin Group, Tariq Binladin, Omar Binladin, and Bakr Binladin

The *Ashton* and *Burnett* complaints name the Saudi Binladin Group ("SBG") as a Defendant. The *Burnett* complaint also names Tariq Binladin, Omar Binladin, and Bakr Binladin, Osama's half-brothers, as Defendants. In both actions, these Defendants move to dismiss the complaint or for a more definite statement.

Based in Jeddah, Saudi Arabia, SBG is the successor to a construction company founded by Mohammed Binladin, the father of Osama bin Laden. *Ashton* Complaint ¶ 543; *Burnett* Complaint ¶ 311. It is now one of the largest engineering and construction companies in the Arab world and is managed by Osama bin Laden's half brothers, including defendants Bakr Binladin, who runs SBG, and Tariq Binladin, who holds a position on the board. *Ashton* Complaint ¶ 545; *Burnett* Complaint ¶ 313. Tariq Binladin allegedly had a prominent role at IIRO in 1990. *Ashton* Complaint ¶ 557; *Burnett* Complaint ¶ 326. Osama bin Laden purportedly used SBG to build an infrastructure in Afghanistan. *Ashton* Complaint ¶¶ 546, 547; *Burnett* Complaint ¶¶ 314–316. After the Soviets withdrew from Afghanistan in 1989, Osama bin Laden returned to work with SBG in Jeddah. *Ashton* Complaint ¶ 548; *Burnett* Complaint ¶ 317. SBG allegedly continued to support Osama bin Laden after he relocated to Sudan in 1991. *Ashton* Complaint ¶ 548; *Burnett* Complaint ¶ 317. For example, SBG, through two subsidiaries allegedly supported Osama bin Laden's participation in the construction of the Tahaddi road and Port Sudan Airport. *Ashton* Complaint ¶¶ 550; 552, 553; *Burnett* Complaint ¶¶ 319–322. Plaintiffs claim Osama bin Laden's name is still listed on SBG corporate records. *Ashton* Complaint ¶ 558; *Burnett* Complaint ¶ 329. Defendants dispute this and argue he was formally removed from SBG's ownership documents in June 1993. SBG's Mem. in Supp. of Motion to Dismiss Ashton Complaint at 2. Plaintiffs also claim that Osama bin Laden never "broke" with his family after he was exiled to Sudan and that SBG continued to provide him financial assistance and engineering support. *Ashton* Complaint ¶ 549; *Burnett* Complaint ¶ 318. Defendants also dispute this statement and argue that Bakr formally ostracized Osama from the family and the company in a February 1994 statement. SBG's Mem. in Supp. of Motion to Dismiss Ashton Complaint at 2.

SBG "sheltered and directly supported operatives of the al Qaeda terrorist organization." *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. Mohammad Jamal Khalifa, allegedly a key al Qaeda operative, was taken in by a branch of SBG, the Mohammed Bin Laden Organization. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. The Mohammed Bin Laden Organization is allegedly a wholly-owned subsidiary of SBG and its board members include defendants Bakr, Tariq, and Omar Binladin. *Ashton* Complaint ¶ 556; *Burnett* Complaint ¶ 325. Khalifa listed the Mohammed Bin Laden Organization address on his visa application. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. Additionally, U.S.-designated terrorist Yassin Abdullah al-Kadi was allegedly introduced to

the Global Diamond Resource's Chairman by an executive of SBG. *Ashton* Complaint ¶ 459; *Burnett* Complaint ¶ 328.

Plaintiffs claim that SBG had an address in Rockville, Maryland until very recently. *Ashton* Complaint ¶ 545; *Burnett* Complaint ¶ 313. SBG claims the Rockville address was the headquarters of a separately incorporated company, SBG USA, which was formally dissolved in December 1999. *See* SBG Memorandum in Support of Motion to Dismiss Ashton Complaint at 7 & Ex. 2 (articles of dissolution); *see also Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 52 (2d Cir.1991) (personal jurisdiction contacts determined at time complaint is filed); *but see Metro. Life,* 84 F.3d at 569 (holding courts should examine a defendant's contacts with the forum for a reasonable period prior to year of lawsuit and finding six years was reasonable).

[67] The *Burnett* complaint does not contain any factual allegations against Tariq, Omar, or Bakr Binladin from which the Court could infer that they purposefully directed their activities at the United States, that they were members of a conspiracy pursuant to the New York long-arm statute, or that they have any general business contacts with the United States. Accordingly, the *Burnett* complaint against these three individuals is dismissed.

[68] Rather than permitting a 12(e) statement, the Court finds jurisdictional discovery is warranted to determine if SBG purposefully directed its activities at the United States. *See Asip v. Nielsen Media Research,* No. 03 Civ. 5866(SAS), 2004 WL 315269, at *2 (S.D.N.Y. Feb. 18, 2004) (noting the purpose of Rule 12(e) is to "strike at unintelligibility rather than want of detail and . . . allegations that are unclear due to lack of specificity are more appropriately clarified by discovery"). Specifically, although the complaints are not specific about when, at the very least, SBG provided construction support to Osama bin Laden. *Ashton* Complaint ¶¶ 550, 552–53; *Burnett* Complaint ¶¶ 319–22. A branch of SBG allegedly look in an al Qaeda operative who listed the SBG branch address on his visa application. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. It is alleged to have ties to U.S.-designated terrorist Yassin Abdullah Al–Kadi. *Ashton* Complaint ¶ 459; *Burnett* Complaint ¶ 328. At this stage, the Court must accept as true Plaintiffs' contentions that SBG still contains Osama bin Laden's name in its corporate documents. *Ashton* Complaint ¶ 558; *Burnett* Complaint ¶ 329. Additionally, although it would not satisfy the due process requisites on its own, SBG's presence in Maryland three years before the complaints were filed, also warrants some discovery. Accordingly, SBG's motion to dismiss the *Ashton* and *Burnett* complaints are denied without prejudice.

9. SAAR Network

The *Federal* Plaintiffs claim the SAAR Network is a network of "interrelated ostensible charities" that was established in the 1980s "to generate and surreptitiously transfer funds to terrorist organizations, including al-Qaeda." *Federal* Complaint ¶ 222. Several organizations within the SAAR Network, including SAAR Foundation, SAAR International, Safa Group, Mar–Jac Poultry, Mar–Jac Holdings, Inc., Safa Trust, Inc. and Aradi, Inc., were established, funded or closely affiliated with Defendant Suleiman Abdul Aziz al Rajhi. *Id.* at ¶ 223. By September 11, 2001, there were allegedly over one hundred entities in this network, "including the U.S. branches of MWL, IIRO and WAMY, [and the SAAR Network Defendants moving to dismiss here,] African Muslim Agency, Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought,

HOUSE_OVERSIGHT_017887

Mar–Jac Investment, Inc., Mena Corporation, Reston Investment, Inc., Sterling Charitable Gift Fund, Sterling Management Group, Inc., Success Foundation, and York Foundation." *Id.* ¶ 224. Allegedly, many of the entities are related by common management, few of them maintained a physical presence at their purported place of business, and they all "have long acted as fully integrated components of al Qaeda's logistical and financial support infrastructure." *Id.* ¶¶ 225, 226.

Plaintiffs argue the Court has personal jurisdiction over the SAAR Network because it participated in the conspiracy that resulted in catastrophic effects in this district. After an ongoing investigation in the Eastern District of Virginia, federal authorities raided the offices of several of these Defendants in Herndon, Virginia in March 2002. *Id.* ¶ 227. The investigation has allegedly revealed that SAAR Network funds have been transferred to designated terrorists and al Qaeda operatives Youssef Nada and Ahmed Idris Nasreddin. *Id.* ¶ 228; *see* Exec. Order No. 13224 (designating individuals as terrorists). Additionally, Plaintiffs claim that the investigation has revealed that SAAR Network entities have engaged in transactions with Bait Ul-mal, Inc. (BMI), which has transferred funds to terrorist organizations including al Qaeda, and materially supported the 1998 embassy bombings in Africa. *Federal* Complaint ¶¶ 229–230.

[69] At this stage, the Court must accept as true Plaintiffs' allegations concerning the relationships of the SAAR Network. *Id.* ¶¶ 222, 226. Defendants correctly argue, however, that Defendants have provided scant basis for linking these entities under the SAAR Network title. Certain of these groups may be subject to personal jurisdiction in light of Plaintiffs' allegation that they purposefully directing its activities at the United States by transferring money to designated terrorists Youssef Nada and Ahmed Idris Nasreddin, particularly if they intended the money to support terrorism. *Id.* ¶ 228. Additionally, general jurisdiction could be appropriate for the SAAR Network entities having offices in Virginia. *Id.* ¶ 227. Accordingly, the SAAR Network's motion to dismiss is denied without prejudice. The parties are to engage in jurisdictional discovery to determine which of the Network's entities have a presence in Virginia and which entities transferred money to Nada and Nasreddin.

10. Adel A.J. Batterjee

The *Burnett* Plaintiffs claim that Defendant Adel A.J. Batterjee is an associate of Osama bin Laden. *Burnett* Complaint ¶ 181. On December 21, 2004, the U.S. Department of Treasury designated Mr. Batterjee as a Specially Designated Global Terrorist. *See* Dec. 23, 2004 Bierstein letter to Court; Exec. Order No. 13224. Mr. Batterjee is the chairman of Al Shamal Islamic Bank, "an instrumental bank in Osama bin Laden's financial support network." *Burnett* Complaint ¶ 365. Mr. Batterjee is also chairman of al-Bir Saudi Organization, whose United States branch, Defendant BIF, is allegedly a "front for al Qaeda sponsorship." *Burnett* Complaint ¶¶ 75, 196, 199. BIF is also a designated terrorist organization. *See* Exec. Order No. 13224. The Saudi government closed Al–Bir in 1993 "at the same time it was closing other organizations for ties to terrorism." *Burnett* Complaint ¶ 183. Mr. Batterjee then allegedly moved the charity's headquarters to Chicago in the name of BIF. *Id.* ¶ 183. Mr. Batterjee is listed as one of BIF's three founders in its articles of incorporation filed in Illinois. *Id.* ¶ 183. Through an alias, Mr. Batterjee allegedly sent money to BIF's branches.

HOUSE_OVERSIGHT_017888

Id. ¶ 184; *see also* Decl. of Jodi Westbrook Flowers in Opp. to Batterjee Motion to Dismiss ("Flowers Decl.") Att. 5, p. 7 (BIF record showing $48,464 contribution by Abdel Abdul Jalil Batterjee). Mr. Batterjee allegedly transferred control of BIF to Defendant Enaam M. Arnaout, on September 15, 1997.[38] *Burnett* Complaint ¶ 183. In October 2001, Arnaout allegedly told Batterjee he was worried about being under scrutiny of the U.S. government and in January 2002, Batterjee requested that Aranout relocate his family to Saudi Arabia. *Id.* ¶¶ 217–218. Plaintiffs also claim that Mr. Batterjee's name is on a BIF list of wealthy Saudi Arabian sponsors of al Qaeda and Osama bin Laden. *Id.* ¶ 219.

Plaintiffs also claim that Defendant charity WAMY and BIF are closely connected and that Mr. Batterjee was the Secretary General of WAMY when he founded BIF in the United States. *Id.* ¶ 229; *see also* Flowers Decl. Att. 4, p. 3 (December 5, 1992 *New York Times* article quoting Adel A. Batterjee as the chairman of WAMY). In his capacity as Secretary General of WAMY, Mr. Batterjee allegedly commissioned a biography of Osama bin Laden and the origins of al Qaeda, which was jointly published by WAMY and BIF in 1991. *Burnett* Complaint ¶ 230.

With respect to his contacts with the United States, Plaintiffs claim that the documents filed in 1992 in conjunction with the establishment of BIF in Chicago state that Mr. Batterjee is a founder of BIF and that BIF's founders travel to the United States on a regular basis. *See* Flowers Decl. Att. 2, pp. 2–3. In 1993 BIF filed an application to conduct business in Florida and listed Mr. Batterjee as a director with an address in Florida. *See id.* at Att. 3, p. 4. BIF's authorization to do business in Florida was revoked on August 26, 1994. *Id.* at p. 1.

Mr. Batterjee disputes the claims against him in a declaration filed in conjunction with his motion to dismiss. Batterjee Decl. ¶ 8. He states he was born in Saudi Arabia, attended college in the United States in the 1960s, and returned to Saudi Arabia. *Id.* ¶¶ 3, 5. He claims he was last in the United States in June 2000 for personal reasons. *Id.* ¶ 5. He denies owning any real property, bank accounts, or investments in the United States. *Id.* ¶ 6. With respect to the allegations contained in the complaint, Mr. Batterjee claims BIF was never a branch of Al Bir or vice versa. *Id.* ¶ 9. He claims he never sent money to BIF in all of its history. *Id.* He states he transferred away all control of BIF in 1993. *Id.* He claims he never served as an executive of WAMY, never wrote a biography of Osama bin Laden, and denies having any knowledge of Osama bin Laden's or al Qaeda's activities other than what is widely published in the press. *Id.* ¶¶ 9, 10.

Mr. Batterjee also disputes the manner in which he was served. Plaintiffs reasoned that *Al–Quds Al–Arabia* had published Osama bin Laden's fatwas in the past and could, therefore, reach his supporters regardless of their location. Further, *The International Herald Tribune* is

38. Mr. Arnaout was "criminally indicted for his role in the September 11, 2001 attacks." *Burnett* Complaint ¶ 199. But in its "written plea agreement, the government agreed to dismiss sensational and highly publicized charges of providing material support to terrorists and terrorist organizations." *United States v. Arnaout,* 282 F.Supp.2d 838, 843 (N.D.Ill.2003). The *Burnett* Plaintiffs allege Mr. Arnaout and Osama bin Laden have ties. For example, law enforcement officials in Bosnia–Herzegovina raided BIF's offices in March 2002 and allegedly recovered documents establishing direct communications between Mr. Arnaout and Osama bin Laden in the late 1980s and early 1990s. *Burnett* Complaint ¶¶ 188, 196, 199.

HOUSE_OVERSIGHT_017889

available to the world community. Additionally, Plaintiffs submit that these cases have been widely reported in the Arabic media and the complaints have been available on numerous websites for over two years. In light of these considerations and Judge Robertson's March 23, 2003 order approving service by publication for Defendants including Mr. Batterjee, the Court denies Mr. Batterjee's motion to quash service.

[70] The Court finds the *Burnett* Plaintiffs made a prima facie showing of personal jurisdiction over Mr. Batterjee. While perhaps not dispositive on its own, Mr. Batterjee's designation as a terrorist lends substantial weight to Plaintiffs' claims that he purposefully directed his activities at the United States and that the exercise of personal jurisdiction over him comports with due process. *See Biton*, 310 F.Supp.2d at 178. Mr. Batterjee purportedly commissioned a book about al Qaeda and Osama bin Laden. He is the chairman of Al Shamal Islamic Bank, a bank with admitted and substantial ties to Osama bin Laden. *Burnett* Complaint ¶¶ 70, 79. Additionally, he is involved in the United States operations of designated terrorist, BIF. In the ten years leading up to the commencement of this action, Mr. Batterjee has had contacts with the United States that could be related to the terrorist attacks inasmuch as BIF participated in those attacks. Specifically, Mr. Batterjee traveled to Chicago for BIF and had an address in Florida for BIF. Accordingly, Mr. Batterjee's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is denied.

III. Failure to State a Claim

In considering Defendants' motions to dismiss for failure to state a claim under Rule 12(b)(6), the Court must "accept all of Plaintiffs' factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the Plaintiffs." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir.1999). Dismissal is not appropriate unless it appears beyond doubt, "even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Id.; Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The Supreme Court reinforced these liberal pleading standards in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (observing the "short and plain statement" required by Rule 8 "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests' ") (quoting *Conley*, 355 U.S. at 47, 78 S.Ct. 99). When presented with a 12(b)(6) motion, the district court may not consider matters outside of the pleadings without converting the motion into a motion for summary judgment. *Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir.2003); *Friedl v. City of New York*, 210 F.3d 79, 83–84 (2d Cir.2000).

A. Elements of Claims

[71] Plaintiffs claim that each Defendant provided material support to the al Qaeda terrorists who perpetrated the attacks on September 11, 2001. Under the ATA, material support includes money, financial services, lodging, training, safehouses, and false documentation or identification. 18 U.S.C. §§ 2339A(b), 2339B(g). Assuming such support is alleged, Plaintiffs will have to present a sufficient causal connection between that support and the injuries suffered by Plaintiffs. *See Bur-*

nett I, 274 F.Supp.2d at 104. Proximate cause will support this connection. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir.1994) ("Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were a substantial factor in the sequence of responsible causation, and whose injury was reasonably foreseeable or anticipated as a natural consequence."). In light of al Qaeda's public acknowledgments of its war against the United States, the September 11 attacks may be the natural and probable consequence of knowingly and intentionally providing material support to al Qaeda. *Burnett I*, 274 F.Supp.2d at 104.

[72] Plaintiffs rely on theories of concerted action liability—conspiracy and aiding and abetting—in support of this causal link. "Concerted action liability under New York law is based on the principle that '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer ... are equally liable with him.'" *Pittman*, 149 F.3d at 122 (quoting *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982)). To be liable under either conspiracy or aiding and abetting, however, the defendant "must know the wrongful nature of the primary actor's conduct," *id.* at 123, and the conduct must be tied to a substantive cause of action, *Chrysler Capital Corp.*, 778 F.Supp. at 1267. In this regard, Plaintiffs rely on the ATCA, RICO, the TVPA, the ATA, and various state laws, including wrongful death, survival, intentional infliction of emotional distress, trespass, assault and battery, negligence, and negligent infliction of emotional distress.

1. ATCA

[73] The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "This statute confers subject matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995); *see also Flores v. Southern Peru Corp.*, 343 F.3d 140, 143 n. 2 (2d Cir.2003). Certain Plaintiffs in these actions are aliens and the complaints all allege common law torts. The Court finds that "aircraft hijacking is generally recognized as a violation of international law." *Burnett I*, 274 F.Supp.2d at 100 (citing *Kadic*, 70 F.3d at 240; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-49 (2d Cir.2000)). Further, "courts, including the Second Circuit, have almost unanimously permitted actions premised on a theory of aiding and abetting and conspiracy." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 311 (S.D.N.Y.2003). Accordingly, the ATCA may provide a basis for a concerted action claim of material support by alien-Plaintiffs here. *See Burnett I*, 274 F.Supp.2d at 100.

2. RICO

"To state a claim under civil RICO, a plaintiff must plead seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Berk v. Tradewell, Inc.*, Nos. 01 Civ. 9035, 01 Civ.

HOUSE_OVERSIGHT_017891

10068(MBM), 2003 WL 21664679, at *11 (S.D.N.Y. July 16, 2003) (quoting *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983)); *see also* 18 U.S.C. § 1962. "Civil RICO is an unusually potent weapon . . . 'courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.' " *Katzman v. Victoria's Secret*, 167 F.R.D. 649, 655 (S.D.N.Y.1996).

[74] The *Federal* complaint asserts a RICO claim under § 1962(a), which states in part: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated a principal within the meaning of 18 U.S.C. § 2, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a). "Because the conduct constituting a violation of § 1962(a) is investment of racketeering income, a plaintiff must allege injury from the defendant's investment of the racketeering income to recover under § 1962(a)." *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir.1990). The *Federal* Plaintiffs have not done that here and seem to abandon the § 1962(a) claim in their RICO statements. Accordingly, the *Federal* Plaintiffs have not stated a claim under 18 U.S.C. § 1962(a).

The *Federal* Plaintiffs' RICO statements against Arab Bank and the SAAR Network assert claims under § 1962(c) and § 1962(d). *See* 03 MDL 1570 Docket ## 307, 309. Subsection (c) states, in part: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). "The four elements of Section 1962(c) are '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' " *U.S. Fire Ins. Co. v. United Limousine Serv., Inc.*, 303 F.Supp.2d 432, 451 (S.D.N.Y.2004). "The elements of section 1962(c) must be established as to each individual defendant." *Id.* Paragraph (d) states that it "shall be unlawful for any person to conspire to violate any provision of" § 1962(a)-(c). 18 U.S.C. § 1962(d). "The Second Circuit has held in the context of a motion to dismiss that to state a claim under [§] 1962(d), the 'complaint must allege some factual basis for a finding of a conscious agreement among the defendants.' " *Am. Arbitration Ass'n, Inc. v. DeFonseca*, No. 93 Civ. 2424(CSH), 1996 WL 363128, at *7 (S.D.N.Y. June 28, 1996) (quoting *Hecht v. Commerce Clearing House*, 897 F.2d 21, 26 n. 4 (2d Cir.1990)); *see also Schmidt v. Fleet Bank*, 16 F.Supp.2d 340, 354 (S.D.N.Y.1998) ("Bare and conclusory allegations are insufficient to withstand a motion to dismiss and a plaintiff must plead facts sufficient to show that each defendant knowingly agreed to participate in the [RICO] conspiracy.").

[75, 76] Assuming for now that the Plaintiffs have pleaded an enterprise, "[u]nder *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), an alleged RICO defendant must have had 'some part in directing' the 'operation or management' of the enterprise itself to be liable." *Dubai Islamic Bank v. Citibank*, N.A., 256 F.Supp.2d 158, 164 (S.D.N.Y.2003). The complaints allege the moving Defendants may have assisted al Qaeda, but they do not allege "anything approaching active 'management or operation.' " *Id.* Accordingly, the Court finds

Plaintiffs have failed to state a RICO claim against the moving Defendants. *See id.; Redtail Leasing, Inc. v. Bellezza*, 95 Civ. 5191(JFK), 1997 WL 603496, at *5 (S.D.N.Y.1997) ("A defendant does not 'direct' an enterprise's affairs under § 1962(c) merely by engaging in wrongful conduct that assists the enterprise."); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 449, 466–67 (S.D.N.Y. 1996) (providing services to racketeering enterprise is not directing the enterprise); *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F.Supp. 1071, 1090 (S.D.N.Y.1996) (same). Plaintiffs' RICO claim under § 1962(d) fails for the same reason. Plaintiffs have not alleged that the moving Defendants were central figures in the underlying schemes or for conspiracy liability under § 1962(d). The RICO claims against the moving Defendants are dismissed.

3. TVPA

[77, 78] "The TVPA establishes a cause of action in federal court against an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extrajudicial killing." *Arndt v. UBS AG*, 342 F.Supp.2d 132, 141 (E.D.N.Y.2004) (citing *Flores*, 343 F.3d at 153); 28 U.S.C. § 1350 note. Only individuals maybe sued under the TVPA. *Arndt*, 342 F.Supp.2d at 141 (citing *Friedman v. Bayer Corp.*, No. 99 Civ. 3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999)). Accordingly, to the extent Plaintiffs have not already withdrawn these claims, the TVPA claims are dismissed against Al Rajhi Bank, Saudi American Bank, Arab Bank, Al Baraka Investment & Development Corp., NCB, Saudi Binladin Group, and the SAAR Network. Similarly, there have been no allegations that Saleh Abdullah Kamel or Adel Batterjee acted under color of law and, therefore, the TVPA claims against these individuals are dismissed as well.

4. ATA

[79, 80] The ATA provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs." 18 U.S.C. § 2333(a).[39] To adequately plead the provision of material support under this section, a plaintiff would have to allege that the defendant knew about the terrorists' illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities. *Boim II*, 291 F.3d at 1023; *see also Boim v. Quranic Literacy Inst.*, 340 F.Supp.2d 885, 906–913 (N.D.Ill. 2004) ("*Boim III*") (granting summary judgment against two entity defendants where record evidence demonstrated the charities' concession that Hamas used terrorism in pursuit of its goals, the organizations' repeated desire to help Hamas by

39. The ATA defines international terrorism as: activities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended—to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1). For now, the Court assumes the attacks of September 11 were an act of international terrorism.

HOUSE_OVERSIGHT_017893

recruiting donations to the Holy Land Foundation, a known supporter of Hamas, distributing pro-Hamas literature, and featuring pro-Hamas speakers at their meetings); *see also Burnett I*, 274 F.Supp.2d at 107 (noting the complaint in *Boim* was quite specific in its allegation of a causal link). Under a conspiracy theory, the Plaintiffs have to allege that the Defendants were involved in an agreement to accomplish an unlawful act and that the attacks of September 11 were a reasonably foreseeable consequence of that conspiracy. *See Boim III*, 340 F.Supp.2d at 895 (framing analysis as what plaintiffs have to prove to succeed on summary judgment). Plaintiffs do not have to allege that Defendants knew specifically about the September 11 attacks or that they committed any specific act in furtherance of that attack. *Id.*

5. Wrongful Death and Survival

[81] New York Estates, Powers and Trusts Law governs Plaintiffs' claims of wrongful death and survival. "The personal representative ... of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued." N.Y. Est. Powers & Trusts § 5-4.1 (McKinney 2002); *see also* N.Y. Est. Powers & Trusts § 11-3.2(b) (McKinney 2002) (outlining survival claim: "No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent."). Accordingly, the Court finds that if Plaintiffs are personal representatives and their allegations sufficiently allege that Defendants supported, aided and abetted, or conspired with the September 11 terrorists, they will have also stated claims for wrongful death and survival.

6. Assault and Battery and Intentional Infliction of Emotional Distress

[82] The *Federal* Plaintiffs bring claims of assault and battery and intentional infliction of emotional distress. The *Burnett* and *Ashton* Plaintiffs also allege claims of intentional infliction of emotional distress. The statute of limitations for assault and battery and intentional infliction of emotional distress is one year. *Holmes v. Lorch*, 329 F.Supp.2d 516, 523 (S.D.N.Y.2004); N.Y. C.P.L.R. 215(3) (McKinney 2002). The *Federal* Plaintiffs filed their complaint on September 10, 2003, nearly two years after September 11, 2001. Accordingly, their assault and battery and intentional infliction of emotional distress claims are dismissed against the SAAR Network and Arab Bank.

[83, 84] "Under New York law, a claim for intentional infliction of emotional distress requires a showing of (*1*) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir.1999) (citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 612 N.E.2d 699 (1993)). "'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" *Id.* (quoting *Howell*, 81 N.Y.2d at 122, 596 N.Y.S.2d 350, 612 N.E.2d 699). Courts are to determine whether the al-

leged conduct is sufficiently extreme and outrageous enough to permit recovery. *Stuto*, at 827. The attacks on September 11, 2001 were undoubtedly extreme and outrageous. The Court finds that if the *Ashton* and *Burnett* Plaintiffs's allegations sufficiently allege that Defendants supported, aided and abetted, or conspired with the September 11 terrorists, they will have also stated a claim for intentional infliction of emotional distress. *See Burnett I*, 274 F.Supp.2d at 107–08 (analyzing claims under New York law).

7. Trespass

[85] The *Federal* Plaintiffs bring a claim for trespass on the theory that Defendants assisted and encouraged those who intentionally entered the World Trade Center property. New York courts describe this cause of action as "the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir.1989) (citing *Ivancic v. Olmstead*, 66 N.Y.2d 349, 352, 497 N.Y.S.2d 326, 488 N.E.2d 72 (1985)). To the extent that the *Federal* Plaintiffs sufficiently plead that Defendants acted in concert with the September 11 hijackers, they may proceed with this claim. *Wantanabe Realty Corp. v. City of New York*, 01 Civ. 10137(LAK), 2003 WL 22862646, at *4 (S.D.N.Y. Dec. 3., 2003) (citing *Pittman*, 149 F.3d at 122–23).

8. Negligence

[86–88] In New York, a plaintiff may establish negligent infliction of emotional distress under the bystander or direct duty theory. *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir.2000). Under the bystander theory, "a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence." *Bovsun v. Sanperi*, 61 N.Y.2d 219, 223–24, 473 N.Y.S.2d 357, 461 N.E.2d 843 (1984). Under the direct duty theory, a plaintiff suffers emotional distress caused by "defendant's breach of a duty which unreasonably endangered [plaintiff's] own physical safety." *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir.1996).

[89–92] To establish a claim for negligence under New York law, "a plaintiff must show that the defendant owed the plaintiff a cognizable duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a proximate cause of that breach." *King v. Crossland Savings Bank*, 111 F.3d 251, 259 (2d Cir. 1997). The most basic element of a negligence claim is the existence of a duty owed to plaintiffs by defendants. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342, 162 N.E. 99 (1928); *see also Burnett I*, 274 F.Supp.2d at 108 (dismissing negligence claims against Defendant Al Haramain Islamic Foundation because complaint failed to allege or identify any duty owed to Plaintiffs). Banks do not owe non-customers a duty to protect them from the intentional torts of their customers. *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926(CSH), 1999 WL 47239, at *13 (S.D.N.Y. Feb. 3, 1999) (citing cases); *Burnett I*, 274 F.Supp.2d at 109 ("Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service."). The

complaints presently before the Court do not allege or identify a duty owed to Plaintiffs by moving Defendants. *See Burnett I*, 274 F.Supp.2d at 108–09. Accordingly, the negligence and negligent infliction of emotional distress claims are dismissed for failure to state a claim.

B. Analysis of Claims Against the Moving Defendants

[93] While applying the liberal notice pleading requirements of Rule 8, the Court notes that in light of "the extreme nature of the charge of terrorism, fairness requires extra-careful scrutiny of Plaintiffs' allegations as to any particular defendant, to ensure that he-or it-does indeed have fair notice of [the claims]." *Id.* at 103–04.

1. Al Rajhi Bank

[94] Al Rajhi Bank was founded in 1987 and now has a network of nearly 400 branch offices throughout Saudi Arabia and seventeen worldwide subsidiaries. *Burnett* Complaint ¶ 84. All the banking Defendants are alleged to have "provided essential support to the al Qaeda organization and operations. The banking Defendants in this lawsuit have acted as instruments of terror, in raising, facilitating and transferring money to terrorist organizations." *Burnett* Complaint ¶ 46. Plaintiffs claim that Al Rajhi Bank is "the primary bank for a number of charities that serve as al Qaeda front groups," including Al Haramain, MWL, WAMY, SJRC, and IIRO. *Burnett* Complaint ¶ 85; Rule 12(e) Statement ¶ 31. "Al Rajhi continues to maintain Al Haramain's accounts despite Al Haramain's designation on March 11, 2002 as terrorist organizations by both the United States and Saudi Arabian authorities." Rule 12(e) Statement ¶ 44. The *Burnett* Plaintiffs claim Al Rajhi Bank knew or had to know that its depositors, Defendant charities WAMY, MWL, IIRC, and SJRC were material supporters of terrorism. Rule 12(e) Statement ¶¶ 44–60.

The *Burnett* Plaintiffs claim that Saudi Arabia has "ineffective and/or rudimentary bank supervisory, anti-money laundering laws and anti-terrorist financing in place." Rule 12(e) Statement ¶¶ 72–78. In 1999, William Weschler of the National Security Council and Richard Newcomb of the Office of Foreign Assets Control traveled to Saudi Arabia to warn Al Rajhi Bank and its regulator, the Saudi Arabian Monetary Agency ("SAMA"), "that their financial systems were being manipulated or utilized to fund terrorist organizations such as Al Qaeda." *Id.* ¶ 75. The United States encouraged SAMA to adopt "know your customer" rules. *Id.* "Despite these warnings, Al Rajhi failed to adopt even the most minimal standards, [which] resulted in the use of Al Rajhi as an instrument of terror and a material supporter, aider and abettor of al Qaeda and international terrorist activities." *Id.* ¶¶ 76–77.

One of the hijackers on board American Airlines Flight 11, Abdulaziz al-Omari, held an account at Al Rajhi Bank. *Burnett* Complaint ¶ 85; Rule 12(e) Statement ¶ 43. Another hijacker, Mohammed Atta, made a transfer to this account at some time. Rule 12(e) Statement ¶ 43. Plaintiffs claim al Qaeda financier Zouaydi asked Abdullah bin Abdul Muhsen al Turki, a counselor to the government of Saudi Arabia, to send money through Al Rajhi. *Burnett* Complaint ¶¶ 388, 538.

The *Burnett* Plaintiffs also claim that Al Rajhi Bank has relationships with Hamas and other terrorists. Rule 12(e) Statement ¶¶ 61–69. Al Rajhi Bank chose Texas-based Infocom to host its website. *Id.* ¶¶ 65, 66. Infocom has provided funding to Hamas and is owned and operated by Hamas leader and designated terrorist, Mousa Marzook. *Id.* There have been transfers made to Marzook and Infocom

from Al Rajhi accounts. *Id.* In "December 1999, Al Rajhi directly funded Tulkarm Charity Committee, a known front for Hamas." *Id.* ¶ 71.

Members of the Al Rajhi family, which owns and controls Al Rajhi Bank, are alleged to have ties to Osama bin Laden's personal secretary. *Id.* ¶ 79. The Al Rajhi family is purportedly a major donor to the SAAR Network, a Defendant here, being investigated by federal authorities in Virginia. *Id.* ¶¶ 80–84. Finally, Al Rajhi family members are allegedly closely associated with wealthy donors to Osama bin Laden. *Id.* ¶ 85 (alleging ties with the Golden Chain).

Judge Robertson found that the only allegation in the Third Amended *Burnett* Complaint that stated a claim upon which relief could be granted was that Al Rajhi Bank acted as an instrument "of terror, in raising, facilitating and transferring money to terrorist organizations." *Burnett I*, 274 F.Supp.2d at 109 (quoting *Burnett* Complaint ¶ 46). Judge Robertson noted that there was no support "for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service." *Id.* In light of the liberal pleading standards, however, Judge Robertson denied Al Rajhi Bank's motion to dismiss and permitted it to request a more definitive statement under Rule 12(e). *Id.* at 110. The *Burnett* Plaintiffs provided an 89–paragraph response on August 27, 2003. Thereafter, Al Rajhi Bank renewed its motion to dismiss pursuant to Rule 12(b)(6).

Al Rajhi Bank argues that Plaintiffs offer no factual allegations in support of their conclusion that Al Rajhi Bank had to know that the charities it supported through Zakat and Hararm[40] payments were really fronts for al Qaeda. Al Rajhi Bank contends it had a legal and religious duty to make its charitable donations and any terrorist activity by the recipient charities was unknown to Al Rajhi Bank. *See* Rule 12(e) Statement ¶¶ 26, 29. Contrary to Plaintiffs' arguments, Al Rajhi Bank submits it did not have a duty, or a right, to inspect the Defendant charities' financial transactions to ascertain the ultimate destination of its donations. *But see* Rule 12(e) Statement ¶ 32 ("Al Rajhi is required to determine that the ultimate recipients of these contributions fall within one of the categories prescribed in the Quran for recipients of Zakat."). Al Rajhi Bank submits that SAMA did not implement any duty to investigate Zakat payments after its meeting with representatives of the National Security Council and Office of Foreign Assets Control.

[95] Plaintiffs do not allege that Al Rajhi Bank provided direct material support to al Qaeda. Rather, Plaintiffs claim Al Rajhi Bank aided and abetted the September 11 terrorists by donating to certain Defendant charities and acting as the bank for these Defendants. New York law and the courts interpreting the ATA in *Boim* make very clear that concerted action liability requires general knowledge of the primary actor's conduct. *See Pittman*, 149 F.3d at 123; *Boim II*, 291 F.3d at 1023; *Boim III*, 340 F.Supp.2d at 906. Even

40. Under Islamic banking laws, Hararm is forbidden income that must be given away. The disposal of Hararm cannot be considered charitable giving. Rule 12(e) Statement ¶ 9. In the 12(e) statement, the *Burnett* Plaintiffs explain that al Qaeda takes advantage of the under-regulated Islamic banking system to move and launder money. 12(e) Statement ¶ 1. Plaintiffs allege that al Qaeda has perverted the Zakat and Hararm principles in Islamic banking to collect and distribute money to individuals and cells throughout the world. *Id.* ¶¶ 4–9; *see also Burnett* Complaint ¶ 43.

HOUSE_OVERSIGHT_017897

with the opportunity to clarify their claims against Al Rajhi Bank, the *Burnett* Plaintiffs do not offer facts to support their conclusions that Al Rajhi Bank had to know that Defendant charities WAMY, MWL, IIRC, and SJRC were supporting terrorism. *See* Rule 12(e) Statement ¶¶ 44–60. "[A] complaint which consists of conclusory allegations unsupported by factual assertions fails even on the liberal standard of Rule 12(b)(6)." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir.1996).

This Court, like Judge Robertson before it, has found no basis for a bank's liability for injuries funded by money passing through it on routine banking business. *See Burnett I*, 274 F.Supp.2d at 109. Similarly, allegations concerning the Al Rajhi family cannot support a claim against Al Rajhi Bank because there is no allegation that the family members were acting in furtherance of Al Rajhi Bank business. *Tasso v. Platinum Guild Int'l*, 94 Civ. 8288(LAP), 1997 WL 16066, at *6 (S.D.N.Y. Jan. 16, 1997). Plaintiffs attach to their opposition brief a September 2002 SAMA report summarizing the initiatives and actions taken by the Kingdom of Saudi Arabia to combat money laundering and terrorist financing. *See Burnett* Plaintiffs' Opp. to Al Rajhi Motion to Dismiss, Ex. 2. Neither this document, nor the complaint, alleges that SAMA or Al Rajhi Bank implemented "know your customer" rules that Al Rajhi failed to follow with respect to accounts held by the Defendant charities. Finally, Plaintiffs' allegations that Al Rajhi Bank has connections to Hamas supporters fails to state a claim because Plaintiffs have not alleged any relationship between Hamas and al Qaeda or the terrorist attacks of September 11. Even accepting all the allegations against Al Rajhi Bank as true, Plaintiffs have failed to state a claim that would entitle them to relief. Accordingly, Al Rajhi Bank's motion to dismiss the *Burnett* complaint is granted in its entirety.

2. Saudi American Bank

[96] Saudi American Bank is based in Rihadh, Saudi Arabia and was formed in 1980 pursuant to a royal decree to take over the then-existing branches of Citibank in Riyadh and Jeddah. *Ashton* Complaint ¶ 603; *Burnett* Complaint ¶ 140. It is the second largest bank in Saudi Arabia and has offices in the United States, based in New York. *Ashton* Complaint ¶ 604; *Burnett* Complaint ¶¶ 141–42. Its chairman, Abdullahziz Bin Hamad Al Gosaibi is also the Chairman of the Saudi Cement Company in Damman, Saudi Arabia. *Ashton* Complaint ¶ 605; *Burnett* Complaint ¶ 142.[41] Ahmed Ali Jumale, purportedly a close associate of Osama bin Laden and responsible for helping Defendant Al Baraka penetrate the United States banking system, allegedly worked for Saudi American Bank as a senior employee from 1979 to 1986. *Ashton* Complaint ¶ 602; *Burnett* Complaint ¶ 148.[42]

Plaintiffs claim that Saudi American Bank is the official correspondent of the al Baraka Bank Lebanon; the Riyadh correspondent of Defendant Al Faisal Islamic Bank, which is managed by Defendant Prince Mohamed; and the Riyadh correspondent bank for a branch of Defendant Al Shamal Islamic Bank, which is involved in the financing of al Qaeda. *Ashton* Complaint ¶¶ 606, 608; *Burnett* Complaint ¶¶ 143, 146. It is also the bank for Defen-

41. The *Ashton* Plaintiffs voluntarily dismissed its claims against the Saudi Cement Company and the Arabian Cement Company on June 10, 2004. *See* 03 MD 1570 Docket # 230.

42. The *Ashton* Plaintiffs voluntarily dismissed their claims against Ahmed Nur Ali Jumale on June 10, 2004. *See* 03 MD 1570 Docket # 230.

HOUSE_OVERSIGHT_017898

dant Dallah Al Baraka Group, which is chaired by Defendant Saleh Abdullah Kamel. Saudi American Bank is close to the Saudi Bin Laden family, . . . appears on its financial transactions" and provides banking services to its Sudanese operations. *Ashton* Complaint ¶¶ 607–8; *Burnett* Complaint ¶¶ 144, 146.

"In the year 2000, the Saudi American Bank participated in the fundraising campaign in Saudi Arabia for collecting donations to the 'heroes of the Al Quds uprising' (Intifada) by providing a bank account and facilities to receive donations for a committee of charity organizations including Defendants WAMY, IIRO and Al Haramain Foundation." *Ashton* Complaint ¶ 609; *Burnett* Complaint ¶ 147.

The essence of Plaintiffs' claim is that through its relationships with other banks and support of the Saudi Binladin group's work in Sudan, Saudi American Bank provided material support to al Qaeda. It is not alleged to have done anything to directly support al Qaeda, Osama bin Laden, or their terrorist agenda. As the Court has stated before, there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided. The *Ashton* Plaintiffs have dismissed their claims against Ahmed Nur Ali Jumale, allegedly an associate of Osama bin Laden. To the extent the *Burnett* Plaintiffs continue their claims against him, his employment at Saudi American Bank from 1979 to 1986 cannot be grounds for relief. Osama bin Laden did not organize al Qaeda until the late 1980s, Saudi American Bank is not alleged to have provided Jumale with a veil of legitimacy or shelter. *Cf. Burnett I*, 274 F.Supp.2d at 104 (finding Al Haramain's employment of al Qaeda operative during height of al Qaeda activity a sufficient allegation of providing material support). The complaints have provided Saudi American Bank with no notice of Plaintiffs' claims or grounds for relief. Accordingly, Saudi American Bank's motions to dismiss the *Ashton* and *Burnett* complaints are granted in their entirety.

3. Arab Bank

[97] The *Federal* Plaintiffs claim Arab Bank is a financial institution headquartered in Egypt with branch offices throughout the world, including New York. *Federal* Complaint ¶ 357. Arab Bank claims it is actually a Jordanian bank headquartered in Amman, Jordan. Arab Bank allegedly has "long provided financial services and other forms of material support to terrorist organizations, including al Qaeda." *Federal* Complaint ¶ 358. Further, these Plaintiffs allege that the September 11 attacks were a "direct, intended and foreseeable product of Arab Bank's participation in al Qaeda's jihadist campaign." *Id.* ¶¶ 364, 363. These claims are based on the allegation that Arab Bank has "long known that accounts it maintained were being used to solicit and transfer funds to terrorist organizations [and despite this knowledge] Arab Bank has continued to maintain those accounts." *Id.* ¶ 362. Specifically, the *Federal* Plaintiffs claim Arab Bank accounts have been used for al Qaeda money transfers throughout the world and that Arab Bank maintains accounts for Defendant charities including IIRO, MWL, WAMY, BIF, Blessed Relief (Muwaffaq) Foundation, and Al Haramain. *Id.* ¶¶ 359, 360. Israeli officials allegedly have seized funds associated with several Arab Bank accounts maintained on behalf of known fronts for Hamas and identified by Arab Bank employees, "confirming the bank's specific knowledge that accounts it maintained were being used to sponsor terrorist activity." *Id.* ¶ 361.

HOUSE_OVERSIGHT_017899

The *Burnett* Plaintiffs claim that members of the Spanish al Qaeda cell used Arab Bank to make wire transfers. *Burnett* Complaint ¶ 138 (alleging Arab Bank is "used regularly by al Qaeda's Spanish cell for transfers of cash to members of al Qaeda operating in Germany, Pakistan, Afghanistan, Lebanon, Yemen, Bosnia, and elsewhere"); *id.* ¶¶ 139, 528 (alleging $6,400 wire transfer through Arab Bank from member of Spanish al Qaeda cell to an extremist associated with Chej Salah in Spain). These Plaintiffs conclude that "Arab Bank PLC has materially supported, aided, and abetted and financed al Qaeda." *Id.* ¶ 138.

The *Federal* and *Burnett* complaints do not include any facts to support the inference that Arab Bank knew or had to know that it was providing material support to terrorists by providing financial services to the charity Defendants or by processing wire transfers in Spain. The paragraphs do not allege any involvement by, knowledge of, or participation in any wrongful conduct by Arab Bank. These Plaintiffs do not claim that Arab Bank ignored any regulations regarding their customer accounts. Providing routine banking services, without having knowledge of the terrorist activities, cannot subject Arab Bank to liability. While claiming Arab Bank has ties with known Hamas fronts, the *Federal* complaint does not contain any allegation of a connection between Hamas and Osama bin Laden, al Qaeda, or the September 11 attacks. A complaint alleging conclusions without supporting facts will not survive a Rule 12(b)(6) motion. *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F.Supp.2d 256, 261 (S.D.N.Y.2004). The *Federal* Plaintiffs asked for leave to amend their complaint with respect to Arab Bank, but they have not offered any facts to support an amendment. Therefore, Arab Bank's motions to dismiss the *Federal* and *Burnett* complaints are granted in their entirety.

4. Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel

[98] The *Ashton* and *Burnett* complaints detail nearly identical claims against Al Baraka Investment & Development Corp. ("Al Baraka") and Saleh Abdullah Kamel. *Ashton* Complaint ¶¶ 583–601; *Burnett* Complaint ¶¶ 47–66. Saleh Abdullah Kamel was born in Saudi Arabia in 1941 and founded Dallah Albaraka Group LLC in 1969. *Ashton* Complaint ¶ 587; *Burnett* Complaint ¶ 51. Dallah Albaraka is a diversified conglomerate based in Jeddah and includes twenty-three banks in Arab and Islamic countries. *Ashton* Complaint ¶ 588; *Burnett* Complaint ¶ 52. Dallah Albaraka is a shareholder of Aqsa Islamic Bank, a bank that Israel has refused to approve, "citing its obvious ties with known terrorists." *Ashton* Complaint ¶¶ 596, 597; *Burnett* Complaint ¶¶ 60, 61. One of Dallah Albaraka's subsidiaries is Dallah Avco Trans–Arabia Co., based in Jeddah. *Ashton* Complaint ¶ 589; *Burnett* Complaint ¶ 53. Omar al Bayoumi, a suspect wanted by the FBI in connection with the September 11 attacks, was the Assistant to the Director of Finance for Dallah Avco and paid rent in San Diego for the house occupied by two September 11 hijackers of American Airlines Flight 77. *Ashton* Complaint ¶¶ 590, 592; *Burnett* Complaint ¶¶ 55, 54. Mr. Kamel is also one of three founders of Defendant Al Shamal Islamic Bank. *Ashton* Complaint ¶ 594; *Burnett* Complaint ¶ 58.

Dallah Albaraka's financial arm is Al Baraka Investment & Development Corp., a wholly owned subsidiary based in Jeddah. *Ashton* Complaint ¶ 593; *Burnett* Complaint ¶ 57. Al Baraka is a holding company with 43 subsidiaries, which are

mainly banks in Arab and Islamic countries. *Ashton* Complaint ¶ 583; *Burnett* Complaint ¶ 47. It also has banks in Chicago, Illinois and Houston, Texas. *Burnett* Complaint ¶ 47. Al Baraka allegedly provided financial infrastructures in Sudan to Osama bin Laden through Defendant charity Al Haramain. *Ashton* Complaint ¶¶ 584, 585, 598; *Burnett* Complaint ¶¶ 48, 49, 62.

Plaintiffs do not offer any factual allegations against Al Baraka or Mr. Kamel to withstand their motions to dismiss. The majority of the complaints' allegations regarding Al Baraka actually concern Dallah Albaraka. The specific allegations against Al Baraka are that through Al Haramain it provided financial infrastructures in Sudan, it provided support to Al Haramain, and it is present in the Sudan banking business through banks it holds. The complaints do not allege that Al Baraka knew or had any reason to know that Al Haramain was supporting terrorism, nor do they allege facts from which such an inference could be drawn.

The allegation that an employee of a Dallah Albaraka subsidiary financially supported two of the hijackers in San Diego does not translate into an allegation that Mr. Kamel provided material support to terrorism or aided and abetted those that provided material support. An employee's actions cannot be a basis for employer liability unless the employee was acting in furtherance of the employer's business. *Tasso,* 1997 WL 16066, at *6. There is no allegation that Mr. Kamel knew Mr. al Bayoumi or directed anyone at the Della Albaraka subsidiary to support al Qaeda or the hijackers. Similarly, the allegation that Mr. Kamel was one of three founders of Al Shamal Islamic Bank in 1983, without additional allegations, does not state a claim for relief. Thus, the *Ashton* and *Burnett* claims against Al Baraka and Mr. Kamel are dismissed in their entirety.

5. NCB

[99] The *Ashton* and *Burnett* Plaintiffs' allegations against NCB are outlined in Part I.B.4. The Court finds it would be premature to analyze Plaintiffs' largely conclusory claims against NCB under Rule 12(b)(6) at this time. NCB may be immune from suit and further discovery if it is found to be an instrumentality of the Kingdom of Saudi Arabia and its actions do not fit within the FSIA's exceptions to immunity. Additionally, the Court is not yet convinced that it would be proper to exercise personal jurisdiction over NCB. Accordingly, NCB's motion to dismiss for failure to state a claim is denied without prejudice. NCB may renew its motion upon completion of the limited jurisdictional discovery—first with respect to its instrumentality status—outlined by the Court above.

6. Saudi Binladin Group

[100] The *Ashton* and *Burnett* allegations against the SBG are outlined in Part II.C.8. The same allegations that warrant limited jurisdictional discovery to investigate whether SBG purposefully directed its activities at the United States and its contacts with the United States preclude dismissal under 12(b)(6) at this time. SBG provided construction support to Osama bin Laden. *Ashton* Complaint ¶¶ 550, 552–53; *Burnett* Complaint ¶¶ 319–22. A branch of SBG purportedly provided shelter to an al Qaeda operative. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. SBG has, at some point, had a close relationship with Osama bin Laden, but the complaints do not specify when or whether the relationship continues. While these allegations are certainly not sufficient to reach a jury, if Plaintiffs demonstrate that

HOUSE_OVERSIGHT_017901

this Court has personal jurisdiction over SBG they are entitled the opportunity to develop these claims. SBG's motions to dismiss the *Ashton* and *Burnett* complaints for failure to state a claim are therefore denied without prejudice.

7. SAAR Network

[101] The *Federal* Plaintiffs' allegations against the SAAR Network are outlined in Part II.C.9. The Court's analysis of the SAAR Network's arguments in favor of 12(b)(6) dismissal depend on a predicate finding of which entities are subject to this Court's personal jurisdiction and which entities—and under what circumstances—transferred money to terror fronts. Accordingly, the SAAR Network's motion to dismiss is denied without prejudice. It may be renewed upon completion of personal jurisdiction discovery.

8. Adel A.J. Batterjee

[102] The *Burnett* Plaintiffs' allegations against Mr. Batterjee are outlined in Part II.C.10. For substantially the same reasons the Court found it had personal jurisdiction over Mr. Batterjee, it denies his motion to dismiss for failure to state a claim. The allegations against him and his designation as a terrorist are sufficient to permit the inference that he provided support to al Qaeda directly or through Al Shamal Islamic Bank, BIF, or WAMY. *Burnett* Complaint ¶¶ 75–76, 183–84, 196, 199, 230; Exec. Order 13224.

IV. Conclusion and Order

For the reasons explained above, Prince Sultan's motions to dismiss the *Burnett, Ashton, Tremsky, Salvo, Barrera,* and *Federal Insurance* complaints for lack of subject matter and personal jurisdiction are granted. Prince Turki's motions to dismiss the *Burnett, Ashton, Tremsky, Salvo, Barrera,* and *Federal Insurance* complaints for lack of subject matter and personal jurisdiction are granted. The Kingdom of Saudi Arabia's motion to dismiss the *Federal Insurance* and *Vigilant Insurance* complaints for lack of subject matter jurisdiction are granted. Prince Mohamed's motions to dismiss the *Ashton* and *Federal Insurance* complaints for lack of personal jurisdiction are granted. Mohammad Abdullah Aljomaih's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Sheikh Hamad al Husani's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Abdulrahman bin Mahfouz's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Tariq, Omar, and Bakr Binladin's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Al Rajhi Bank's motion to dismiss the *Burnett* complaint for failure to state a claim is granted. Saudi American Bank's motions to dismiss the *Burnett* and *Ashton* complaints for failure to state a claim are granted. Arab Bank's motions to dismiss the *Burnett* and *Federal Insurance* complaints for failure to state a claim are granted. Al Baraka and Saleh Abdullah Kamel's motions to dismiss the *Burnett* and *Ashton* complaints for failure to state a claim are granted. NCB's motions to dismiss the *Burnett* and *Ashton* complaints for lack of subject matter and personal jurisdiction are denied without prejudice. The *Burnett* and *Ashton* negligence claims against NCB are dismissed for failure to state a claim. The Saudi Binladin Group's motions to dismiss the *Burnett* and *Ashton* complaints for lack of personal jurisdiction and failure to state a claim are denied without prejudice, but the TVPA and negligence claims against SBG are dismissed. The SAAR Network's motion to dismiss the *Federal* complaint for lack of personal jurisdiction and failure to state a claim is denied without prejudice. T he RICO,

TVPA, assault and battery, intentional infliction of emotional distress, and negligence claims against the SAAR Network are dismissed. Adel Batterjee's motion to dismiss the *Burnett* complaint is denied.

So ordered.

Lawrence AGEE Plaintiff,

v.

Richard GRUNERT, M.D., Chris Fukuda, M.D., Fletcher Allen Health Care, Inc., and Copley Hospital Defendants.

No. 2:00–CV–169.

United States District Court,
D. Vermont.

Oct. 1, 2004.

Background: Physician brought federal statutory and state contract and tort claims against former partners in medical group practice and others, after partners reported his alleged mental unfitness to practice medicine and placed him on disability leave. Partners moved for summary judgment, and physician cross-moved for summary judgment.

Holdings: The District Court, Sessions, Chief Judge, held that:

(1) under Vermont law, partners did not make false and defamatory statements about physician in reporting his conduct;

(2) partners' statements were conditionally privileged;

(3) physician did not have claim for "restriction of trade" against doctors who raised legitimate concerns about his fitness to practice;

(4) partners' behavior in reporting physician's suspected mental unfitness was not extreme and outrageous conduct that intentionally inflicted emotional distress;

(5) partners did not negligently inflict emotional distress;

(6) physician failed to exhaust administrative remedies on ADA claim; and

(7) physician was not employee for purposes of ADA claim.

Motions granted in part and denied in part.

1. Federal Civil Procedure ⚷2554

On defendants' motion for summary judgment, district court would not consider new claims raised for first time in plaintiff's memorandum in opposition to motion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Libel and Slander ⚷1

Under Vermont law, the elements of defamation are: (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

3. Libel and Slander ⚷30

Under Vermont law, partners in medical practice did not make false and defamatory statements in telling hospitals that physician had been determined to be disabled and that he was on disability leave; partners were required under ethics code to question physician's fitness when he attempted surgery despite not having slept for weeks and while on sleep medication, and their group practice agreement provided for his acquiescence in determination

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Abecassis v. Wyatt, S.D.Tex., March 31, 2010

392 F.Supp.2d 539
United States District Court,
S.D. New York.

In re: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Nos. 03 MDL 1570(RCC), 02 Civ. 6977, 03 Civ. 6978, 03 Civ. 9849.
|
Sept. 21, 2005.

Synopsis
Background: Representatives, survivors, and insurance carriers of victims of September 11, 2001 terrorist attacks brought actions against terrorist organization responsible for the attacks and its members and associates, alleged state sponsors of terrorism, and individuals and entities who allegedly provided support to the terrorist organization, asserting causes of action under Torture Victim Protection Act (TVPA), Antiterrorism Act (ATA), Alien Tort Claims Act (ATCA), and Racketeer Influenced and Corrupt Organizations Act (RICO), as well as claims under New York law for aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery. Actions were consolidated, various defendants filed motions to dismiss, and plaintiffs moved to supplement the record.

Holdings: The District Court, Casey, J., held that:

[1] Saudi High Commission (SHC) was entitled to immunity under discretionary function exception to Foreign Sovereign Immunities Act (FSIA);

[2] chairman of SHC and Saudi Minister of Interior were entitled to immunity under discretionary function exception to FSIA;

[3] two Saudi officials did not have such minimum contacts with the United States as to support a finding of general personal jurisdiction;

[4] complaint alleging that various Islamic charities and organizations provided support for September 11th attacks, failed to state a claim under TVPA;

[5] allegation that defendant provided a satellite phone battery to terrorist leader sufficiently stated a claim under ATA; and

[6] absent any allegation that defendant had any role in directing an enterprise, allegation that he funneled money to terrorist organization through the charities with which he was involved failed to state a claim under RICO.

Motions granted in part and denied in part.

See also 349 F.Supp.2d 765.

West Headnotes (46)

[1] **International Law**
Evidence of immunity, and fact questions

Pursuant to the Foreign Sovereign Immunities Act (FSIA), a foreign state and its instrumentalities are presumed immune from jurisdiction unless one of the statute's exceptions applies. 28 U.S.C.A. § 1602 et seq.

Cases that cite this headnote

[2] **International Law**
Evidence of immunity, and fact questions

In a challenge to subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), the defendant must present a prima facie case that it is a foreign sovereign; thereafter plaintiff has burden of going forward with evidence showing that, under the exceptions to FSIA, immunity should not be granted. 28 U.S.C.A. § 1602 et seq.

2 Cases that cite this headnote

[3] **Federal Civil Procedure**

HOUSE_OVERSIGHT_017904

Matters considered in general

Article stating that Islamic aid organizations in Afghanistan, Bosnia, Somalia, and Tajikistan provided funds and cover to terrorists would not be admitted to supplement record on motion to dismiss in action, arising out of the September 11 terrorist attacks, alleging that two Saudi officials involved with Islamic charities were knowingly providing funding for terrorists; plaintiffs failed to explain why they were only able to obtain and translate the article on eve of oral argument, article and its translation were not authenticated, and article did not say officials were put on notice regarding specific charities or that they continued to contribute to those charities with intent that donations would assist terrorists.

Cases that cite this headnote

[4] **International Law**
Extent and effect of immunity

Immunity under Foreign Sovereign Immunities Act (FSIA) extends to agents of a foreign state acting in their official capacities, inasmuch as a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly. 28 U.S.C.A. § 1602 et seq.

1 Cases that cite this headnote

[5] **International Law**
Evidence of immunity, and fact questions

Court is required to give great weight, in determining whether foreign defendants are entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), to any extrinsic submissions made by the foreign defendants regarding the scope of their official responsibilities. 28 U.S.C.A. § 1602 et seq.

2 Cases that cite this headnote

[6] **International Law**
Corporations and other instrumentalities

Saudi High Commission (SHC) made prima facie showing it was entitled to immunity, under Foreign Sovereign Immunities Act (FSIA), in action alleging it had provided funding for terrorists; SHC was created by the Council of Ministers of Kingdom of Saudi Arabia to provide Kingdom's aid to Bosnia and was governed by a Saudi official, its employees were Saudi civil servants, and it could be sued in the Kingdom's administrative court like other Saudi government agencies, and SHC made no explicit waiver of its sovereign immunity inasmuch as any contrary representations by SHC were made prior to the action. 28 U.S.C.A. § 1602 et seq.

Cases that cite this headnote

[7] **International Law**
Extent and effect of immunity

To extent that complaint, in action alleging support for terrorist organizations, alleged that two Saudi officials provided such support through actions undertaken in their government positions, officials made prima facie showing of entitlement to immunity under the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C.A. § 1602 et seq.

Cases that cite this headnote

[8] **International Law**
Extent and effect of immunity

For jurisdiction over agents of a foreign government to be proper under torts exception to Foreign Sovereign Immunities Act (FSIA), plaintiffs must show that defendants' tortious acts caused plaintiffs' injuries and that defendants' actions were not discretionary, i.e., not grounded in their governments' social, economic, or political policies. 28 U.S.C.A. § 1605(a)(5).

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3 Cases that cite this headnote

[9] **International Law**
Extent and effect of immunity

Under the Foreign Sovereign Immunities Act's (FSIA) discretionary function exception, acts which are performed at the planning level of government, as opposed to those at the operational level, are entitled to immunity. 28 U.S.C.A. § 1605(a)(5).

Cases that cite this headnote

[10] **International Law**
Extent and effect of immunity

Relief agency established by government of Saudi Arabia was entitled to immunity, under discretionary function exception to Foreign Sovereign Immunities Act (FSIA), in action alleging it had provided funding for terrorist organization responsible for September 11th attacks; agency's decisions regarding the distribution of humanitarian relief funds were within the discretion of its chairman and his advisors and were guided by government policies. 28 U.S.C.A. § 1605(a)(5).

1 Cases that cite this headnote

[11] **International Law**
Extent and effect of immunity

Chairman of relief agency established by government of Saudi Arabia, and Saudi Minister of Interior, were entitled to immunity, under discretionary function exception to Foreign Sovereign Immunities Act (FSIA), in action alleging their decisions regarding distribution of humanitarian relief funds provided support for terrorist organization responsible for September 11th attacks; allegations stemmed from officials' discretionary functions inasmuch as their decisions were grounded in government's social, economic, and political policy. 28 U.S.C.A. § 1605(a)(5).

5 Cases that cite this headnote

[12] **Federal Courts**
Presumptions and burden of proof

In considering a motion to dismiss for lack of personal jurisdiction, court reviews the complaints and affidavits in the light most favorable to plaintiffs, but does not accept conclusory allegations or draw argumentative inferences. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

8 Cases that cite this headnote

[13] **Constitutional Law**
Non-residents in general
Federal Courts
Contacts with United States as a whole; nationwide jurisdiction

For jurisdiction to exist under rule establishing personal jurisdiction in any district court for cases arising under federal law where defendant has sufficient contacts with the United States as a whole but is not subject to jurisdiction in any particular state, there must be a federal claim, personal jurisdiction must not exist over defendant in any state, and defendant must have sufficient contacts with the U.S. as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 4(k)(2), 28 U.S.C.A.

3 Cases that cite this headnote

[14] **Courts**
Allegations, pleadings, and affidavits

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To establish personal jurisdiction based on a conspiracy theory under New York's long-arm statute, plaintiffs must make a prima facie showing of conspiracy and allege facts warranting an inference that defendant was a member of the conspiracy. NY.McKinney's CPLR 302(a)(2).

3 Cases that cite this headnote

[15] **Conspiracy**
Nature and Elements in General
Conspiracy
Pleading

To plead a valid cause of action for conspiracy, a plaintiff must allege the primary tort and four elements: (1) a corrupt agreement between two or more persons, (2) an overt act in furtherance of the agreement, (3) the parties' intentional participation in the furtherance of a plan or purpose, and (4) the resulting damage or injury.

Cases that cite this headnote

[16] **Courts**
Conspiracy and co-conspirators

To warrant the inference that a defendant was a member of the conspiracy, as would establish personal jurisdiction under New York's long-arm statute, plaintiffs must show that (1) defendant had an awareness of the effects in New York of its activity, (2) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators, and (3) the co-conspirators acting in New York acted at the direction or under the control of or at the request of or on behalf of the out-of-state defendant. N.Y.McKinney's CPLR 302(a)(2).

3 Cases that cite this headnote

[17] **Constitutional Law**
Non-residents in general

The exercise of personal jurisdiction must comport with due process requirements, i.e., there must be minimum contacts and the exercise of jurisdiction must be reasonable. U.S.C.A. Const.Amends. 5, 14.

1 Cases that cite this headnote

[18] **Federal Courts**
Related contacts and activities; specific jurisdiction
Federal Courts
Business contacts and activities; transacting or doing business

Specific jurisdiction over a nonresident defendant exists when the forum exercises jurisdiction over the defendant in a suit arising out of defendant's contacts with that forum; general jurisdiction is based on a defendant's general business contacts with the forum.

Cases that cite this headnote

[19] **Federal Courts**
Terrorism

Two officials of Saudi Arabian government did not have such minimum contacts with the United States as to support a finding of general personal jurisdiction, in action alleging their decisions regarding distribution of humanitarian relief funds provided support for terrorist organization responsible for September 11th attacks, despite alleged donations of money to established humanitarian organizations that might have been diverting funds to support terrorists and despite one official's visit to the White House twelve years before the attacks. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

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[20] **Federal Civil Procedure**
Jurisdictional discovery
Federal Courts
Dismissal or other disposition

District Court would deny without prejudice purported Islamic charitable trust's motion to dismiss, for lack of personal jurisdiction, complaint in action alleging provision of support for terrorists involved in September 11th attacks, pending further jurisdictional discovery as to whether trust's activities were directed at the United States; U.S. Government had designated the trust a Specially Designated Global Terrorist Entity. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

[21] **Federal Civil Procedure**
Jurisdictional discovery

Courts enjoy great discretion in deciding whether to order jurisdictional discovery before resolving motions to dismiss for lack of personal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

[22] **Federal Courts**
Terrorism

Pursuant to rule establishing personal jurisdiction in any district court for cases arising under federal law where defendant had sufficient contacts with the United States as a whole but was not subject to jurisdiction in any particular state, District Court had personal jurisdiction, in action alleging provision of support for terrorists involved in September 11th attacks, over defendant alleged to be a founder and leader of terrorist organization responsible for the attacks; defendant had purposefully directed his activities at the U.S. Fed.Rules Civ.Proc.Rules 4(k)(2), 12(b)(2), 28 U.S.C.A.

2 Cases that cite this headnote

[23] **Constitutional Law**
Non-profit, charitable, and educational organizations
Federal Courts
Terrorism

District Court had personal jurisdiction, under rule establishing personal jurisdiction for cases arising under federal law where defendant had sufficient contacts with the United States as a whole but was not subject to jurisdiction in any particular state, over purported Islamic relief organization, for purposes of action alleging provision of support for terrorists involved in September 11th attacks; organization purposefully directed its activities at the U.S., satisfying due process minimum contacts requirement, inasmuch as it operated in the U.S. and was involved in supporting attacks and activities of the terrorist organization. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rules 4(k)(2), 12(b)(2), 28 U.S.C.A.

Cases that cite this headnote

[24] **Racketeer Influenced and Corrupt Organizations**
Association with or participation in enterprise; control or intent

To state a claim for liability under civil Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiffs must allege that defendants participated in the operation or management of the enterprise itself, which requires that these defendants must have had some part in directing the enterprise's affairs. 18 U.S.C.A. § 1962(c).

Cases that cite this headnote

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[25] **Aliens, Immigration, and Citizenship**
Torture victim protection

Complaint brought under Torture Victim Protection Act (TVPA), alleging that various Islamic charities and organizations provided support for terrorist organization responsible for September 11th attacks, failed to state a claim; TVPA provided a cause of action only against individuals. 28 U.S.C.A. § 1350.

2 Cases that cite this headnote

[26] **Aliens, Immigration, and Citizenship**
Torture victim protection

Absent any allegation that named defendants were acting under color of state law, action brought under Torture Victim Protection Act (TVPA), alleging that various individuals provided support for September 11th attacks, failed to state a claim. 28 U.S.C.A. § 1350.

2 Cases that cite this headnote

[27] **Limitation of Actions**
Injuries to person

Claims, under New York law, for assault and battery and intentional infliction of emotional distress, asserted in action alleging provision of support for September 11th attacks, were time-barred. N.Y.McKinney's CPLR 215(3).

Cases that cite this headnote

[28] **Negligence**
Necessity and Existence of Duty
Negligence
Protection against acts of third persons

Negligence claims, in action under New York law arising out of September 11th attacks, would be dismissed for failure to state claims inasmuch as they failed to allege or identify duty owed to plaintiffs by defendants.

1 Cases that cite this headnote

[29] **War and National Emergency**
Private Remedies

Allegation that defendant provided a satellite phone battery to leader of terrorist organization responsible for September 11th attacks sufficiently stated a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339A(b).

1 Cases that cite this headnote

[30] **Racketeer Influenced and Corrupt Organizations**
Association with or participation in enterprise; control or intent

Complaint which failed to allege that defendant participated in the operation or management of any enterprise thus failed to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), for purposes of action alleging provision of support for terrorists involved in September 11th attacks. 18 U.S.C.A. § 1961 et seq.

Cases that cite this headnote

[31] **War and National Emergency**
Private Remedies

Complaint which failed to allege that defendant took any action that could be considered the provision of material support for terrorist organization responsible for the September 11th attacks thus failed to state a claim under the Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists

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HOUSE_OVERSIGHT_017909

involved in those attacks. 18 U.S.C.A. § 2339A(b).

Cases that cite this headnote

[32] **War and National Emergency**
Private Remedies

Allegation that defendant funneled money to terrorist organization responsible for September 11th attacks, through charities in which he was involved, was sufficient to state a claim under Antiterrorism Act (ATA), in action alleging provision of support for those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[33] **Racketeer Influenced and Corrupt Organizations**
Association with or participation in enterprise; control or intent

Complaint which failed to allege that defendant had any role in directing an enterprise thus failed to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), for purposes of action alleging provision of support for terrorist organization responsible for September 11th attacks. 18 U.S.C.A. § 1961 et seq.

Cases that cite this headnote

[34] **War and National Emergency**
Private Remedies

Absent any allegation that purported charitable organization knew that the money it was transferring between two other organizations would somehow assist terrorist organization responsible for the September 11th attacks, or that it knew that other organizations to which it transferred money were in the business of supporting terrorism, allegation that organization made such transfers failed to state a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[35] **War and National Emergency**
Private Remedies

Allegations that defendant was a founder and leader of terrorist organization responsible for the September 11th attacks, that he had been designated a terrorist by the U.S. government, and that he was the head of various non-government organizations providing financial and logistical support to the terrorist network, sufficiently stated a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[36] **War and National Emergency**
Private Remedies

Allegation that purported Islamic relief organization collected and laundered money for terrorist organization responsible for the September 11th attacks, was involved in numerous attacks and plots, and funded the Taliban and terrorist training camps in Afghanistan sufficiently stated a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[37] **Federal Civil Procedure**
Time of determination; reserving decision

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District Court would deny, without prejudice, purported Islamic charitable trust's motion to dismiss, for failure to state a claim, complaints against it in action alleging provision of support for terrorists involved in September 11th attacks, where Court had not yet determined whether it had personal jurisdiction over the trust.

1 Cases that cite this headnote

[38] **War and National Emergency**
Private Remedies

Allegation, that defendants were co-conspirators, material sponsors, and/or aiders and abettors of a network alleged to have provided support for terrorist, was insufficient, without more, to state a claim under Antiterrorism Act (ATA), for purposes of action alleging provision of support for terrorists involved in September 11th attacks; allegations failed to provide notice of the factual grounds on which the claims were based. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[39] **War and National Emergency**
Private Remedies

Absent any allegation that organization knew that two purported Islamic charities it allegedly financed were terrorist cells, or whether and how those cells contributed to agenda of terrorist organization responsible for the September 11th attacks, allegation that the organization provided that financial support were insufficient to state a claim under Antiterrorism Act (ATA), in action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 2339(A).

Cases that cite this headnote

[40] **Racketeer Influenced and Corrupt Organizations**
Association or participation

Absent any allegation that company had any role in directing an enterprise, allegation that it donated money to a group alleged to have later laundered the money, and that it donated money to unnamed entities who later forwarded it to terrorist organization responsible for the September 11th attacks, were insufficient to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), in action alleging provision of support for terrorists involved in those attacks. 18 U.S.C.A. § 1961 et seq.

Cases that cite this headnote

[41] **Racketeer Influenced and Corrupt Organizations**
Association or participation
War and National Emergency
Private Remedies

Complaint, alleging that individual defendants aided and abetted, conspired with, and provided material support and resources to terrorist organization responsible for the September 11th attacks and/or affiliated organizations, failed to state claims for violations of Racketeer Influenced and Corrupt Organizations Act (RICO) or Antiterrorism Act (ATA), in action alleging provision of support for terrorists involved in those attacks; complaint did not adequately provide defendants with notice as to how they provided material support to terrorist organization. 18 U.S.C.A. §§ 1961 et seq., 2339(A).

2 Cases that cite this headnote

[42] **War and National Emergency**
Private Remedies

Complaint alleging that defendant controlled several bank accounts and transmitted money

HOUSE_OVERSIGHT_017911

internationally for terrorist purposes was sufficient to state a claim under Antiterrorism Act (ATA), in action alleging provision of support for September 11th attacks. 18 U.S.C.A. § 2339(A).

2 Cases that cite this headnote

[43] **Racketeer Influenced and Corrupt Organizations**
Association or participation

Absent any allegation that defendant participated in the operation or management of alleged terrorist enterprise, allegation that he controlled several bank accounts and transmitted money internationally for terrorist purposes failed to state a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), for purposes of action alleging provision of support for terrorists involved in September 11th attacks. 18 U.S.C.A. § 1961 et seq.

1 Cases that cite this headnote

[44] **Federal Civil Procedure**
Error by court

A motion for reconsideration is appropriate where a court overlooks controlling decisions or factual matters that were put before it on the underlying motion and which, had they been considered, might have reasonably altered the result before the court.

Cases that cite this headnote

[45] **Federal Civil Procedure**
Justice; prevention of injustice
Federal Civil Procedure
Error by court

A motion for reconsideration may be granted to correct a clear error or prevent manifest injustice.

Cases that cite this headnote

[46] **International Law**
Proceedings to determine immunity

On reconsideration of prior order, District Court would postpone further inquiry into bank's status as a foreign sovereign, for purposes of its assertion that it was entitled to immunity, under Foreign Sovereign Immunities Act (FSIA), in action alleging it provided support for terrorists involved in September 11th attacks, until completion of personal jurisdiction discovery; personal jurisdiction issue was more straightforward and Court was hesitant to subject Kingdom of Saudi Arabia to discovery. 28 U.S.C.A. § 1602 et seq.

3 Cases that cite this headnote

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HOUSE_OVERSIGHT_017912

LLP (DC), Christopher Mark Curran, White & Case LLP (DC), David Charles Frederick, John Christopher Rozendaal, Mark Charles Hansen, Michael John Guzman, Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans PLLC (DC), Lawrence Saul Robbins, Robbins Russel Englert Orseck & Untereiner LLP, Washington, DC, Jean Engelmayer Kalicki, Arnold & Porter, LLP, John Joseph Walsh, Carter Ledyard & Milburn LLP, Omar T. Mohammedi, Law Office of Omar T. Mohammedi, Brian Howard Polovoy, Shearman & Sterling LLP (New York), Geoffrey S. Stewart, Michael Bradley, Jones Day, Matthew Phineas Previn, Wilmer, Cutler & Pickering, L.L.P., T. Barry Kingham, Curtis, Mallet-Prevost, Colt and Mosle LLP, New York City, Wilmer Parker, III, Gillen Parker and Withers LLC, Atlanta, GA, Lynne Bernabei, Alan R. Kabat, Bernabei & Katz, PLLC, Washington, DC, for Defendants.

Michael J. Sommi, Cozen O'Connor, New York City, for Movants.

Opinion and Order

CASEY, District Judge.

The Court presumes familiarity with the factual background giving rise to this multi-district litigation. *See In re Terrorist Attacks on September 11, 2001,* 349 F.Supp.2d 765 (S.D.N.Y.2005) (*"Terrorist Attacks I"*). Generally, Plaintiffs are representatives, survivors, and insurance carriers of the victims of the attacks of September 11, 2001, who allege, pursuant to various theories of liability including the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.;* the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.;* the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note; theories of aiding and abetting, civil conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery, that Defendants are responsible for those attacks as terrorists, state sponsors of terror, or material sponsors of terror. In *Terrorist Attacks I,* the Court resolved several motions to dismiss the complaints by various Defendants. Additional motions remain pending before the Court.

Saudi High Commission ("SHC"), HRH Prince Salman bin Abdulaziz Al–Saud ("Prince Salman"), and HRH Prince Naif bin Abdulaziz Al–Saud ("Prince Naif") move to dismiss the complaints for lack of subject matter jurisdiction pursuant to the FSIA, lack of personal jurisdiction, and failure to state a claim for relief. Immediately prior to the Court's scheduled oral argument on these motions, the Federal Plaintiffs moved to supplement the record against Prince Salman and Prince Naif.

Defendants Rabita Trust, Wa'el Jalaidan, and International Islamic Relief Organization ("IIRO") move to dismiss the ***547** complaints for lack of personal jurisdiction and failure to state a claim.

Other Defendants move to dismiss the complaints for failure to state a claim. Tarik Hamdi and Abdulrahman Alamoudi move to dismiss the *Burnett* and *Federal* complaints. Success Foundation moves to dismiss the *Burnett* complaint. The *Burnett* Plaintiffs denominate certain Defendants as the "SAAR Network entities." The SAAR Network entities, which include African Muslim Agency, Grove Corporate, Heritage Education Trust, International Institute of Islamic Thought ("IIIT"), Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, Safa Trust, and York Foundation, move to dismiss the *Burnett* complaint. IIIT also moves to dismiss the *Ashton* complaint. In addition to its motion to dismiss *Burnett,* Mar–Jac Poultry moves to dismiss the *Ashton* and *Federal* complaints. The *Federal* Plaintiffs label certain individuals "SAAR Network executives." These Defendants, including Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, Iqbal Unus, and Jamal Barzinji, move to dismiss the *Federal* complaint.

Finally, Defendant National Commercial Bank ("NCB") moves for reconsideration of this Court's denial without prejudice of its motions to dismiss the *Ashton* and *Burnett* complaints. The Court resolves all the aforementioned motions in this opinion.

I. Subject Matter Jurisdiction Under the FSIA

[1] [2] Pursuant to the FSIA, a foreign state and its instrumentalities are presumed immune from this Court's jurisdiction unless one of the statute's exceptions applies. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001). "In contrast to a Rule 12(b)(6) motion to dismiss for failure to state a claim, in a challenge to FSIA subject matter jurisdiction, the defendant must present a 'prima facie case that it is a foreign sovereign.' " *Virtual*

HOUSE_OVERSIGHT_017913

Countries v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir.2002) (quoting *Cargill Int'l S.A. v. M/T PAVEL DYBENKO,* 991 F.2d 1012, 1016 (2d Cir.1993)). "Then, the plaintiff 'has the burden of going forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted.' " *Virtual Countries,* 300 F.3d at 241 (quoting *Cargill,* 991 F.2d at 1016); *see also Terrorist Attacks I,* 349 F.Supp.2d at 792–797 (explaining that the possibly relevant exceptions to immunity in this litigation include the commercial activities, torts, and state sponsor of terrorism exceptions). Determining whether this burden is met involves a 'review [of] the allegations in the complaint, the undisputed facts, if any, placed before [the court] by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—[resolution of] disputed issues of fact.' " *Virtual Countries,* 300 F.3d at 241 (quoting *Robinson,* 269 F.3d at 141). Throughout the inquiry, Defendants retain the burden of persuasion, which they must meet by a preponderance of the evidence. *Virtual Countries,* 300 F.3d at 241; *see also Robinson,* 269 F.3d at 141 n. 8.

A. Allegations Against Defendants Asserting Foreign Sovereign Immunity

1. Saudi High Commission[1]

In 1993, then-King Fahad bin Abdulaziz Al–Saud, the President of the Council of ***548** Ministers of Saudi Arabia, decreed the formation of SHC, also known as the Saudi High Relief Commission, by High Order 17419. (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392; *Federal* Compl. ¶ 180; *see also* SHC Mem. in Sup. Mot. to Dismiss at 3.) The same High Order named Defendant Prince Salman the President of SHC. (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392; SHC Mem. in Sup. Mot. to Dismiss at 3.)

SHC allegedly has contributed $600 million to aid "Bosnian Muslims impoverished by the country's recent civil war." (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392.) Plaintiffs claim, however, that SHC does not provide support to the needy but actually diverts funds for terrorist activities. (*Ashton* Compl. ¶ 454; *Burnett* Compl. ¶ 404.) In support, Plaintiffs allege that Prince Salman received a letter in September 2000 from a Bosnian association claiming SHC did not provide charitable assistance, and that none of the money collected after the fall of Srebrenica in July 1995 actually reached the Srebrenican people. (*Ashton* Compl. ¶¶ 454–55; *Burnett* Com pl. ¶¶ 404–05; *Federal* Compl. ¶¶ 185, 457.) Plaintiffs claim SHC's financial records fail to account for $41 million. (*Ashton* Compl. ¶ 456; *Burnett* Compl. ¶ 407; *Federal* Compl. ¶ 460.) SHC allegedly made donations to charity Defendant Taibah and the bin Laden Establishment. (*Ashton* Compl. ¶¶ 376, 462 (relying on 1995 bin Laden interview); *Burnett* Compl. ¶ 298.) Plaintiffs also claim that SHC is responsible for "importing the extreme form of Saudi Islam, Wahhabism" to Bosnia. (*Ashton* Compl. ¶ 447; *Burnett* Compl. ¶ 393.)

The *Federal* Plaintiffs allege that al Qaeda fighters began entering Bosnia–Herzegovina in 1992 disguised as SHC relief workers. (*Federal* Compl. ¶ 183.) On October 21, 2001, a group of Algerians who were supposedly part of the al Qaeda network were arrested in Bosnia Herzegovina on charges of terrorism directed at the United States embassy. (*Ashton* Compl. ¶¶ 448–49; *Burnett* Compl. ¶¶ 394–95.) One of the arrested, Sabir Lamar, apparently worked for SHC as an Arabic language teacher. (*Ashton* Compl. ¶ 450; *Burnett* Compl. ¶ 396.) Also in October 2001, Plaintiffs claim that United States forces raided the Sarajevo branch of SHC and "found computer hard drives with photographs of the World Trade Center before and after its collapse as well as photos of United States embassies in Kenya and Tanzania and the U.S.S. Cole." (*Ashton* Compl. ¶ 451; *Burnett* Compl. ¶ 397; *Federal* Compl. ¶ ¶ 186, 458.) The U.S. forces also apparently found files on pesticides and crop dusters, the locations of Washington government buildings, fake State Department badges, and cash. (*Ashton* Compl. ¶¶ 451, 453; *Burnett* Compl. ¶¶ 397, 399; *Federal* Compl. ¶¶ 186, 459.) After the raid, the Financial Police of the Federation of Bosnia Herzegovina Ministry of Finance analyzed the seized documents and stated that some did "not belong in the scope of work of a humanitarian organization." (*Federal* Compl. ¶¶ 187, 459; *see also Ashton* Compl. ¶ 452; *Burnett* Compl. ¶ 398.) The *Federal* Plaintiffs claim that the SHC "has long acted as a fully integrated component of al Qaida's logistical and financial support infrastructure ... [and that the attacks of September 11 were] a direct, intended and foreseeable product of [its] participation in al Qaida's jihadist campaign." (*Federal* Compl. ¶¶ 182, 189.)

*549 2. Prince Salman[2]

Prince Salman is a member of the Kingdom of Saudi Arabia's Council of Ministers, the governor of the province of Riyadh, and the President of Defendant SHC. (Prince Salman Mem. in Sup. Mot. to Dismiss at 2.) Plaintiffs allege that Prince Salman provided material support to Osama bin Laden and al Qaeda. (*Ashton* Compl. ¶ 255; *Burnett* Compl. ¶ 403; *Federal* Compl. ¶¶

HOUSE_OVERSIGHT_017914

455, 463; *see also Federal* RICO Statement Applicable to Saudi Princes at Ex. A.) The Federal Plaintiffs claim Prince Salman "fully intended [SHC] would serve as a vehicle for funding and supporting Islamic militants in Bosnia, including elements of the al Qaida movement." (*Federal* Compl. ¶ 456.) "Prince Salman knowingly failed to take appropriate actions regarding the management and use of funds of the SHC in Bosnia." (*Ashton* Compl. ¶ 457; *Burnett* Compl. ¶ 406.) On December 30, 2000, the Embassy of the State of Palestine in Riyadh sent Prince Salman a letter expressing Yasser Arafat's concern regarding the funding of radical organizations in Palestine. (*Ashton* Compl. ¶ 291; *Burnett* Compl. ¶ 402.) Further, Plaintiffs claim Prince Salman "has a history of funding Islamic extremism," because he was named the Chairman of the General Donation Committee for Afghanistan in 1980, which gave $39 million to aid the Afghan mujahideen. (*Ashton* Compl. ¶ 289; *Burnett* Compl. ¶ 400.)

In 1994, Prince Salman allegedly stated that he had personally raised more than six million Saudi Riyals for Defendant IIRO and Sanabel al-Kheer. (*Federal* Compl. ¶ 462.) And in 1998, he allegedly donated one million Saudi Riyals during a fundraising drive by IIRO and Sanabel al-Kheer. (*Federal* Compl. ¶ 461.) In 1999, Prince Salman donated $400,000 during a fundraising event organized by charity Defendants IIRO, World Assembly of Muslim Youth ("WAMY"), and Al–Haramain Foundation for the benefit of Bosnia Herzegovina and Chechnya. (*Ashton* Compl. ¶ 290; *Burnett* Compl. ¶ 401; *Federal* Compl. ¶ 461.) Finally, Plaintiffs claim that members of the Saudi royal family have assets and do business in the United States. (*Ashton* Compl. ¶ 296.)

3. Prince Naif

Prince Naif has been the Minister of Interior of the Kingdom of Saudi Arabia since 1975. (*Ashton* Compl. ¶ 286; *Federal* Compl. ¶ 433; Prince Naif Mem. in Supp. Mot. to Dismiss at 1, 5.) According to Plaintiffs, the Minister of Interior "controls the activities of Islamic Charities and is empowered to verify their legality and conduct." (*Ashton* Compl. ¶ 286; *Burnett* Compl. ¶ 382; *see also Federal* Compl. ¶ 435 (alleging that as Minister of Interior Prince Naif is "responsible for the oversight of charities based within Saudi Arabia, including the operations of the Saudi Joint Relief Committee [('SJRC')], Muslim World League [('MWL')], IIRO, Saudi Red Crescent, WAMY, and al Haramain Foundation").) He is also a member of the Council of Ministers and serves on the Supreme Council for Islamic Affairs. (Plaintiff's Mem. in Opp'n to Prince Naif's Mot. at 2–3, 5.)

Plaintiffs claim that "Prince Naif has engaged in a pattern of conduct that aids, abets, and materially sponsors international terrorism and Al Qaeda." (*Ashton* Compl. ¶¶ 288, 255; *Burnett* Compl. ¶¶ 342, 381; *Federal* Compl. ¶ 434; *see also Federal* RICO Statement Applicable to Saudi Princes at Ex. A.) They claim that along with other Saudi princes, Prince ***550** Naif made "monetary payoffs to Osama bin Laden's al Qaeda." (*Ashton* Compl. ¶ 288; *Burnett* Compl. ¶ 381.) "In 1996, according to various intelligence sources, a group of Saudi princes ... met in Paris and agreed to continue contributing, sponsoring, aiding and abetting Osama bin Laden's terrorist network." (*Burnett* Compl. ¶ 347.) Plaintiffs claim that Prince Naif and the Saudi government received warnings from the United States and France that charitable donations to Islamic charities were being used to fund terrorism. (See Plaintiffs' Mem. in Opp'n to Naif's Mot. to Dismiss at 5.) Prince Naif was present for one such meeting in 1994 with French Interior Minister Charles Pasqua. (Id.) The *Federal* Plaintiffs allege that Prince Naif has used his position as the Minister of Interior to "protect al Qaida's support infrastructure." (*Federal* Compl. ¶ 438.)

The *Federal* complaint further alleges that "[b]etween 1998 and 2000, the Kingdom of Saudi Arabia, through SJRC, diverted more than $74 million to al Qaida members and loyalists affiliated with SJRC bureaus. Throughout this time, [SJRC] was under the supervision and control of ... Prince Naif." (*Federal* Compl. ¶¶ 126, 436.) "Prince Naif also heads the Saudi Committee for Relief to Afghans, ... [i]n this position, Prince Naif has channeled substantial financial and logistical support to sustain al Qaida's presence and operations in Afghanistan." (*Id.* ¶ 437.) Plaintiffs allege that Prince Naif is the "Chairman of the Saudi Arabian Committee for Support of the Intifada al Quds, [which] knowingly transferred large sums of money to the families of Hamas terrorists who had executed murderous attacks against Israelis." (*Ashton* Compl. ¶ 287; *Burnett* Compl. ¶ 379; *Federal* Compl. ¶ 439; *see also Burnett* Compl. ¶ 380 (citing letter written on behalf of Yasser Arafat and claiming this committee funds radical groups).) As a result, Plaintiffs assert that "Prince Naif ... supports suicide martyrs." (*Ashton* Compl. ¶ 287; *Burnett* Compl. ¶ 379.) The *Federal* Plaintiffs also allege that in 2003, U.S. Senator Charles Schumer asked that Prince Naif be replaced as Interior Minister because of his "well-documented history of supporting terrorist financing and ignoring the evidence when it comes to investigating terrorist attacks on Americans." (*Federal* Compl. ¶ 441.) Finally, the *Federal* Plaintiffs claim Prince Naif made significant personal contributions to

HOUSE_OVERSIGHT_017915

Saudi-based charities that were sponsors of al Qaida's operations, including IIRO, MWL, WAMY, BIF, SHC, SJRC, and al Haramain. (*Federal* Compl. ¶¶ 442–43.)

[3] The Federal Plaintiffs seek leave to supplement the record against Prince Salman and Prince Naif with an article that appeared in *Rus al Yusef,* an Egyptian publication, in August 1998. The unidentified author writes that Islamic aid organizations located in Afghanistan, Bosnia, Somalia, and Tajikistan provided funds and cover to terrorists. (*See Federal* Mot. to Supplement Record on Prince Naif and Prince Salman, Ex. 2, at 2.) Donors to these unidentified organizations "probably ha[d] no idea where their charity money ha[d] gone." (*Id.*) Prince Naif reportedly responded that "if charity money is going to illegitimate targets, it must stop immediately." (*Id.*) From this submission, the Plaintiffs argue that the Princes knew their charitable donations were going to terrorists.

The submission is problematic for a variety of reasons and will not be accepted. First, Plaintiffs do not provide an explanation as why they were only able to obtain and translate the article on the eve of oral argument—well after the motions were fully submitted. Second, the article and ***551** its translation have not been authenticated. More pointedly, however, it simply does not say that the Princes were put on notice regarding specific charities and that they continued to contribute to those charities with the intent that their donations would assist al Qaeda. The *Federal* Plaintiffs' motion to supplement the record against Prince Salman and Prince Naif is denied.

B. Defendants' Status as Foreign States for FSIA Purposes

[4] The FSIA provides the following definition of "foreign state":

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603. Further, "immunity under the FSIA extends also to agents of a foreign state acting in their official capacities [because] [i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Bryks v. Canadian Broad. Corp.,* 906 F.Supp. 204, 210 (S.D.N.Y.1995) (internal quotations omitted); *see also Terrorist Attacks I,* 349 F.Supp.2d at 788–89 (finding Princes Sultan and Turki were foreign states for FSIA purposes to the extent Plaintiffs alleged liability for actions taken in their official capacities).

1. SHC

[5] SHC contends that it is an organ, agency, or instrumentality of the Kingdom of Saudi Arabia and acts on behalf of the Kingdom to fund a range of humanitarian relief efforts to Bosnia, Egypt, and Somalia. (*See generally* Al–Roshood Decl., at Huffman Decl. Ex. A.) In support of its position as a foreign state, SHC submits the affidavits of Dr. Al–Nafissa, a Saudi Arabian lawyer and a Minister of State on the Council of Ministers in the Kingdom of Saudi Arabia, and Mr. Al–Roshood, who has been the Director of the Executive Office of SHC since its inception. The Court notes it is "required to give 'great weight' to any extrinsic submissions made by the foreign defendants regarding the scope of their official responsibilities." *Leutwyler v. Office of Her Majesty Queen Rania Al–Abdullah,* 184 F.Supp.2d 277, 287 (S.D.N.Y.2001).

King Faud authorized Dr. Al–Nafissa to make his declaration concerning SHC. (Al–Nafissa Decl. ¶ 2, at Huffman Decl. Ex. C.) Dr. Al–Nafissa attests that SHC is "an arm of the Saudi Arabian government [and that its actions] are in keeping with the foreign and domestic governmental policies of the Kingdom of Saudi Arabia." (*Id.* ¶ 3.) SHC was formed by Decision of the President of the Council of Ministers in 1993. (Al–Roshood Decl. ¶ 6.) In the same Decision, the Council of Ministers appointed Prince Salman as President of SHC. (*Id.* ¶ 7.) As President of SHC, Prince Salman is the head of SHC's Executive Committee and Supreme Commission, members of which Prince Salman appoints. (*Id.*) SHC is staffed by civil servant employees of the Kingdom of Saudi Arabia. (*Id.* ¶ 10.)

HOUSE_OVERSIGHT_017916

Dr. Al–Nafissa states that private charities in the Kingdom of Saudi Arabia receive governmental approval through Royal Order, are run by boards, and disburse ***552** funds in accordance with their charters. (Al–Nafissa Decl. ¶ 5.) In contrast, governmental commissions, such as SHC, are chaired by a governmental official, like Prince Salman, and conduct their affairs in accordance with the Kingdom's policy objectives. (*Id.* ¶ 5.) According to Dr. Al–Nafissa, "[d]ecisions regarding causes to support and recipients for Saudi High Commission funds are within the discretion of the Executive Committee, the Supreme Commission, and Prince Salman." (*Id.* ¶ 8.) The Kingdom of Saudi Arabia is SHC's largest source of funding, having provided approximately 30% of the funds used and distributed by SHC. (Al–Roshood Decl. ¶ 24.) The remainder of SHC funds are collected through fundraisers "in accordance with the directives of ... King Fahd." (*Id.* ¶ 5.) SHC can be sued for its administrative acts in the Board of Grievances. (Al–Nafissa Decl. ¶ 8.)

In their complaint, the *Federal* Plaintiffs alleged that SHC is "an agency, instrumentality and organ of the Kingdom of Saudi Arabia." (*Federal* Compl. ¶ 181.) They now back away from that allegation and join other Plaintiffs in disputing SHC's status. Plaintiffs submit that SHC has repeatedly and systematically described itself as a non-governmental organization in representations to the Bosnian government. (*See* Plaintiffs' Mem. in Opp'n to SHC Mot. to Dismiss at 10.) Thus, even if SHC is considered a foreign state, Plaintiffs assert it has implicitly waived its immunity through those representations. *See* 28 U.S.C. § 1605(a)(1) (FSIA waiver provision). Plaintiffs also argue that it is disingenuous for SHC to simultaneously maintain that it is an organ of the Kingdom and that this Court lacks personal jurisdiction over it when the Kingdom itself did not dispute the personal jurisdiction issue.

In response to Plaintiffs' arguments that it described itself as a non-governmental organization to Bosnian authorities, SHC submits the declaration of Hadsimuratovic Hajrudin, a Bosnian lawyer who serves as a legal advisor to SHC. (*See generally* Hajrudin Decl. at SHC Reply Ex. A.) Mr. Hajrudin states that SHC characterized itself as non-governmental in accordance with Article 22 of the Law on Humanitarian Activities and Humanitarian Organizations of the Federation of Bosnia and Herzegovina because SHC is "not considered part of the government of Bosnia–Herzegovina." (*Id.* ¶ 4.) Mr. Hajrudin attests that the head of SHC's European Office received diplomatic status in Bosnia–Herzegovina in 1996 because SHC is an organization of the Saudi government. (*Id.* ¶ 6.) He also states that the Kingdom of Saudi Arabia is represented by SHC when it makes donations to Bosnia–Herzegovina. (*Id.*)

[6] There is no dispute that SHC is a separate legal person from the Kingdom and not a citizen of the United States or any third country. *See* 28 U.S.C. § 1603. Accordingly, the only dispute regarding SHC's status is whether it is an organ of the Kingdom. In *Filler v. Hanvit Bank,* 378 F.3d 213 (2d Cir.2004), the Second Circuit considered various factors to determine whether an entity could be considered an organ of a foreign sovereign. *Id.* at 217. The factors include:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217 (citations omitted).

SHC offers undisputed evidence that it was created by the Kingdom's Council of ***553** Ministers to "centralize all charitable giving from the Kingdom to Bosnia–Herzegovina [and that it was] vested with the sole authority to collect and distribute charitable funds in Bosnia." (Al–Roshood Decl. ¶¶ 5–6; Hajrudin Decl. ¶ 6 & Ex. D (noting the Kingdom of Saudi Arabia provides humanitarian relief to Bosnia through SHC).) The Council of Ministers appointed Prince Salman to supervise SHC. (Al Roshood Decl. ¶¶ 7–9.) The salaries of SHC employees are paid by either the Kingdom of Saudi Arabia or out of the SHC budget. (*Id.* ¶ 10.) Like other Saudi Arabian government agencies, SHC can be sued in the administrative court of the Kingdom. (Al–Nafissa Decl. ¶ 8.)

The Court finds that SHC has made a prima facie showing that it is a foreign sovereign. *See Cargill,* 991 F.2d at 1016 (requiring defendant to make prima facie case of sovereignty). Because SHC was formed by order of the Kingdom's governing body, it provides the Kingdom's aid to Bosnia, it is governed by a Saudi official and its

HOUSE_OVERSIGHT_017917

employees are civil servants, it is an organ of the Kingdom of Saudi Arabia. *See Filler,* 378 F.3d at 217. Further, the Court finds SHC has not waived its sovereign immunity. The representations to the contrary on which Plaintiffs rely were made before this lawsuit was contemplated and cannot be read as a waiver of immunity from this court's jurisdiction. The Second Circuit has made clear that the waiver of FSIA immunity must be explicit. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F.3d 255, 261 (2d Cir.2003) (requiring wavier that unambiguously waives claims of immunity from legal proceedings in this country). Finally, Plaintiffs have not identified a factual dispute that would require jurisdictional discovery. *See Filetech S.A. v. France Telecom S.A.,* 304 F.3d 180, 183 (2d Cir.2002) (finding no abuse of discretion where district court resolved jurisdictional issue without holding evidentiary hearing because factual disputes were "readily ascertainable" from the record). Accordingly, Plaintiffs must demonstrate that an exception under the FSIA applies to their claims against SHC. *See Virtual Countries,* 300 F.3d at 241.

2. Prince Salman and Prince Naif

[7] Aside from allegations regarding personal contributions to charities that were fronts for terrorists, the Plaintiffs' claims against Prince Salman and Prince Naif concern their official functions. The allegations against Prince Salman, for example, center on his role as President of SHC, (*see, e.g., Ashton* Compl. ¶ 457; *Burnett* Compl. ¶ 406; *Federal* Compl. ¶ 456) or as Governor of Riyadh, (*see Ashton* Compl. ¶ 291; *Burnett* Compl. ¶ 402). Similarly, the allegations against Prince Naif center on his role as Minister of Interior of the Kingdom. (*See Ashton* Compl. ¶ 286; *Burnett* Compl. ¶ 382; *Federal* Compl. ¶ 435.) To the extent the allegations concern actions undertaken in their government positions, the Court finds that Prince Salman and Prince Naif are foreign states for FSIA purposes. *See Leutwyler,* 184 F.Supp.2d at 286–87 (recognizing that "individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities"). Thus, Plaintiffs must also show that an FSIA exception applies to Princes Salman and Naif. *Virtual Countries,* 300 F.3d at 241.

C. Application of FSIA Torts Exception

Plaintiffs claim any immunity enjoyed by SHC, Prince Salman, and Prince Naif is overcome by the FSIA's torts exception. The *Federal* Plaintiffs also argue that the commercial activities exception should lift ***554** the sovereigns' immunity. For the reasons explained in its previous opinion, the Court concludes that the torts exception is the only exception relevant to the allegations contained in the *Ashton, Burnett,* and *Federal* complaints against SHC, Prince Salman, and Prince Naif. *See Terrorist Attacks I,* 349 F.Supp.2d at 793–94 (explaining that the *Federal* Plaintiffs' reliance on the commercial activities exception is inappropriate because the alleged acts by Defendants were not the type of actions "by which a private party engages in trade and traffic or commerce," and explaining the state sponsor of terrorism exception applies only to designated state sponsors of terror, of which the Kingdom of Saudi Arabia is not).

[8] [9] The torts exception lifts immunity for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official ... of that foreign state while acting in the scope of his office." 28 U.S.C. § 1605(a)(5). For jurisdiction to be proper under the torts exception, Plaintiffs will have to show, first, that the Defendants' tortious acts caused Plaintiffs' injuries. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 142 (2d Cir.2001) ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5)."). Second, Plaintiffs must show that Defendants' actions were not discretionary, i.e., not grounded in the social, economic, or political policies of the Kingdom of Saudi Arabia. *Terrorist Attacks I,* 349 F.Supp.2d at 794–97; *see also* 28 U.S.C. § 1605(a)(5)(A) (providing that the torts exception is not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused"). "Under the FSIA's 'discretionary function' exception, 'acts which are performed at the planning level of government, as opposed to those at the operational level, are protected by the immunity.' " *Marchisella v. Gov't of Japan,* No. 02 Civ. 10023(DC), 2004 WL 307248, at *2 (S.D.N.Y. Feb.17, 2004) (quoting *Napolitano v. Tishman Constr. Corp.,* No. 96 Civ. 4402(SJ), 1998 WL 102789, at *4 (E.D.N.Y. Feb.26, 1998)).

Here, since SHC, Prince Salman, and Prince Naif are not alleged to have been the actual perpetrators of the attacks, Plaintiffs rely on theories of conspiracy and aiding and abetting.

HOUSE_OVERSIGHT_017918

> Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act ..., aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer.... In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct.

Pittman v. Grayson, 149 F.3d 111, 122–23 (2d Cir.1998). Accordingly, to survive these Rule 12(b)(1) motions to dismiss, Plaintiffs must plead facts from which it reasonably can be inferred that the Defendants knew or should have known that their tortious actions were supporting terrorists or terrorist fronts. *Terrorist Attacks I,* 349 F.Supp.2d at 800–01; *see also Boim v. Quranic Literacy Inst.,* 291 F.3d 1000, 1023 (7th Cir.2002) (*"Boim II"*) (explaining elements of concerted-action civil liability under ATA); *Virtual Countries,* 300 F.3d at 241 ("Determining whether [Plaintiffs have demonstrated that one of the FSIA's exceptions applies] involves a review of the allegations in the complaint, the undisputed facts, if any, placed before ***555** the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of fact.") (internal quotations omitted).

1. SHC

[10] Even if Plaintiffs alleged that SHC was tortiously liable for the attacks of September 11, such allegations could not overcome the discretionary function exception. SHC offers undisputed evidence that all decisions regarding the distribution of humanitarian relief funds were within the sole discretion of its Chairman Prince Salman and the advisors he selected. (*See* Al–Nafissa Decl. ¶ 8.) Further, SHC was guided by the Kingdom's policies regarding Bosnia–Herzegovina in making its funding determinations. (*Id.* ¶ 3.) Accordingly, SHC's alleged misuse of funds and/or inadequate record-keeping—even if it resulted in the funds going to terrorists—was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity. *See U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (explaining FTCA discretionary function exception is designed to "prevent judicial 'second-guessing' of ... decisions grounded in social, economic, and political policy through the medium of an action in tort"); *Marchisella,* 2004 WL 307248, at *2 (explaining the FSIA's discretionary function exception replicates that found in the FTCA and that courts rely on the FTCA for guidance in interpreting the scope of the FSIA's exception); *Kline v. Kaneko,* 685 F.Supp. 386, 392 (S.D.N.Y.1988) (explaining sovereign's decisions regarding formation and enforcement of national policies are discretionary functions); 28 U.S.C. § 1605(a)(5)(A) (stating torts exception is not applicable to claims based discretionary actions, even when that discretion is abused). Accordingly, the Court finds SHC is immune from suit in this litigation. Its motions to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack subject matter jurisdiction are granted.

2. Prince Salman and Prince Naif

[11] Similarly, even if Plaintiffs adequately plead a tort against Prince Salman and Prince Naif, the discretionary function exception prevents this Court from exercising jurisdiction over them in their official capacities. Plaintiffs take issue with Prince Salman's management of SHC and its funding decisions. Prince Salman's direction of SHC, however, is discretionary. He was appointed President of SHC by King Fahd to carry out the Kingdom's policy toward the refugees of the Bosnian war. (Al–Roshood Decl. ¶ 6; Al–Nafissa Decl. ¶ 5.) Plaintiffs claim that as Chairman of the General Donation Committee for Afghanistan he assisted the Afghanistan mujahideen in the 1980s. To the extent Prince Salman held this position as a member of the Saudi government, this was also a policy decision made at the operational level of government. Plaintiffs claim Yasser Arafat complained to Prince Salman as Governor of Riyadh regarding Saudi funding of extremists in Palestine. Plaintiffs do not allege, however, what relation that complaint has to the al Qaeda terrorists or this litigation. They argue that Prince Salman, who did not attend the meeting with the former French Minister of Interior, should have known from Saudi officials who did meet with him that unnamed terrorists were receiving funding from largely unidentified Saudi charities.[4] *See* ***556** *Terrorist Attacks I,* 349 F.Supp.2d at 799. The Saudi attendees' decisions concerning with whom the French Minister's warnings should be shared and what the Saudi response would be, are surely grounded in social, economic, and political policy, and are, therefore, not

HOUSE_OVERSIGHT_017919

actionable under the FSIA. *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755.

Similarly, the claims against Prince Naif stem from his discretionary functions. The Plaintiffs complain that Prince Naif, as Minister of Interior, ignored warnings in 1994 from French Interior Minister Charles Pasqua that Islamic charities were being used to fund terrorism. Additionally, Plaintiffs contend that he did not adequately supervise certain Saudi charities whose diverted funds allegedly landed in the coffers of al Qaeda and Hamas.

Prince Naif's role on the Council of Ministers and as Minister of Interior makes it "nearly self-evident" that his official acts are "squarely covered by the 'discretionary function' language of [the FSIA]." *Burnett II,* 292 F.Supp.2d at 20. As the Minister of Interior, Prince Naif oversees matters relating to Saudi public security, civil defense, fire service, police, passports, special security, and investigative forces. The Council of Ministers, of which he is a member, oversees the implementation of internal, external, financial, economic, educational, defense policies, and general affairs of state for the Kingdom. Prince Naif's official responsibilities included managing Saudi relations with Osama bin Laden, *see* Prince Naif Mem. in Supp. Mot. to Dismiss at 2 (stating Prince Naif urged the Kingdom to strip bin Laden of his Saudi citizenship in 1994), and thus became a target of al Qaeda himself (*see, e.g.,* Bierstein Aff. in Opp'n to Prince Sultan's Mot. to Dismiss (fatwa issued by Osama bin Laden expressing extreme bitterness toward Saudi Royal family).) Therefore, Prince Naif's administration of his responsibilities was "clearly ... grounded in social, economic, and political policy." *Burnett II,* 292 F.Supp.2d at 21 (citing *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755)).

This Court lacks subject matter jurisdiction over Prince Salman and Prince Naif for their official acts. The FSIA does not immunize an official for his private tortious acts, however. *See* 28 U.S.C. § 1605(a)(5) (explaining torts exception is relevant to official's official acts); *Leutwyler,* 184 F.Supp.2d at 286–87 (explaining officials are "deemed foreign states when they are sued for actions undertaken within the scope of their official capacities"). Accordingly, the Court will consider the appropriateness of exercising personal jurisdiction over Prince Salman and Prince Naif for their alleged personal acts below.

II. Personal Jurisdiction

[12] To survive the motions to dismiss under Federal Rule of Civil Procedure 12(b)(2), Plaintiffs must make a prima facie showing that personal jurisdiction exists over each moving Defendant. *PDK Labs, Inc. v. Friedlander,* 103 F.3d 1105, 1108 (2d Cir.1997). The Court reviews the complaints and affidavits in a light most favorable to Plaintiffs, *id.,* but it does not accept conclusory allegations or draw "argumentative inferences." *Mende v. Milestone Tech., Inc.,* 269 F.Supp.2d 246, 251 (S.D.N.Y.2003) (citing *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1994)).

[13] Plaintiffs offer two bases for personal jurisdiction. First, New York's long-arm statute, which the Court looks to in federal question cases in which no federal statute provides for national service of process or when the Court is sitting in diversity. *PDK Labs,* 103 F.3d at 1108; *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 124 (2d Cir.2002). ***557** New York's long-arm statute, C.P.L.R. 302(a)(2), provides for personal jurisdiction over a person who, personally or through an agent, "commits a tortious act within the state." Because a co-conspirator can be considered an agent, *see Chrysler Capital Corp. v. Century Power Corp.,* 778 F.Supp. 1260, 1266 (S.D.N.Y.1991), Plaintiffs argue that Defendants are subject to personal jurisdiction here based on the acts of their co-conspirators, the al Qaeda terrorists.

[14] [15] [16] As this Court has previously explained, to establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy and allege facts warranting an inference that the defendant was a member of the conspiracy. *Terrorist Attacks I,* 349 F.Supp.2d at 805. "To plead a valid cause of action for conspiracy ... a plaintiff must allege the primary tort and four elements: '(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury.' " *Chrysler Capital Corp.,* 778 F.Supp. at 1267 (quoting *Kashi v. Gratsos,* 790 F.2d 1050, 1055 (2d Cir.1986)). Further, "[t]o warrant the inference that a defendant was a member of the conspiracy, Plaintiffs must show that '(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control' of or 'at the request of or on behalf of' the out-of-state defendant." *Terrorist Attacks I,* 349 F.Supp.2d at 805 (quoting *Chrysler Capital Corp.,* 778 F.Supp. at 1268–69). The Court must resolve the question of whether a conspiracy exists "based upon an independent examination of the factual allegations while mindful of its duty to draw all factual inferences in

HOUSE_OVERSIGHT_017920

plaintiffs' favor." *Daventree v. Republic of Azerbaijan,* 349 F.Supp.2d 736, 760 (S.D.N.Y.2004).

The alternative basis for personal jurisdiction offered by Plaintiffs is found in Federal Rule of Civil Procedure 4(k). Rule 4(k)(1) provides that service of process establishes personal jurisdiction when service is authorized by a federal statute. Here, the ATA provides for personal jurisdiction through its nationwide service of process provision. *See* 18 U.S.C. § 2334(a); Fed.R.Civ.P. 4(k)(1)(D). In situations in which Defendants were not served in the United States pursuant to the ATA, Rule 4(k)(2) acts as a personal jurisdiction gap-filler "in the enforcement of federal law." Fed.R.Civ.P. 4(k)(2) advisory committee's note. For the Court to exercise personal jurisdiction pursuant to Rule 4(k)(2), "there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient minimum contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process." *Terrorist Attacks I,* 349 F.Supp.2d at 807 (citing *United States v. Int'l Bhd. of Teamsters,* 945 F.Supp. 609, 617 (S.D.N.Y.1996)).

[17] Under either basis offered by Plaintiffs, the exercise of personal jurisdiction must comport with due process requirements—there must be minimum contacts and the exercise of jurisdiction must be reasonable. *Metro. Life Ins. Co. v. Robertson–Ceco Corp.,* 84 F.3d 560, 567 (2d Cir.1996); *see also Terrorist Attacks I,* 349 F.Supp.2d at 810–11 (reviewing due process requirements); *Ungar v. Palestinian Auth.,* 153 F.Supp.2d 76, 87 (D.R.I.2001) (requiring minimum contacts with the United States for personal jurisdiction under ***558** ATA). If personal jurisdiction is based on New York's long-arm statute, the Fourteenth Amendment's due process standards apply. If jurisdiction is based on Rule 4(k), the Fifth Amendment applies. The analysis is essentially the same. "The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only contacts with the forum state may be considered." *Chew v. Dietrich,* 143 F.3d 24, 28 n. 4 (2d Cir.1998).

Plaintiffs claim that Rule 4(k)'s minimum contacts requirement is satisfied because the Defendants have purposefully directed their activities at the United States. *See Terrorist Attacks I.,* 349 F.Supp.2d at 807 (reviewing the purposefully directed activities theory). This Court has held that to succeed on this theory, "Plaintiffs must make a prima facie showing of each Defendant's personal or direct participation in the conduct giving rise to Plaintiffs' injuries." *Id.* at 809.[5] The Court does not require direct participation in the attacks themselves, but at least participation in al Qaeda's terrorist agenda.

[18] In analyzing a defendant's minimum contacts, courts distinguish between specific and general jurisdiction. "Specific jurisdiction exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum." *Terrorist Attacks I,* 349 F.Supp.2d at 811 (citing *Metro. Life Ins.* 84 F.3d at 567–68). General jurisdiction is based on a defendant's general business contacts with the forum. Because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required and the plaintiff must demonstrate the defendant's continuous and systematic general business contacts with the forum. *Metro. Life. Ins.,* 84 F.3d at 568; *see also Helicopteros Nacionales de Colombia, S.A.,* 466 U.S. 408, 414–16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

In most instances, Plaintiffs do not specify which basis for personal jurisdiction applies to each Defendant, or whether the Defendant was served in the United States pursuant to the ATA's nationwide service of process provision. Accordingly, in analyzing Defendants' motions, the Court considers as a threshold matter whether Plaintiffs have made a prima facie showing of the Defendant's minimum contacts with the United States as a whole.

A. Prince Salman and Prince Naif

Plaintiffs seek to hold Prince Salman responsible for the attacks of September 11, theorizing that Prince Salman purposefully directed his activities at the United ***559** States by contributing to and raising funds for IIRO, Sanabel-al Kheer, WAMY, and Al–Haramain. As for other contacts with the United States, Prince Salman owns stock in two United States corporations based in Texas, and, during a trip to the United States in 1989, he met with President George H.W. Bush and the governor of Maryland. (Plaintiffs' Opp'n to Prince Salman Mot. to Dismiss at 21–22; *see generally* Parrett Aff.) Additionally, Plaintiffs claim that Prince Salman's son attended school in California, had a residence in the United States, owned a corporation that breeds race horses in the United States, and is involved, through his estate, in a New Jersey lawsuit with a former employee. *Id.* They seek jurisdictional discovery to determine if Prince Salman has other contacts here.

Plaintiffs do not allege that Prince Naif has any general contacts with the United States. Rather, they claim that he

HOUSE_OVERSIGHT_017921

purposefully directed his activities toward the United States by making personal contributions to several Saudi-based charities. (*Federal* Compl. ¶¶ 442–43.)

[19] Plaintiffs must make a prima facie showing that Prince Salman and Prince Naif have minimum contacts with the United States. The minimum contacts requirement is satisfied "if the defendant has 'purposefully directed' his activities at the residents of the forum." *Burger King v. Rudzewicz,* 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Foreseeability is not enough, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum." *Id.* Donating money to established humanitarian organizations that may or may not have been diverting funds to support al Qaeda cannot be considered primary participation in intentional wrongdoing expressly aimed at the United States. *Terrorist Attacks I,* 349 F.Supp.2d at 809 (citing *In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d 204, 208 (2d Cir.2003)).

As to Prince Salman's various limited contacts with the United States, they do not support general jurisdiction over him. The 1989 visit to the White House and Maryland is too far removed in time from the 2001 attacks. See, e.g., *Metro. Life Ins. Co.*, 84 F.3d at 569 (explaining that a defendant's "continuous and systematic" contacts with a forum must be examined over a period of time and finding a six-year period reasonable). Prince Salman's deceased son's contacts with the United States are irrelevant to this Court's analysis. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 ("Each defendant's contacts with the forum State must be assessed individually."). Prince Salman's ownership of shares in Texas corporations, on its own, cannot be considered sufficiently systematic and continuous to establish general jurisdiction. *Helicopteros,* 466 U.S. at 414–16, 104 S.Ct. 1868 (finding CEO's travel to forum for contract negotiations, employees' travel to forum for training, receipt of funds drawn on forum bank accounts, and purchase from forum companies were not contacts sufficiently systematic and continuous to establish general jurisdiction). Plaintiffs have not presented a genuine issue of jurisdictional fact such that discovery is necessary. *Daventree,* 349 F.Supp.2d at 761. Plaintiffs have not satisfied the constitutional requirement of showing that the Princes have minimum contacts with the United States. Accordingly, Prince Salman's and Prince Naif's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of personal jurisdiction are granted.

***560 B. Rabita Trust**[6]

[20] Plaintiffs allege that Rabita Trust is

> a charitable organization which was created to organize the repatriation and rehabilitation of stranded Pakistanis from Bangladesh. Founded in 1988, the trust fund was started jointly by the government of Pakistan and the Saudi-based charity, [Defendant MWL]. Rabita Trust received the majority of its funding from the MWL and the Saudis, and [has] been involved with terrorism.

(*Ashton* Compl. ¶ 521; *Burnett* Compl. ¶ 268.) The charity initially received funding from its founders to help relocate 250,000 displaced refugees. (*Ashton* Compl. ¶ 522; *Burnett* Compl. ¶ 269.) Plaintiffs assert that Rabita Trust has actually relocated only a few hundred refugees. (*Ashton* Compl. ¶ 522; *Burnett* Compl. ¶ 269.)

On October 12, 2001, the United States Treasury Department designated Rabita Trust a Specially Designated Global Terrorist Entity and froze its assets.[7] (*Ashton* Compl. ¶ 312, 527; *Burnett* Compl. ¶ 236; *Federal* Compl. ¶¶ 117, 214.) Rabita Trust is allegedly related to various other charity Defendants and al Qaeda. For instance, as a subsidiary of MWL, it is a "sibling organization of the IIRO." (*Ashton* Compl. ¶ 525; *Burnett* Compl. ¶ 272; *Federal* Compl. ¶ 113.) Through MWL and its own officers, Rabita Trust is also related to the SAAR Network. (*Ashton* Compl. ¶¶ 338, 526–28; *Burnett* Compl. ¶¶ 273–75; *Federal* Compl. ¶ 213.) Plaintiffs claim that "Rabita Trust is an al Qaeda front" and that its General Director, Wa'el Julaidan, is a known al Qaeda member. (*Ashton* Compl. ¶ 523; *Burnett* Compl. ¶ 270; *Federal* Compl. ¶¶ 100, 121, 210.) In a list of orders obtained in a raid of BIF's Sarajevo's offices, investigators allegedly recovered a document from Osama bin Laden regarding the management of Islamic charities in which he urged the creation of a committee to receive and distribute donations to al Qaeda and suggests Rabita Trust's participation. (*Federal* Compl. ¶¶ 195, 211.)

Rabita Trust claims that it does not have an office in the United States and that the complaints are devoid of any allegations that it directed money to terrorists. It admits

HOUSE_OVERSIGHT_017922

that it has been designated a terrorist, but claims it does not have the same connections to the United States, bin Laden, and al Qaeda that Defendants Benevolence International Foundation ("BIF") and Adel A.J. Batterjee had. *See Terrorist Attacks I,* 349 F.Supp.2d at 823–25 (finding Court had personal jurisdiction over Mr. Batterjee based on his designation as a global terrorist, his role with BIF, another designated terrorist, his ***561** leadership of BIF's United States operations, and his relationship with Osama bin Laden). It also argues that the document that Plaintiffs attribute to Osama bin Laden is similar to the Golden Chain, in that it lacks foundation and authentification. *See Terrorist Attacks I.,* 349 F.Supp.2d at 817 ("The 'Golden Chain' is a group of documents that was discovered by Bosnian authorities searching the offices of charity Defendant BIF in March 2002. Plaintiffs claim the 'Golden Chain' contains a list of early direct donors to al Qaeda.")

[21] In assessing whether Rabita Trust has purposefully directed its activities at the United States under Rule 4(k), the Court is mindful of the executive branch's designation of it as a SDGT. While the designation is not dispositive on its own, it does warrant some deference. In the realm of foreign affairs, the executive branch has access to "confidential sources of information [and] agents in the form of diplomatic, consular and other officials." *United States v. Curtiss–Wright Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Entities are designated under Executive Order 13224 if the executive branch determines they are involved in terrorist activities. *See* Executive Order 13224 Fact Sheet. Courts enjoy great discretion in deciding whether to order jurisdictional discovery before resolving motions to dismiss for lack of personal jurisdiction. *See, e.g., APWU v. Potter,* 343 F.3d 619, 627 (2d Cir.2003). This Court finds that such discovery would be helpful in assessing whether any of Rabita Trust's activities were directed at the United States. Accordingly, Rabita Trust's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied without prejudice.

C. Wa'el Jalaidan[8]

[22] The United States Department of Treasury has designated Defendant Jalaidan a terrorist,[9] frozen his assets, and named him "one of the founders of al Qaeda." (*Ashton* Compl. ¶ 304; *Burnett* Compl. ¶ 255; *Federal* Compl. ¶¶ 117, 91.) The Treasury Department "characterized [him] as having 'directed organizations that have provided financial and logistical support to al-Qa-ida, [he] is the logistics chief of bin Laden's organization and fought on bin Laden's side in Afghanistan.' " (*Ashton* Compl. ¶¶ 304, 312, 523–24; *Burnett* Compl. ¶¶ 236, 255, 271; *Federal* Compl. ¶ 117; *see also Federal* Compl. ¶ 196 (claiming documents found in the Bosnian raid of BIF offices contained a note from Osama bin Laden to Jalaidan regarding al Qaeda's need for weapons).) Further, Osama bin Laden and his lieutenant, Abu Zubaydah, allegedly "have acknowledged Wa'el Julaidan as a known associate of their operations. Julaidan has been the head of various non-government organizations providing financial and logistical support to the al-Qa'ida network." (*Ashton* Compl. ¶¶ 304, 312, 341, 484; *Burnett* Compl. ¶ 236, 255.)

Jalaidan was in charge of the MWL in Peshawar, Pakistan and served as the General Director of Rabita Trust. (*Ashton* Compl. ¶ 304; *Burnett* Compl. ¶ 236, 255.) He "operated MWL offices that served in the early days of al Qaeda to attract and train holy warriors from around the world for the war in Afghanistan" and has "repeatedly aided and abetted terrorists." (*Ashton* Compl. ¶¶ 304, ***562** 312; *Burnett* Compl. ¶ 255.) Jalaidan is also allegedly connected to Defendant SJRC. (*Ashton* Compl. ¶ 484; *Federal* Compl. ¶ 125.)

Defendant Jalaidan argues that the allegations against him are simply allegations of guilt by association, and do not include any specificity regarding dates to put his actions in context. He urges the Court to not rely on his designation as a terrorist by the Treasury Department because he did not have an opportunity to rebut it.

Plaintiffs do not claim to have served Mr. Jalaidan in the United States under the ATA's nationwide service provision. Accordingly, Rule 4(k)(2) may provide a basis for personal jurisdiction. There are several federal claims at issue in this litigation and Plaintiffs have not made a prima facie showing that Mr. Jalaidan is subject to personal jurisdiction in New York or any other state. The Court turns to Mr. Jalaidan's contacts with the United States. In addition to being designated as a global terrorist by the Department of Treasury, Mr. Jalaidan is alleged to be a founder and the logistical chief of al Qaeda, and affiliated with several other charities that are allegedly in al Qaeda's fundraising network. In light of al Qaeda's public declarations of war against the United States, someone who is alleged to be a founder, an admitted associate, and a provider of financial and logistical support to al Qaeda, has purposefully directed his activities at the United States such that the exercise of personal jurisdiction over him is reasonable.[10] See *Mwani v. bin Laden*, 417 F.3d 1, 14 (C.A.D.C. 2005).

HOUSE_OVERSIGHT_017923

D. IIRO[11]

[23] Plaintiffs claim that IIRO has "materially supported terror around the globe, including Osama bin Laden and al Qaeda." (*Ashton* Compl. ¶ 310; *Burnett* Compl. ¶¶ 234, 239; *Federal* Compl. ¶ 133.) In the early 1990s, IIRO "was rapidly becoming al Qaeda's foremost charity used as a means to transfer funds, personnel, and other means of material support." (*Burnett* Compl. ¶ 326; *Federal* Compl. ¶ 142.) Plaintiffs claim IIRO remains "firmly entrenched with Osama bin Laden's al Qaeda organization" because of its support of an al Qaeda guest house in Egypt, its office's close proximity to Osama bin Laden's personal office in Sudan, and its relationship with bin Laden's brother-in-law Defendant Mohammed Jamal Khalifa. (*Ashton* Compl. ¶¶ 310, 315, 317; *Burnett* Compl. ¶¶ 234, 239, 241.)

Mohammed Jamal Khalifa headed IIRO's Philippines office, which served as a center of terrorist financing and training. (*Ashton* Compl. ¶ 310; *Burnett* Compl. ¶ 234; *Federal* Compl. ¶¶ 135–36.) Khalifa collected and laundered money for al Qaeda through IIRO's Phillipines office. (*Ashton* Compl. ¶ 316; *Burnett* Compl. ¶ 240.) Through Khalifa, IIRO was allegedly involved with bombings in Jordan in 1993 and 1994, the 1993 attack on the World Trade Center, plots to assassinate former President Bill Clinton and the late Pope John Paul II and to simultaneously blow up twelve American airliners, and the 1998 Embassy bombings in Africa. (*Ashton* Compl. ¶¶ 310, 318, 510–12; *Burnett* Compl. ¶¶ 189, 234, 239 240, 242; *Federal* Compl. ¶¶ 136, 137, 139.)

***563** Plaintiffs claim IIRO supported al Qaeda terrorists in other ways as well. One of the September 11 hijackers claimed to be working for IIRO's Fazeh Ahed. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.) IIRO allegedly funded the Taliban regime with $60,000,000. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.) Pakistan deported 89 aid workers from the IIRO on the grounds that they were supporting al Qaeda. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246; *Federal* Compl. ¶ 144.) Plaintiffs claim IIRO funded al Qaeda training camps in Afghanistan. (*Ashton* Compl. ¶ 556; *Federal* Compl. ¶ 134 (basing allegations on declassified 1996 CIA report alleging IIRO funded six al Qaeda training camps, including those from which it planned, approved, and coordinated the September 11 attacks and where hijackers received training and indoctrination).) IIRO funded Egyptian al-Jihad, a branch of al Qaeda. (*Burnett* Compl. ¶ 243.) IIRO conducted a joint fundraising event with al-Haramain and WAMY in Riyadh, Saudi Arabia in December 1999. (*Burnett* Compl. ¶ 156.)

Defendant MWL is the parent organization of IIRO and uses it as an "operational arm to perform many of its charitable activities." (*Ashton* Compl. ¶ 298; *Federal* Compl. ¶¶ 130–31.) Plaintiffs claim IIRO also works with numerous other charities allegedly affiliated with al Qaeda, including SJRC, BIF, Global Relief Foundation, Taibah International, Islamic African Relief Agency, and WAMY. (*Ashton* Compl. ¶ 320; *Burnett* Compl. ¶¶ 172, 244; *Federal* Compl. ¶ 147.) The FBI raided IIRO's offices in Virginia after September 11, 2001. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.)

Plaintiffs allege that IIRO operates under the name International Relief Organization ("IRO") in the United States in Falls Church, Virginia, and that the IIRO and IRO transfer money to each other and have the same president. (*Ashton* Compl. ¶¶ 311, 320; *Burnett* Compl. ¶¶ 172, 235, 237; *Federal* Compl. ¶ 146 (U.S. branch established in 1991); *see also* Parrett Aff. Ex. 1 (attaching IRO's 1991 certificate of incorporation in Virginia); *id.* Ex. 2 (attaching IRO's 1993 certificate for doing business in Virginia under assumed name of International Islamic Relief Organization (IIRO)).) IIRO claims IRO was finally dissolved as a corporate entity in December 2002. (Saleh bin Abdallah Alsaikhan Decl. ¶ 10.)

The parties agree that this Court's exercise of personal jurisdiction over IIRO depends on its contacts with the United States as a whole under Rule 4(k)(1). The Court looks, therefore, at IIRO's contacts with the United States. It appears that IIRO was operating in the United States until December 2002. It is alleged to have supported an al Qaeda guest house. Through its relationship with Mohammed Jamal Khalifa, it has allegedly been involved in several al Qaeda attacks and plots for other attacks. It has allegedly funded the Taliban and al Qaeda training camps in Afghanistan. The Court finds that Plaintiffs have made a prima facie case that IIRO has purposefully directed its activities at the United States, thus satisfying the constitutional minimum contacts requirement. IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied.

III. Failure to State a Claim

In these Rule 12(b)(6) motions to dismiss for failure to state a claim, the Court accepts as true the facts alleged in the complaints and draws all reasonable inferences in favor of Plaintiffs. *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir.1999). The complaints should be dismissed only if it appears beyond doubt ***564** that Plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Id.; see also*

HOUSE_OVERSIGHT_017924

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (citing *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168–69, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). Plaintiffs must still give Defendants fair and adequate notice of their claims and the grounds on which they rest. *See Simmons v. Abruzzo,* 49 F.3d 83, 86 (2d Cir.1995). "[W]hile *Swierkiewicz* made clear that pleading a *McDonnell Douglas prima facie* case was not necessary to survive a motion to dismiss, it did not even remotely suggest that a pleading could survive dismissal when it contained only the barest of conclusory allegations without notice of the factual grounds on which they purport to be based." *Jackson v. BellSouth Telecomms.,* 372 F.3d 1250, 1270–71 (11th Cir.2004).

The Court limits its review to the facts stated in the complaints, documents attached to the complaints as exhibits, and documents incorporated by reference in the complaints. *Dangler v. N.Y.C. Off Track Betting Corp.,* 193 F.3d 130, 138 (2d Cir.1999). For purposes of the RICO claims, the Court also reviews the RICO statements.

Plaintiffs claim that Defendants in these lawsuits are liable for the attacks of September 11, in most instances, as co-conspirators, aiders, or abettors with al Qaeda. The Court has held that Defendants may be responsible for the September 11 attacks if they knowingly and intentionally provided material support to al Qaeda. *See Terrorist Attacks I,* 349 F.Supp.2d at 826. The complaints' various theories of recovery merit a brief review here. *See id.* at 825–31.

The ATA provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or estate, survivors, or heirs." 18 U.S.C. § 2333(a). An act of international terrorism includes the provision of material support to terrorists, which is also a criminal act under the ATA. *Boim II,* 291 F.3d at 1015. The ATA's criminal provisions define "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b); *see also Boim II,* 291 F.3d at 1015 (finding conduct that violates § 2339A would be sufficient to meet the definition of "international terrorism" in § 2333). This Court adopts the Seventh Circuit's requirement that Plaintiffs plead that Defendants knew of al Qaeda's illegal activities, "that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." *Id.* at 1023–24 (finding allegation that defendants are " 'front' organizations with ostensibly legitimate purposes which are actually engaged in ***565** fund-raising and money laundering in support of terrorist activities" and that those defendants "supplied money to Hamas to fund terrorist operations" were sufficient to survive 12(b)(6) motion).

The ATCA provides a basis for relief when an alien sues for a tort committed in violation of the law of nations. 28 U.S.C. § 1350; *Kadic v. Karadzic,* 70 F.3d 232, 238 (2d Cir.1995). Aircraft hijacking is considered a violation of international law, *Kadic,* 70 F.3d at 240, and the ATCA includes "actions premised on a theory of aiding and abetting and conspiracy." *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, 311 (S.D.N.Y.2003). The ATCA, therefore, may provide a basis of recovery for those Plaintiffs who are aliens.

The *Federal* Plaintiffs include violations of civil RICO in their complaint. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in ... interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." *Id.* § 1962(d). Section 1964 provides for a private right of action to enforce the statute. *Id.* § 1964. Plaintiffs must plead an injury resulting from conduct of an enterprise through a pattern of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 491 (1985).

[24] In *Reves v. Ernst & Young,* 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), the Supreme Court found that liability under § 1962(c) requires that a defendant be a participant "in the operation or management of the enterprise itself." *Id.* at 185, 113 S.Ct. 1163. The Court stated:

HOUSE_OVERSIGHT_017925

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.

Id. at 179, 113 S.Ct. 1163. Therefore "to state a claim for liability under § 1962(c), Plaintiffs must allege that the [Defendants] participated 'in the operation or management of the enterprise itself,' which requires that these Defendants must have had some part in directing the enterprise's affairs." *Redtail Leasing, Inc. v. Bellezza,* No. 95 Civ. 5191(JFK), 1997 WL 603496, at *5 (S.D.N.Y. Sept.30, 1997).

[25] [26] The TVPA provides a cause of action against individuals who under actual or apparent authority of any foreign nation subject an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 note; *Arndt v. UBS AG,* 342 F.Supp.2d 132, 141 (E.D.N.Y.2004). The TVPA claims against Rabita Trust, IIRO, Success Foundation, and the SAAR Network entities are dismissed because these Defendants are not individuals. *Arndt,* 342 F.Supp.2d at 141. The TVPA claims against Tarik Hamdi, Abdulrahman Alamoudi, Wa'el Jalaidan, and the SAAR Network executives are dismissed because there is no allegation that these Defendants were acting under ***566** color of state law. In re: South African Apartheid Litigation, 346 F.Supp.2d 538, 548 (S.D.N.Y.2004) (finding no TVPA claim where complaint did not include allegation of individual acting under color of state law or with significant state aid)

Under New York law, Plaintiffs who are personal representatives who sufficiently allege that Defendants caused the death of their represented decedent will have also stated a claim for wrongful death and survival. N.Y. Est. Powers & Trusts Law §§ 5–4.1 (providing claim for wrongful death) and 11–3.2(b) (providing claim for survival).

[27] [28] Plaintiffs bring various torts claims against these Defendants. As the Court explained in *Terrorist Attacks I,* the *Federal* Plaintiffs' claims of assault, battery, and intentional infliction of emotional distress are time-barred, and therefore dismissed against Rabita Trust, Wa'el Jalaidan, IIRO, Tarik Hamdi, Abdulrahman Alamoudi, Mar–Jac Poultry, and the SAAR Network executives. *Terrorist Attacks I,* 349 F.Supp.2d at 829; N.Y. C.P.L.R. 215(3). To the extent the *Ashton* and *Burnett* Plaintiffs plead that Defendants are liable for the September 11 attacks as co-conspirators or aiders or abettors of al Qaeda, they will have pled a claim for relief for intentional infliction of emotional distress, which requires extreme and outrageous conduct, intent to cause severe emotional distress, a causal connection between the conduct and the injury, and severe emotional distress. *See Stuto v. Fleishman,* 164 F.3d 820, 827 (2d Cir.1999). The *Federal* Plaintiffs' trespass claims require "the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *N.Y. State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1361 (2d Cir.1989). Provided the *Federal* Plaintiffs plead that Defendants here acted in concert with the September 11 hijackers, they will have stated a claim for relief for trespass. Finally, the negligence claims against the Defendants are dismissed because the complaints do not allege or identify a duty owed to Plaintiffs by these Defendants. *Terrorist Attacks I,* 349 F.Supp.2d at 830–31.

To summarize, the TVPA and negligence claims against all of the Defendants moving for dismissal under Rule 12(b)(6) here are dismissed. The *Federal* claims of assault and battery and intentional infliction of emotional distress are also dismissed. The Court reviews the complaints to determine if they state a claim for relief under the ATA and RICO. If Plaintiffs state a claim for relief under the ATA, they will have also stated a claim for wrongful death and survival, the *Federal* Plaintiffs will have stated a claim for trespass, and the *Ashton* and *Burnett* Plaintiffs will have stated claims for intentional infliction of emotional distress. Plaintiffs who are aliens will have also stated a claim for relief under the ATCA.

A. Tarik Hamdi[12]

[29] The *Burnett* and *Federal* Plaintiffs allege that after 1996, when Osama bin Laden declared war on Americans, Tarik Hamdi allegedly arranged for the delivery of a battery for a satellite phone used by Osama bin Laden. (*Burnett* Compl. ¶¶ 245, 581 (citing arguments of then-AUSA Kenneth Karas); *Federal* RICO Statement Ex. A.) Osama bin Laden allegedly used that phone and battery pack to coordinate and order the African embassy bombings. (*Federal* RICO Statement Ex. A.)

***567** Plaintiffs also allege that Hamdi is affiliated with various al Qaeda operatives. For instance, he has

HOUSE_OVERSIGHT_017926

connections with the Committee for the Defense of Legitimate Rights ("CDLR") and the Advice and Reformation Committee ("ARC"), two dissident Saudi groups with ties to Osama bin Laden. (*Burnett* Compl. ¶¶ 561–62.) A radical Arabic publication allegedly provided a phone number registered in Hamdi's name when it advertised the contact information of CDLR's U.S. branch. (*Burnett* Compl. ¶ 580.) CDLR published bin Laden's October 12, 1996 fatwa on the Muslim Students Association listserve, the "MSA News." (*Burnett* Compl. ¶ 584.) Plaintiffs claim that ARC allegedly serves as al Qaeda's front in the United Kingdom and facilitates communication to and from Osama bin Laden. (*Burnett* Compl. ¶¶ 562, 564, 575, 577, 584–85.) Hamdi is also alleged to have connections to Khalid al-Fawwaz, one of the masterminds of the embassy bombings. (*Burnett* Compl. ¶ 582.) Finally, Plaintiffs claim Hamdi is a co-conspirator with the SAAR Network. He worked at IIIT in Herndon, Virginia, "the central address surrounding the SAAR Foundation raids, evidence and investigation." (*Burnett* Compl. ¶¶ 267, 583; *Federal* Compl. ¶ 146, 224.)

Hamdi asserts that he is a journalist. He argues that ABC requested that he arrange the interview with Osama bin Laden and that he did not purchase the phone or battery pack. He claims he has not had any ties to CDLR since 1995. He admits that he worked at IIIT as an editor. These factual disputes cannot be resolved on a 12(b)(6) motion.

[30] The *Federal* Plaintiffs have not alleged that Mr. Hamdi participated in the operation or management of any enterprise. The RICO claims against Mr. Hamdi must be dismissed. *See Redtail Leasing, Inc. v. Bellezza,* 1997 WL 603496 at *5. Plaintiffs allege that Mr. Hamdi knew about bin Laden's terrorist activities at the time he procured a phone for him because the first fatwas had already been issued. They allege he provided material support to bin Laden in the form of a satellite phone battery. The ATA includes communications equipment in its definition of material support. *See* 18 U.S.C. § 2339A(b). "[E]ven small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333." *Boim II,* 291 F.3d at 1015. These allegations are sufficient to notify Mr. Hamdi of the claims against him. Tarik Hamdi's motions to dismiss the *Burnett* and *Federal* complaints are denied.

B. Abdulrahman Alamoudi[13]

Defendant Abdulrahman Alamoudi has connections with several organizations that the *Burnett* and *Federal* Plaintiffs claim support terrorism. He is Vice President of Taibah International Aid Association's U.S. branch. (*Federal* Compl. ¶ 245.) Plaintiffs claim Taibah was implicated in the 1998 embassy bombings. (*Federal* Compl. ¶¶ 66, 239, 244.) Additionally, Taibah allegedly works closely with designated-terrorist Global Relief Fund and SHC and has diverted funds to al Qaeda and its affiliates in Bosnia. (*Federal* Compl. ¶¶ 241, 243.) Through Taibah, Alamoudi is also connected with several SAAR Network entities, including American Muslim Council, American Muslim Foundation, Hajj Foundation, Happy Hearts Trust, IIRO, and Success Foundation. (*Federal* Compl. ¶¶ 245, 490; *Burnett* Compl. ¶¶ 237, 248.) He allegedly used his SAAR connections to funnel money to al Qaeda ***568** through various fronts. (*Federal* Compl. ¶ 247.)

Plaintiffs allege that Alamoudi has openly stated his support for Hamas and Hezbollah, both designated terrorist organizations that cooperate with al Qaeda. (*Federal* Compl. ¶¶ 50, 53 *Burnett* Compl. ¶ 237.)

In August 2003, Alamoudi was detained at Heathrow Airport on his way to Syria. Customs officers seized approximately $340,000 in sequentially numbered bills, two U.S. passports, and one Yemeni passport. (*Federal* Compl. ¶ 246.) Alamoudi was arrested by U.S. officials at Washington Dulles Airport on September 28, 2003. (*Federal* Compl. ¶ 247.) He subsequently pleaded guilty to unlicensed travel to and commerce with Libya, false statements on his naturalization application, and tax offenses involving Libyan financial transactions. (*Federal* Mem. in Opp'n at 6.) He is currently serving a twenty-three year sentence. (*Id.*)

[31] [32] [33] The *Burnett* complaint does not allege any act taken by Mr. Alamoudi that could be considered the provision of material support for al Qaeda. The *Federal* complaint is sustained inasmuch as it claims that Mr. Alamoudi funneled money to al Qaeda through the charities with which he was involved. (*Federal* Compl. ¶¶ 241, 243.) *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities [and] financial services" in definition of material support). This claim puts Mr. Alamoudi on notice that he is alleged to have provided financial material support to al Qaeda. Because the *Federal* complaint does not allege that Mr. Alamoudi had any role in directing an enterprise, however, the RICO claims against Mr. Alamoudi are dismissed. In sum, Mr. Alamoudi's motion to dismiss the *Burnett* complaint is granted; his motion to dismiss the *Federal* complaint is denied.

HOUSE_OVERSIGHT_017927

C. Success Foundation[14]

[34] The Burnett Plaintiffs claim that Success Foundation is a sister company to Defendant IIRO and that it "sends money back and forth with the IIRO and IRO" and other sponsors of terror. (*Burnett* Compl. ¶ 235.) If given the opportunity to replead its allegations against Success, the Plaintiffs would allege that, in 1998, Success Foundation entered into a contract to act as an agent for Defendant Taibah, which has since been designated a global terrorist.

The complaint does not allege that Success Foundation knew the money it was transferring between IIRO and IRO would somehow assist al Qaeda, nor does it allege facts showing that Success Foundation knew the other unnamed organizations to which it transferred money were in the business of supporting terrorism. *See Boim II,* 291 F.3d at 1012 ("To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation."). The *Burnett* complaint is against Success Foundation is dismissed without prejudice.

D. Wa'el Jalaidan

[35] For the reasons the Court found that it has personal jurisdiction over Mr. Jalaidan, the Court finds the Plaintiffs have stated a claim for relief against him. Plaintiffs have alleged facts, that if true, would be sufficient to prove that he knowingly provided material support to al Qaeda in the form of financial and logistical support. *See* 18 U.S.C. § 2339(A) (including ***569** "currency or other financial securities, financial services, ... weapons, [and] personnel" in definition of material support). The *Federal* complaint does not allege that Jalaidan directed an enterprise and the RICO claim is dismissed. Wa'el Jalaidan's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied

E. IIRO

[36] Similarly, for the reasons the Court found that Plaintiffs made a prima facie demonstration that IIRO has purposefully directed its activities at the United States, the Court finds they have stated a claim under the ATA in that IIRO has allegedly funded al Qaeda training camps in Afghanistan, supported al Qaeda guest houses, and been involved in other terrorist attacks and plots. *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities, financial services, ... weapons, [and] personnel" in definition of material support). IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied.

F. Rabita Trust

[37] Rabita Trust moves to dismiss the complaints against it for failure to state a claim. These motions are denied without prejudice until this Court determines whether it has personal jurisdiction over Rabita Trust.

G. SAAR Network Defendants[15]

1. Entities

The *Burnett* and *Ashton* complaints' allegations against the SAAR Network entities are substantially similar to one another.[16] Paragraph 267 of the *Burnett* complaint and paragraph 339 of the *Ashton* complaint both state:

> Co-conspirators, material sponsors, and/or aiders and abettors of the SAAR Network include Defendants ... African Muslim Agency, ... Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar–Jac Investments, Inc., Mar–Jac Poultry, Inc., ... Reston Investments, Inc., ... Safa Trust, ... and York Foundation, all located doing business or registered to do business in the United States.

In support of their claims against these Defendants, Plaintiffs rely primarily on their allegations against the "SAAR Foundation and network." (*See Burnett* Compl. ¶¶ 261–67; *Ashton* Compl. ¶¶ 333–39.) The SAAR Foundation, allegedly a financial sponsor of terror, was formed in the 1970s by a group of Muslim scholars and scientists. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.) It was incorporated in Virginia in 1983 and dissolved in December 2000. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.) Its largest donor is the al Rajhi family of Saudi Arabia. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.)

The complaints claim that over one hundred "affiliated organizations" are registered or are doing business at one of the SAAR Foundation's addresses in Herndon, Virginia, but many "do not maintain a physical presence

HOUSE_OVERSIGHT_017928

at that address, or elsewhere." ***570** (*Burnett* Compl. ¶ 262; *Ashton* Compl. ¶ 334.) The complaints further allege that many of the "SAAR Network" organizations' offices in Herndon were raided in March 2002 as part of Operation Greenquest to investigate "potential money laundering and tax evasion activities and their ties to terrorist groups such as ... al Qaeda as well as individual terrorists ... (including) Osama bin Laden." (*Burnett* Compl. ¶ 263; *Ashton* Compl. ¶ 335.) As noted above, Plaintiffs claim that the entity Defendants are among numerous co-conspirators, material sponsors, and/or aiders and abettors of the SAAR Network. (*Burnett* Compl. ¶ 267; *Ashton* Compl. ¶ 339.) The Plaintiffs also refer the Court to their allegations regarding charity sponsors of terror. (*See, e.g., Burnett* Compl. ¶¶ 150–53 (alleging, for example, that charity Defendants "are used as terrorist fronts, to mask money transfers and provide cover for terrorist operatives").) Additionally, the *Ashton* complaint claims that IIIT received its "operating expenses" from SAAR and "in turn financed two Florida charitable organizations accused of being cells for Islamic Jihad in Florida." (*Id.* ¶ 579.)

Unlike the SAAR Network entities whose motions to dismiss the *Federal* complaint the Court considered in its previous opinion and order, *see Terrorist Attacks I,* 349 F.Supp.2d at 822–23, these Defendants do not dispute that this Court has personal jurisdiction over them. Although each of these moving Defendants filed a separate motion to dismiss, their arguments in favor of dismissal are similar.[17] They argue that, even "assum[ing] that plaintiffs have stated a claim against the 'SAAR Network,' " (*see, e.g.,* African Muslim Agency's Mem. in Supp. Mot. to Dismiss at 3, n.1) the complaints must be dismissed because they contain only conclusory allegations that they are "co-conspirator[s], material sponsor[s], and/or aider[s] and abettor[s] of the SAAR Network." (*Burnett* Compl. ¶ 267; *Ashton* Compl. ¶ 339.) Further, they argue that the complaints must be dismissed because they do not allege that they donated any money improperly, or with the knowledge that it would be given to Osama bin Laden, al Qaeda, or to any other charity allegedly funneling money to terrorists.

[38] Plaintiffs offer the legal conclusion that the SAAR Network entities conspired with the SAAR Network. These Defendants, however, have no notice of the factual grounds on which Plaintiffs' claims of conspiracy are based. *See Jackson,* 372 F.3d at 1271 (explaining *Swierkiewicz* does not permit bare conclusory allegations without notice of the factual grounds on which they purport to be based); *see also* Bodner v. Banque Paribas, 114 F.Supp.2d 117, 125 (E.D.N.Y.2000) (noting the Second Circuit "has dismissed complaints which plead conspiracy in vague or conclusory terms and which do not allege specific instances of misconduct in furtherance of the conspiracy"); *Ying Jing Gan v. City of New York,* 996 F.2d 522, 534 (2d Cir.1993) (explaining that on a Rule 12(b)(6) motion, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness") (internal quotations omitted)). The *Burnett* complaint against African Muslim Agency, Grove Corporate, Heritage Education Trust, International Institute of Islamic Thought, Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, Safa Trust, ***571** and York Foundation is therefore dismissed without prejudice. For the same reasons, the *Ashton* complaint against Mar–Jac Poultry is dismissed without prejudice.

[39] The *Ashton* complaint alleges one action by IIIT in support of its claims—that it allegedly financed two charitable organizations in Florida accused of being Islamic Jihad cells. The complaint does not allege that IIIT knew these charities were Islamic Jihad cells or whether and how these cells participated in or contributed to al Qaeda's agenda of terror. *See Boim II,* 291 F.3d at 1011–12 (making donations to an alleged terrorist group, without "knowledge of and intent to further payee's violent criminal acts," cannot sustain cause of action). Accordingly, the *Ashton* complaint against IIIT is dismissed without prejudice.

[40] In support of the claim that Mar–Jac Poultry is a material sponsor of terrorism, Plaintiffs allege two acts: first, that it donated money to African Muslim Agency, which the Plaintiffs claim was later "laundered," and second, that it donated money to unnamed SAAR Network entities, which was later forwarded to al Qaeda. (*See* Federal RICO Statement Applicable to SAAR Network Entities at 5(f) and Ex. A.) The RICO claim against Mar–Jac Poultry is dismissed because it is not alleged that Mar–Jac had any role in directing an enterprise, *see Redtail Leasing, Inc.,* 1997 WL 603496, at *5. The *Federal* complaint does not provide Mar–Jac Poultry with notice as to how it could be liable for the terrorist attacks. *See Boim II,* 291 F.3d at 1012 ("To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation."). Mar–Jac's motion to dismiss the *Federal* complaint is therefore granted.

2. Executives

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HOUSE_OVERSIGHT_017929

[41] Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus are SAAR Network executives who are mentioned once in the *Federal* complaint in a long list of Defendants who allegedly "have aided and abetted, conspired with, and provided material support and resources to, defendant al Qaida and/or affiliated FTOs, associations, organizations or persons, as described herein." (*Federal* Compl. ¶ 66.) The complaint does not include any other allegations against these Defendants.

The *Federal* complaint alleges that Jamal Barzinji, another SAAR Network executive who moves to dismiss the complaint, is a Saudi national who, "through his various for-profit enterprises and involvement with charities and individuals operating within al Qaida's infrastructure, has long provided material support and resources to al Qaida." (*Federal* Compl. ¶¶ 490–91.) Barzinji has served as a board member of, or been associated with, several SAAR Network entities, including IIIT, WAMY, Safa Trust, Mar–Jac Poultry, and SAAR Foundation. *Id.* ¶ 490 (claiming that while he was the President of Safa Trust, he "held authority over eighteen bank accounts"). He is a business associate of the designated terrorist Yousef Nada. (*Id.*) According to unnamed federal authorities, Barzinji "committed and conspired to: transit money internationally for the purpose of promoting offenses against foreign nations involving murder or the destruction of property by means of explosive, fire, kidnapping or extortion ...; provide material support or resources to foreign terrorist organizations ...; and provide material support or conceal or disguise the source of ownership of material support ***572** intended for use in preparation for or in carrying out a terrorist act." (*Id.*)

The RICO statement provides additional associations between each of these SAAR Network executives and the SAAR Network. (*See Federal* RICO Statement Applicable to the SAAR Network Executives at Ex. A (alleging in their roles as executives of SAAR Network entities, each of these Defendants committed multiple acts of conspiracy to commit multiple crimes).) Specifically, Taha Al–Alwani was President of IIIT and an officer of Heritage Education Trust; Muhammad Ashraf was an officer and/or director of Sterling Investment Group, Sterling Charitable Gift Fund, and York Foundation; M. Omar Ashraf was an officer and/or director of Grove Corporate Plaza, Mar–Jac Investments, and Sterling Charitable Gift Fund; Yaqub Mirza served as an officer and/or director of African Muslim Agency, Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, SAAR Foundation, Safa Trust, where he was the principal signatory on Safa Group checks, and York International; Iqbal Yunus was a director of Child Development Foundation, a SAAR Network entity, and was associated with Sterling Charitable Gift Fund, and Sterling Management Group; finally, Jamal Barzinji was president of Safa Trust and a director of Mar–Jac Poultry, Reston Investments, IIIT, and Safa Trust. (*Id.* at 5(f) and Ex. A.)

The complaint does not state a claim for relief against Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, or Iqbal Unus on a civil RICO theory or under the ATA. Reading the complaint as a whole and considering the overlap of executives among the SAAR Network entities, the complaint does not adequately provide these Defendants with notice as to how they provided material support to al Qaeda terrorists. *See Boim II,* 291 F.3d at 1023 (explaining a claim under the ATA must include allegation that defendant knew about terrorists' illegal activities, defendant wanted to help those activities succeed, and defendant engaged in an act of helping). The *Federal* complaint against Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus is dismissed without prejudice.

[42] [43] Jamal Barzinji controlled several bank accounts. (*Federal* Compl. ¶ 490.) He has allegedly transmitted money internationally for terrorist purposes. (*Id.*) He allegedly made these transfers to support al Qaeda. (*Id.* at ¶¶ 490–91.) The *Federal* Plaintiffs do not allege that Mr. Barzinji participated in the operation or management of their claimed RICO enterprise, and the RICO claim against him is dismissed. *Reves,* 507 U.S. at 179, 113 S.Ct. 1163. But Mr. Barzinji does have sufficient notice of the claims against him regarding his alleged provision of material support in the form of financial transactions to al Qaeda. *See* 18 U.S.C. § 2339(A) (including provision of "currency or other financial securities [and] financial services" in definition of material support) Accordingly, his motion to dismiss the *Federal* complaint is denied.

IV. NCB's Motion for Reconsideration

In deciding NCB's motions to dismiss the *Ashton* and *Burnett* complaints, the Court ruled that NCB's status as a foreign sovereign for purposes of immunity under the FSIA was unclear. It also questioned whether it had personal jurisdiction over NCB. The Court ordered limited jurisdictional discovery on both issues. *Terrorist Attacks I,* 349 F.Supp.2d at 792, 820. In light of the possible lack of subject matter and personal jurisdiction, the Court refrained from deciding NCB's motion to dismiss for failure to state a claim. NCB ***573** moves for

HOUSE_OVERSIGHT_017930

reconsideration of those decisions.

A. Standard

[44] [45] A motion for reconsideration is appropriate where a court overlooks "controlling decisions or factual matters that were put before it on the underlying motion ... and which, had they been considered, might have reasonably altered the result before the court." *Range Road Music, Inc. v. Music Sales Corp.,* 90 F.Supp.2d 390, 392 (S.D.N.Y.2000); *see also Shrader v. CSX Transp. Inc.,* 70 F.3d 255, 257 (2d Cir.1995) ("The standard for granting a motion [for reconsideration] is strict, and ... will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked...."). A motion for reconsideration may also be granted to "correct a clear error or prevent manifest injustice." *Doe v. New York City Dep't of Soc. Servs.,* 709 F.2d 782, 789 (2d Cir.1983).

B. The Court Will Consider NCB's Personal Jurisdiction Defense First

NCB offers two bases for reconsideration. First, NCB argues that even if the Court becomes assured of its subject matter and personal jurisdiction over NCB, Plaintiffs' claims are doomed because the Court dismissed similar claims against Al Rajhi Bank, Saudi American Bank, and Arab Bank. NCB contends that *Center for Reproductive Law & Policy v. Bush,* 304 F.3d 183, 194–95 (2d Cir.2002), supports its theory that the Court does not need to establish jurisdiction over NCB because the Court's dismissal of other Saudi banks "foreordains" NCB's dismissal on 12(b)(6) grounds. Alternatively, NCB urges the Court to limit this litigation's intrusion on Saudi Arabia and postpone resolution of its FSIA immunity defense until after the personal jurisdiction question is resolved.

The *Ashton* and *Burnett* Plaintiffs argue that the Court should not consider NCB's reliance on *Bush* because it was not raised in NCB's original motion to dismiss. Moreover, they are adamant that jurisdictional questions must be resolved first. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (internal citation and quotations omitted). And in Plaintiffs' view, the subject matter jurisdiction question must be resolved before the Court addresses personal jurisdiction. *See Reiss v. Societe Centrale Du Groupe Des Assurances Nationales,* 235 F.3d 738, 746 (2d Cir.2000) ("The initial question to be answered in this case is not whether there is personal jurisdiction within the meaning of the New York [C.P.L.R.] but whether there is subject matter jurisdiction within the meaning of the [FSIA]."). Plaintiffs submit that it would be inefficient to separate the personal jurisdiction discovery from the FSIA discovery since the two inquiries are related. Finally, Plaintiffs argue that the Court's rulings on the other Saudi banks' Rule 12(b)(6) motions cannot apply to NCB because the allegations against the various banks are not identical.

In *Bush,* following the Supreme Court's instructions in *Steel Co.,* the district court dismissed the case for lack of subject matter jurisdiction after finding plaintiffs lacked standing to sue. On appeal, the Second Circuit found the case "exceptional," because twelve years earlier it had "entertained and rejected, on the merits, the same constitutional challenge to the provision at issue." *Bush,* 304 F.3d at 186; ***574** *see also Planned Parenthood Fed. of Am. v. Agency of Int'l Devl.,* 915 F.2d 59 (2d Cir.1990) (rejecting same constitutional challenge to same governmental provision). It explained two exceptions to the general rule that courts "ordinarily ... are not to assume the existence of jurisdiction in favor of reaching an 'easier' merits issue." *Bush,* 304 F.3d at 193 (quoting *Fidelity Partners, Inc. v. First Trust, Co. of N.Y.,* 142 F.3d 560, 565 (2d Cir.1998)).

The only exception relevant here is "in those 'particular circumstances' where the outcome on the merits has been 'foreordained' by another case such that the 'jurisdictional question could have no effect on the outcome,' provided the court 'does not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed.' " *Bush,* 304 F.3d at 194 (quoting *Steel Co.,* 523 U.S. at 98, 118 S.Ct. 1003). The exception stems from *Secretary of Navy v. Avrech,* 418 U.S. 676, 94 S.Ct. 3039, 41 L.Ed.2d 1033 (1974), in which the Supreme Court dismissed a constitutional challenge to a governmental provision on the merits before reaching the jurisdiction question because the Court had earlier rejected a similar constitutional challenge to the same provision in *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). *See Bush,* 304 F.3d at 194 (describing *Avrech* and *Parker*). Accordingly, in *Bush,* the Second Circuit skipped the initial-and "novel"—standing question because that analysis would have been rendered "advisory" by "a controlling decision

HOUSE_OVERSIGHT_017931

of this Court [that] has already entertained and rejected the same constitutional challenge to the same [governmental] provision." *Id.* at 195 (limiting holding to constitutional challenges to governmental provisions).

NCB's reliance on *Bush* cannot prevail here. The exception relied on in *Bush* is limited to constitutional challenges to governmental provisions. *Bush,* 304 F.3d at 195; *see also Steel Co.,* 523 U.S. at 99, 118 S.Ct. 1003. Here, the merits of NCB's liability for the attacks of September 11 do not present a constitutional challenge to a governmental provision such that skipping the jurisdiction question would be appropriate.

In its alternative argument for reconsideration, NCB requests that the Court postpone resolution of the subject matter jurisdiction question posed by the FSIA until NCB's personal jurisdiction defense is resolved. NCB argues that such a course would lead to its quicker dismissal from the litigation and would limit the intrusion into Saudi affairs since personal jurisdiction discovery would involve only NCB's contacts with the United States and not Saudi Arabia's relationship to NCB.

The Supreme Court and Second Circuit agree that there are certain circumstances in which it is appropriate to give priority to the personal jurisdiction inquiry. *See Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 578, 588, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (holding "there is no unyielding jurisdictional hierarchy ... [and] there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry" and finding no abuse of discretion where a court resolves a straightforward personal jurisdiction question before a novel subject matter jurisdiction question); *Cantor Fitzgerald v. Peaslee,* 88 F.3d 152, 155 (2d Cir.1996) (upholding district court's decision to dismiss for lack of personal jurisdiction before considering whether it had subject matter jurisdiction and finding "[o]n some occasions ... considerations of judicial economy and restraint may persuade the court to avoid a difficult question of subject-matter jurisdiction when the case may be disposed of on a simpler ***575** ground"). Further, deference to foreign sovereigns under the FSIA "need not imply priority of immunity determination.... If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first." *In re Minister Papandreou,* 139 F.3d 247, 254 (D.C.Cir.1998).

[46] Here, the Court finds that the personal jurisdiction issue raised by NCB is "straightforward" when compared to the more "difficult" subject matter jurisdiction question posed by NCB's status within the Kingdom of Saudi Arabia. *See Ruhrgas,* 526 U.S. at 588, 119 S.Ct. 1563; *see also Terrorist Attacks I,* 349 F.Supp.2d at 789–792 (analyzing NCB's status as a foreign sovereign). Additionally, NCB acknowledges that personal jurisdiction discovery will only involve it, its relationship to the Kingdom of Saudi Arabia is sufficiently remote that an inquiry into NCB's contacts with the United States will not intrude on the inner workings of the Kingdom's government. Finally, discovery regarding NCB's FSIA defense would necessarily subject the Kingdom to discovery, which the Court is hesitant to do unnecessarily. *See First City, Texas–Houston, N.A. v. Rafidain Bank,* 150 F.3d 172, 176 (2d Cir.1998); *see also Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 534 (5th Cir.1992) (recommending that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination").

For all the foregoing reasons, the Court reconsiders its order regarding simultaneous subject matter and personal jurisdiction discovery. *See Shrader,* 70 F.3d at 257 ("[I]n light of [defendant's] introduction of additional relevant case law ... we cannot say that reconsider[ation is] an abuse of discretion."). Further inquiry into NCB's status as a foreign sovereign is postponed until the parties have completed their personal jurisdiction discovery and this Court has determined whether it has personal jurisdiction over NCB. *See Ruhrgas,* 526 U.S. at 588, 119 S.Ct. 1563; *In re Arbitration Between Monegasque De Reasurrances S.A.M.,* 311 F.3d 488, 498 (2d Cir.2002) (noting "dismissal for want of personal jurisdiction is independent of the merits and does not require subject-matter jurisdiction") (quoting *In re Minister Papandreou,* 139 F.3d at 255–56).

V. Conclusion

For the reasons explained above, SHC's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter jurisdiction is granted. Prince Salman's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter and personal jurisdiction is granted. Prince Naif's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter and personal jurisdiction is granted. Rabita Trust's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied without prejudice. Wa'el Jalaidan's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against him are dismissed. IIRO's motions to dismiss the *Ashton,*

HOUSE_OVERSIGHT_017932

Burnett, and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against it are dismissed. Tarik Hamdi's motions to dismiss the *Burnett* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against him are dismissed. Abdulrahman Alamoudi's motion to dismiss the *Burnett* complaint is granted; his motion to dismiss the *Federal* complaint is ***576** denied, but the RICO, TVPA, intentional tort, and negligence claims are dismissed. Success Foundation's motion to dismiss the *Burnett* complaint is granted. The motions by African Muslim Agency, Grove Corporate, Heritage Education Trust, IIIT, Mar–Jac Investments, Reston Investments, Safa Trust, and York Foundation to dismiss the *Burnett* complaint are granted. IIIT's motion to dismiss the *Ashton* complaint is granted. Mar–Jac Poultry's motions to dismiss the *Burnett, Ashton,* and *Federal* complaints are granted. The motions to dismiss the *Federal* complaint by Taha Al–Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus are granted. Jamal Barzinji's motion to dismiss the *Federal* complaint is denied, but the RICO, TVPA, intentional tort, and negligence claims against him are dismissed. National Commercial Bank's motion to reconsider the Court's January 18 opinion and order is granted to the extent that it requests the Court to consider its personal jurisdiction defense before resolving the FSIA issue.

So ordered.

All Citations

392 F.Supp.2d 539, 10 A.L.R. Fed. 2d 789

Footnotes

1 SHC moves to dismiss the *Ashton, Burnett, Federal, Barrera,* and *Salvo* complaints. The Court consolidated *Barrera v. al Qaeda Islamic Army,* 03 Civ. 7038, with *Ashton* on December 6, 2004. Similarly, at Plaintiffs' request, the Court consolidated *Salvo v. al Qaeda Islamic Army,* 03 Civ. 5071, with *Burnett* on August 16, 2005.

2 Prince Salman moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

3 Prince Naif moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

4 The French Interior Minister named one charity, the World Islamic League, during his meeting. Plaintiffs claim this is another name for the Muslim World League.

5 Plaintiffs bring the Court's attention to *Mwani v. bin Laden*, 417 F.3d 1 (D.C.Cir.2005), in which the D.C. Circuit found that Osama bin Laden and al Qaeda were subject to personal jurisdiction under Rule 4(k)(2) because they had "engaged in unabashedly malignant actions directed at and felt in this forum." *Id*. at 13 (citing, among other examples, bin Laden's and al Qaeda's orchestration of the Nairobi embassy bombing and the 1993 World Trade Center bombing, their plot to bomb various landmarks in New York City, their fatwas against Americans, the criminal indictment against them arising from the Nairobi attack, and the conclusions of the 9/11 Commission). As a result, their "decision to purposefully direct their terror at the United States, and the fact that the plaintiffs' injuries arose out of one of those terrorist activities, should suffice to cause the defendants to 'reasonably anticipate being haled into' an American court." *Id*. at 14. In light of the level of bin Laden's and al Qaeda's unquestionably direct involvement in the Nairobi attack, Mwani supports this Court's conclusion that a defendant's actions must be personal or direct so that the defendant has fair warning that his activities could subject him to personal jurisdiction in the United States. *Id.*

6 Rabita Trust moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

7 Certain Defendants have been designated Specially Designated Global Terrorists ("SDGTs") pursuant to Executive Order 13224. In response to the attacks of September 11, President Bush issued Executive Order 13224 on September 23, 2001, pursuant to the authorities of the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.,* the National Emergencies Act, 50 U.S.C. § 1601 *et seq.,* United Nations Participation Act of 1945, as amended, 22 U.S.C. 287(c), and 3 U.S.C. § 301. The Secretaries of State and Treasury, in consultation with each other and the Attorney General, may designate individuals or entities if they determine the individual or entity has committed or poses the risk of committing acts of terrorism, or are owned or controlled by terrorists, or assist in or sponsor terrorism. As a result, the property and interests of the SDGT that come within the possession or control of U.S. persons are blocked. The process is intended to deter contributions to designated persons and entities and

HOUSE_OVERSIGHT_017933

heighten public awareness regarding links to terrorism. *See* Executive Order 13224 Fact Sheet *available at* http://www.state.gov/s/ct/rls/fs/2002/16181.htm.

8 Wa'el Jalaidan moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

9 At oral argument Plaintiffs alleged and Defendant heard for the first time, that Saudi Arabia and the United Nations have also designated him a terrorist.

10 In reaching this conclusion, the Court did not consider the supplemental material that the *Burnett* and *Federal* Plaintiffs submitted in opposition to Mr. Jalaidan's motions to dismiss. (*See* Letter from Sean P. Carter to Court of June 23, 2005; Letter from Jodi Westbrook Flowers to Court of June 24, 2005.)

11 IIRO moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

12 Tarik Hamdi moves to dismiss the *Burnett* and *Federal* complaints.

13 Abdulrahman Alamoudi moves to dismiss the *Burnett* and *Federal* complaints.

14 Success Foundation moves to dismiss the *Burnett* complaint.

15 Certain of these Defendants object to the label "SAAR Network Defendants," arguing there is no such entity and that, even if there were, Plaintiffs cannot agree as to which Defendants are included in the network. The Court refers to these Defendants under this label solely because Plaintiffs have so-identified these Defendants in their complaints.

16 African Muslim Agency, Grove Corporate, Heritage Education Trust, IIIT, Mar–Jac Investments, Mar–Jac Poultry, Reston Investments, Safa Trust, and York Foundation move to dismiss the *Burnett* complaint. IIIT and Mar–Jac Poultry also move to dismiss the *Ashton* complaint. Mar–Jac Poultry moves to dismiss the *Federal* complaint as well.

17 The *Burnett* Plaintiffs filed one opposition brief in response to all of the SAAR Network entities' motions, except Mar–Jac Poultry. The *Ashton* Plaintiffs filed a single opposition brief in response to IIIT's and Mar–Jac Poultry's motions to dismiss. The *Burnett* and *Federal* Plaintiffs filed separate briefs opposing Mar–Jac Poultry's motions to dismiss.

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United States District Court
Southern District of New York

VIRGINIA L. GIUFFRE,

Plaintiff, CASE NO:

v.

ALAN DERSHOWITZ,

Defendant.

_____ /

COMPLAINT

Boies Schiller Flexner LLP

Plaintiff, VIRGINIA L. GIUFFRE, formerly known as Virginia Roberts ("Roberts"), for her Complaint against Defendant, Alan Dershowitz ("Dershowitz") avers upon personal knowledge as to her own acts and status and upon information and belief and to all other matters:

NATURE OF THE ACTION

1. This suit arises out of Defendant's defamatory statements of and concerning Plaintiff.

2. During 2000-2002, beginning when Plaintiff was 16, Plaintiff was the victim of sex trafficking and abuse by convicted sex offender Jeffrey Epstein.

3. Epstein's trafficking scheme involved recruiting young girls, often by claiming they would be paid $200 for simply providing a massage to a wealthy billionaire. The young girl would then be brought up to Epstein's bedroom where Epstein would be on a massage table; Epstein would then sexually abuse the girl. This same pattern was repeated numerous times with numerous children.

4. "From between 1999 – 2007, Jeffrey Epstein sexually abused more than 30 minor girls…in his mansion in Palm Beach Florida, and elsewhere in the United States and overseas… In addition to his own sexual abuse of the victims, Epstein directed other persons to abuse the girls sexually. Epstein used paid employees to find and bring minor girls to him. Epstein worked in concert with others to obtain minors not only for his sexual gratification, but also for the sexual gratification of others." United States District Court Judge Marra February 21, 2016 Summary Judgement Order at 2, Case No.: 9:08-cv-80786 (internal citations omitted). One of the persons with whom Epstein acted in concert was Dershowitz.

5. Like other minor children who came before and after her, Plaintiff was initially recruited to provide massages, and thereafter to engage in a variety of sexual acts, for Epstein.

HOUSE_OVERSIGHT_017936

Plaintiff was required to be on call for Epstein for sexual purposes and frequently traveled with him both nationally and internationally. Plaintiff was regularly abused by Epstein and was lent out by Epstein to others for sexual purposes.

6. Defendant Dershowitz was Epstein's attorney, close friend, and co-conspirator. Dershowitz was also a participant in sex trafficking, including as one of the men to whom Epstein lent out Plaintiff for sex.

7. When Epstein was arrested for sex trafficking in 2006, Dershowitz defended his friend and client by falsely attacking the veracity of his accusers, including calling the children whom Epstein had abused (and, in the case of Plaintiff, the Defendant himself had also abused), liars and prostitutes.

8. Despite his significant criminal activity, Epstein's criminal charges were resolved by a guilty plea to a single Florida state law charge and a non-prosecution agreement (a "NPA") with the U.S. Attorney for the Southern District of Florida. Unknown to the public and the victims at the time, Epstein's lawyers, including Dershowitz, were pressuring the Government to commit to the NPA without informing the victims. Epstein's multiple victims, including Roberts, were kept in the dark and told to be "patient" while Dershowitz participated in the drafting of the NPA and worked to protect Epstein and other "potential co-conspirators" (including himself) from prosecution.

9. On July 7, 2008, a challenge to the NPA was brought on behalf of two of Epstein's victims (not including Plaintiff) based on the fact that, contrary to the requirements of the Criminal Victims' Rights Act (the "CVRA"), the NPA had been concealed from Epstein's victims.

10. In December 2014, Roberts, who had not initially been part of the CVRA action, was asked to, and did, provide information to Plaintiffs' counsel in the CVRA case in which she discussed her sex trafficking by Epstein. On December 31, 2014, Plaintiff's counsel in the CVRA proceeding (Brad Edwards and Paul Cassell) filed a Motion Pursuant to Rule 21 for Joinder in the Action ("Joinder Motion") on behalf of Roberts. Ms. Roberts's joinder motion described how she had been sexually trafficked by Jeffrey Epstein and was forced to have sex with, among others, Alan Dershowitz.

11. Based on Plaintiff's December 2014 filing, Dershowitz, as he had previously done to Epstein's victims, publically and viciously attacked plaintiff's counsel in the CVRA actions, Brad Edwards and Paul Cassell. Dershowitz, in nationally televised news interviews, wrongfully claimed that Edwards and Cassell had engaged in unethical behavior warranting disbarment for filing the Joinder Motion that described Dershowitz's involvement with Epstein and Roberts. Edwards, who is a prominent attorney for sexually abused women and children, and Cassell who is a former United States District Court judge who left the bench to advocate for criminal victims, sued Dershowitz for defamation. Edwards and Cassell asserted that the factual allegations that Dershowitz had knowledge of and participated in Epstein's criminal conduct were entirely proper and well founded and that Dershowitz's statements about Edwards and Cassell were defamatory.

12. In April 2016 Dershowitz settled the Edwards and Cassell defamation claims against him. As a condition of the settlement, Dershowitz required that the financial terms of the settlement be kept confidential.

13. In November 2018, after conducting a lengthy investigation that involved interviewing over eighty (80) women, the Miami Herald published the first in a series of articles

exposing how Epstein and his lawyers had corrupted the legal system to obtain the NPA and referring to Dershowitz's sexual abuse of Roberts. Dershowitz's response on behalf of himself and his client and co-conspirator Epstein has been a desperate barrage of false and increasingly defamatory attacks on Roberts. The purpose and effect of these attacks has been to damage Robert's reputation and credibility and to try to intimidate her into silence.

14. Defendant's central assertion is that Roberts has committed perjury, and that in December 2014, Roberts and her attorneys hatched a scheme to falsely accuse Dershowitz of sex trafficking as part of a criminal attempt to extort a settlement from another party.

15. As Defendant and Epstein well knew, Dershowitz's assertion was false. Dershowitz and Epstein knew that Dershowitz had in fact had sex with Plaintiff. Dershowitz and Epstein also knew that Roberts's assertions about Dershowitz were not part of any criminal extortion plot. Indeed, Dershowitz and Epstein knew that Roberts had identified Dershowitz as a sexual predator years before December 2014.

16. Defendant's knowledge of the falsity of his attacks on Roberts have not, however, limited the scope or scale of those attacks.

17. Examples of Dershowitz's knowingly false and malicious defamatory statements made on behalf of himself and Epstein are:

(a) November 28, 2018: "the story was 100% flatly categorically made up" and "Roberts and her attorneys fabricated the assertion in order to get money from other powerful, wealthy people". (Exhibit 1, p. 8).

(b) December 1, 2018: "I never met Roberts; I never had sex with her; she simply made up the entire story for money". (Exhibit 2).

(c) December 2, 2018: "I was 'deliberately framed for financial reasons'"; Roberts made her claims about Dershowitz "in order to obtain money from a wealthy businessman and that Roberts had never previously included me among the people with whom she claimed to have had sex"; "one of Roberts' own lawyers has acknowledged in front of witnesses that Roberts claims against me are 'wrong' 'simply wrong'"; "I never met Roberts; I never had sex with her; she simply made up the entire story for money". (Exhibit 3).

(d) December 4, 2018: Plaintiff is a "certified, complete, total liar"; "I can prove conclusively that she made the whole thing up". At the same time Dershowitz claimed "that the FBI recognized the evidence showed he was not where she said he was". (Exhibit 4).

(e) December 5, 2018: "Roberts made up the accusations out of whole cloth in order to obtain millions of dollars from Leslie Wexner" and "there is evidence that directly proves I was framed. These include emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was deliberately framed for financial reasons." (Exhibit 5).

(f) March 2, 2019: "My perjuring accusers are Virginia Roberts and Sarah Ransome [who reported that Epstein lent her out to Dershowitz for sex at the same time as Dershowitz was, at Epstein's request, representing Ransome as her lawyer]. Both have long records of lying". (Exhibit 6).

18. Dershowitz and Epstein knew Dershowitz's assertions about Roberts, including his assertions referenced in paragraph 17 above, were, and would be taken by persons who read and heard them to be, specific statements of fact.

19. Dershowitz has repeatedly, publically claimed that he wanted to have a trial that would determine the facts concerning his conduct. He said on national television that he would waive the statute of limitations so that Roberts could sue him for sex abuse. However, when Robert's counsel asked Dershowitz to do so, Dershowitz refused -- and continues to refuse.

20. Similarly, when Dershowitz was faced with an actual case brought by Edwards and Cassell which would have determined the veracity of Roberts' claims, Dershowitz settled to avoid that determination.

21. More recently, Dershowitz, perhaps believing that Roberts who is now living with her husband and children in Australia would not be prepared to engage in litigation, has again taken to claiming publically that he demands a trial on the question of whether Roberts committed perjury and made up her statements about him for money. For example on March 2, 2019: My "accusers are Virginia Roberts and Sarah Ransome…I hereby accuse my false accusers of committing the felony of perjury and challenge them to sue me for defamation." (Exhibit 6).

22. Mr. Dershowitz now has what he claims to have been looking for.

JURISDICTION AND VENUE

23. This is an action for damages in an amount in excess of the minimum jurisdictional limits of this Court.

24. This Court has jurisdiction over this dispute pursuant to 28 U.S.C. §1332 (diversity jurisdiction) in that Roberts and Dershowitz are citizens of different states and the amount in controversy exceeds seventy-five thousand ($75,000), exclusive of interest and costs.

25. This Court has personal jurisdiction over Defendant. Defendant resides in New York City; Defendant conducts regular business in New York City; and this action arose,

defamatory statements were made, and abuse occurred, within the Southern District of New York.

26. Venue is proper in this Court as (a) the cause of action arose within the jurisdiction of this Court and (b) Defendant resides within this District.

PARTIES

27. Plaintiff is an individual who is a citizen of the State of Florida and a resident of Australia.

28. Defendant Dershowitz is an individual who resides in the Southern District of New York at 2 Tudor City Place Apt. 10EN, New York, New York 10017.

29. Jeffrey Epstein is an individual who resides in the Southern District of New York at 9 East 71st Street, New York, New York, 10021.

FACTUAL ALLEGATIONS

A. Epstein's Sex Trafficking Enterprise

30. Plaintiff became a victim of sex trafficking and repeated sexual abuse after being recruited by Ghislaine Maxwell and Jeffrey Epstein when Plaintiff was under the age of eighteen.

31. Between 2000 and 2002, Epstein sexually abused Roberts at numerous locations including his mansions in West Palm Beach, Florida, New Mexico, the Virgin Islands, and this District. Epstein also flew Roberts on his plane nationally and internationally numerous times when she was under the age of 18. Only portions of the flight logs of Epstein's private planes are yet known, and Epstein also flew Roberts frequently on commercial airlines to meet him and others. However, the chart below which shows Roberts' flights on Epstein's private plane from the limited logs that are available illustrates the international scope of Epstein's sex trafficking.

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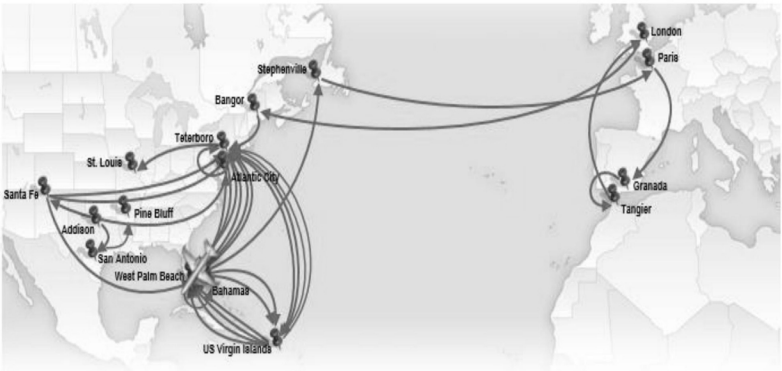

32. Between 1999 and 2007, with the assistance of numerous co-conspirators, Epstein abused more than thirty (30) minor underage girls, a fact confirmed by state and federal law enforcement.

33. After years of abuse, Epstein sent Roberts to Thailand in September 2002. One of Roberts' assignments from Epstein was to bring a young girl back to Epstein in the United States. Fearing for her life, and not wanting to subject another young girl to the abuse she was forced to endure, Roberts fled from Thailand to Australia to escape from Epstein.

B. <u>Dershowitz's Role with Epstein and Abuse of Plaintiff</u>

34. Dershowitz has been "a close friend of Mr. Epstein" for many years. (Exhibit 7). In 2003, Dershowitz said "I'm on my 20th book… The only person outside of my immediate family that I send drafts to is Jeffrey." "The Talented Mr. Epstein." *Vanity Fair* 2003. (Exhibit 8). Dershowitz also described Epstein as his friend "I would be interested in him [Epstein] as a friend if we had hamburgers on the boardwalk in Coney Island and talked about his ideas." "Vanity Fair Reminds US When Jeffrey Epstein Wasn't a Creep." *The Atlantic Wire*. June 21, 2011. Dershowitz frequently traveled with Epstein, including on Epstein's private plane. In

addition, Epstein's employees have confirmed that Dershowitz visited Epstein's Palm Beach and New York City mansions often, would stay overnight, and was present when the victims of Epstein's sex trafficking were there. Dershowitz also visited Epstein's other homes.

35. In addition to their close friendship, Dershowitz represented Epstein as his attorney. On or about December 2, 2018, Dershowitz stated that he is still Epstein's attorney (Exhibit 9).

36. During the time period that Roberts was being trafficked by Epstein she was forced to have sex with Alan Dershowitz. Roberts was forced to engage in sexual acts with Dershowitz in, among other locations, Epstein's mansion located at 9 East 71st Street, New York, New York 10021.

C. <u>The Arrest and Prosecution of Epstein</u>

37. Epstein ultimately pled guilty to procuring a minor for prostitution, and is now a registered sex offender.

38. In September 2007, Epstein entered into a Non-Prosecution Agreement ("NPA") in which the U.S. Attorney for the Southern District of Florida agreed not to prosecute Epstein for numerous federal sex crimes committed in that District.

39. In the NPA, the United States Attorney for the Southern District of Florida additionally agreed that it would not institute any federal criminal charges against any potential co-conspirators of Epstein.

40. Epstein flippantly referred to his sexual abuse of multiple minors, and the slap on the wrist he had received for it, in a 2011 interview with the New York Post: "Billionaire pervert Jeffrey Epstein is back in New York City – and making wisecracks about his just-ended jail stint for having sex with an underage girl. 'I am not a sexual predator, I'm an "offender,"' the

HOUSE_OVERSIGHT_017944

financier told The Post yesterday. "'It's the difference between a murderer and a person who steals a bagel,' said Epstein." February 25, 2011, New York Post "Billionaire Jeffrey Epstein: I'm a Sex Offender Not A Predator".

D. <u>The Criminal Victims' Rights Act Proceeding</u>

41. Rather than confer with the victims about the NPA, the U.S. Attorney's Office and Epstein, who was represented by Dershowitz at that time, agreed to a "confidentiality" provision in the Agreement barring its disclosure to anyone—including Epstein's victims. As a consequence, the victims were not told about the NPA.

42. On July 7, 2008, a young woman identified as Jane Doe No. 1, one of Jeffrey Epstein's victims (other than Roberts), filed a petition to enforce her rights under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. ¶ 3771, alleging that the Government failed to provide her the rights promised in the CVRA with regard to the plea arrangement with Epstein.

43. On February 21, 2019, the Court found that the victims' rights had been violated and granted summary judgment in favor of the victims finding: "It was a material omission for the Government to suggest to the victims that they have patience relative to an investigation about which it had already bound itself not to prosecute." Order at 31. In its Order the Court acknowledged that: "Jeffrey Epstein sexually abused more than 30 minor girls". The Court also found: "Among other provisions, the NPA expanded immunity to any 'potential coconspirator' of Epstein's: 'In consideration of Epstein's agreement to plead guilty and to provide compensation in the manner described above, if Epstein successfully fulfills all of the terms and conditions of this agreement, the United States also agrees that it will not institute any criminal charges against any potential co-conspirators of Epstein, including but not limited to Sarah Kellen, Adriana Ross, Lesley Groff or Nadia Marcinkova… From the time the FBI began

investigating Epstein until September 24, 2007 – when the NPA was concluded – the Office never conferred with the victims about a NPA or told the victims that such an agreement was under consideration." Order at 2, 8.

E. Victims Refuse Silence

44. Ultimately, as a mother and one of Epstein's many victims, Roberts concluded that she should speak out about her sexual abuse experiences in hopes of helping others who had also suffered from sexual trafficking and abuse, and of possibly protecting future potential victims.

45. On December 23, 2014, Roberts incorporated an organization called Victims Refuse Silence, Inc., a Florida not-for-profit corporation.

46. Roberts intended Victims Refuse Silence to change and improve the fight against sexual abuse and human trafficking. The goal of her organization was, and continues to be, to help survivors surmount the shame, silence, and intimidation typically experienced by victims of sexual abuse, and to help others to escape becoming victims of sex trafficking.

F. Defendant Acted Maliciously to Defame, Discredit, and Intimidate Roberts

47. Dershowitz made his false and defamatory statements as set forth above on behalf of himself and on behalf of his co-conspirator and client Epstein, in the Southern District of New York and elsewhere, in a deliberate effort to maliciously discredit Roberts and silence her efforts to expose the sexual abuse she suffered. Dershowitz and Epstein did so with the purpose and effect of having others repeat such false and defamatory statements and thereby further damaged Roberts's reputation. Dershowitz and Epstein knew Dershowitz's statements were false.

48. Dershowitz made his statements to discredit Roberts in concert with Epstein and others, including Ghislaine Maxwell, one of Epstein's long-time procurers, as part of a conspiracy to discredit and try to silence Roberts. Epstein was particularly interested in discrediting and silencing Roberts because he feared a reopening of a federal criminal investigation of him.

49. Dershowitz made his statements pursuant to his conspiracy with Epstein and Maxwell maliciously as part of an effort to conceal sex trafficking crimes committed around the world by Epstein and other powerful persons.

50. Dershowitz and Epstein intended Dershowitz's false and defamatory statements set out above to be broadcast around the world and to intimidate and silence Roberts from making further efforts to expose sex crimes committed by Epstein and other powerful persons, including Dershowitz.

51. Dershowitz and Epstein intended their false statements to be specific statements of fact. Dershowitz's false statements were, as he and Epstein intended, broadcast around the world and were reasonably understood by those who heard them to be specific factual claims by Dershowitz that he had not had sex with Roberts, that Roberts was intentionally lying about having sex with Dershowitz, that Roberts committed the crime of perjury, that Roberts had committed the crime of extortion, and that Roberts had intentionally fabricated her assertions about Dershowitz to extort money from others.

52. Epstein also worked with other of his attorneys to attack Roberts' allegations, including in a false statement they made in a letter to the editor to the New York Times asserting: "The number of young women involved in the investigation has been vastly exaggerated, there

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was no 'international sex-trafficking operation' and there was never evidence that Mr. Epstein 'hosted sex parties' at his home". (Exhibit 10).

G. Dershowitz's Lies

53. From the beginning, Dershowitz and Epstein have sought to hide their crimes behind a curtain of lies. In response to Roberts' description of Dershowitz's participation in Epstein's sex trafficking, Dershowitz began a series of intentional, outright lies designed to distance himself from Epstein, to cover up his own wrongdoing, and to discredit Roberts and intimidate her into silence.

54. Dershowitz's repeated lies are compelling evidence both of his lack of credibility and his guilt. Only a person seeking to conceal improper conduct would have engaged in the pattern of lies which has characterized Dershowitz's statements since his sex trafficking was revealed.

55. In attempt to conceal his relationship with Epstein, Dershowitz in January 2015 asserted that "my relationship with him was entirely professional. It is a total bum rap to say that I…was 'chummy' with him". (Exhibit 11). That was a lie, as Dershowitz and Epstein knew (*see*, e.g., paragraphs 34-35).

56. Both to conceal Dershowitz's relationship with Epstein, and to discredit Roberts, Dershowitz has repeatedly asserted that he was only at Epstein's residence once in Palm Beach, and that was with his family. However, Juan Alessi, a long time Epstein household employee, has confirmed that Dershowitz visited Epstein "pretty often. I would say at least four or five times a year" and that he would "typically" stay two or three days. Similarly, Alfredo Rodriguez who worked for Epstein approximately only six months confirmed that during that six months period Dershowitz visited Epstein twice.

57. Again, both to conceal his relationship with Epstein and to discredit Roberts, Dershowitz has repeatedly asserted that he was never in Epstein's residence in the presence of young women. As both Dershowitz and Epstein know, that assertion was also false. As Mr. Rodriguez has confirmed, there were "also young ladies in the house at the time he [Dershowitz] was there". Mr. Rodriguez also confirmed that "Mr. Dershowitz was there" when "women came to Mr. Epstein's home to give a massage". Mr. Rodriguez also confirmed that "Alan Dershowitz was at the house" with "the local Palm Beach girls" who he was "told to call masseuses", although he did not himself know whether or not Dershowitz personally received a massage.

58. Maria Farmer was an employee of Epstein responsible for "manning the front door at his New York mansion and keeping records of people who came to the home" (Exhibit 12, ¶ 2).

(a) Ms. Farmer "witnessed a number of school age girls coming to the house, some of the young girls would be wearing their school uniforms"…who "then would be escorted upstairs" (Exhibit 12, ¶ 3).

(b) Ms. Farmer was told these young girls "were interviewing for modeling positions" even though "it did not seem credible to me that these young girls were interviewing for modeling positions". (Exhibit 12, ¶ 3).

59. Ms. Farmer asserts that "Alan Dershowitz was an individual who came to visit Epstein at his New York mansion a number of times when I was working for Epstein. Dershowitz was very comfortable at the home and would come in and walk upstairs. On a number of occasions I witnessed Dershowitz at the NY mansion going upstairs at the same time there were young girls under the age of 18 who were present upstairs in the house" (Exhibit 12, ¶ 4).

60. Ms. Farmer, like other victims of, and witnesses to, Epstein and Dershowitz's sex trafficking and abuse has been subjected to attacks and intimidations. (Exhibit 12, ¶¶ 8-9). Her courageous testimony, together with the sworn testimony of victims such as Sarah Ransome and witnesses such as Mr. Alessi and Mr. Rodriguez , proves beyond any doubt that Dershowitz's claims that he was never present where Ms. Roberts was trafficked, and never in the presence of young girls, are a lie intended to cover up his culpability.

61. Again both to conceal his relationship with Epstein and to discredit Roberts, Dershowitz has repeatedly asserted that he has records that prove that it would have been "impossible" for him to be with Roberts because he was never in the same place and time as Roberts. As both Dershowitz and Epstein know, that too was a lie. The testimony of Epstein's household staff establishes that Dershowitz was repeatedly at Epstein's residence. Even Dershowitz's own selected, incomplete, and apparently revised, records demonstrate that Dershowitz was present at locations where Ms. Roberts was with Epstein.

62. Dershowitz's assertion that Roberts accused him of having sex with her only after her lawyers convinced her to do so in late 2014 is not only false, as both Dershowitz and Epstein knew, but thoroughly disproved by the record.

63. Roberts had identified Dershowitz as a participant in her sexual abuse at the time it occurred. She did so again in 2009. In 2010 Epstein's co-conspirators were repeatedly asked about Dershowitz. For example:

(a) Adriana Ross refused to answer on Fifth Amendment grounds whether "Alan Dershowitz stays at Jeffrey Epstein's house…when underage minor females have been in the bedroom with Jeffrey Epstein".

(b) Nadia Marcinkova refused to answer on Fifth Amendment grounds: "Alan Dershowitz is also somebody that you also know to have been at the house when L.M. was being sexually abused in Jeffrey Epstein's bedroom, correct?"

64. In 2011 Counsel for Edwards wrote Dershowitz:

(a) On August 23, 2011: "We…have reason to believe that you have personally observed Jeffrey Epstein in the presence of underage females".

(b) On September 7, 2011: "Multiple individuals have placed you in the presence of Jeffrey Epstein on multiple occasions and in various locations when Jeffrey Epstein was in the company of underage females subsequently identified as victims of Mr. Epstein's criminal molestations."

65. Dershowitz lied and stated that he had never flown on Jeffrey Epstein's plane with a young woman and always flew with his wife. (*Hala Gorani, CNN Live,* Jan. 5, 2015). However, even the limited publically available flight logs of Jeffrey Epstein's private plane demonstrate that Dershowitz flew often on Epstein's planes without his wife; with young women, including a Victoria's Secret model; Epstein's procurer Ghislaine Maxwell; and Sarah Kellen who was identified by the Government as Epstein's co-conspirator in his sex trafficking.

66. Dershowitz also lied by saying that he "never" got a massage from anybody: "I never got a massage from anybody. It's made up out of whole cloth." (*NY Daily News*, January 21, 2015). However, after it was revealed that Epstein's household staff identified Dershowitz as one of the recipients of "massages" at Epstein's Palm Beach mansion, Dershowitz changed his story and admitted he got a massage at Epstein's Palm Beach home but claimed: **"I kept my underwear on during the massage."** (*Local 10*, January 22, 2015).

67. Dershowitz lied and said he never saw any naked pictures of females in Epstein's Palm Beach home during his many visits, yet the police footage that was obtained from the search of Epstein's home proves that there were naked pictures of females throughout the home including in the common areas.

68. In a desperate attempt to deflect attention from his own misconduct, Dershowitz fabricated an extortion plot by Roberts and her lawyers. Dershowitz falsely told the media that he was being used as a pawn as part of a fanciful plan to extort money from a billionaire business mogul and colleague of Epstein. Dershowitz's claim was that he was framed in order to send a message to the billionaire that this is what would happen to the billionaire if the billionaire did not pay Roberts and her attorneys. As Dershowitz knew:

(a) No complaint was ever made against the billionaire.

(b) No money was either paid or demanded by or from the billionaire.

(c) Roberts' assertions about Dershowitz long predated the time of the alleged extortion plot.

69. Dershowitz also falsely claimed that Roberts' lawyer had told him that he had concluded that Roberts was "wrong" and "simply wrong" in accusing Dershowitz. Dershowitz, in violation of the canons of ethics and in at least one case in violation of state law, had surreptitiously tape recorded confidential settlement negotiations he had engaged in with Ms. Roberts' lawyer. Dershowitz then played and described excerpts from those tapes out of context to reporters to try to make it appear that Ms. Roberts' lawyer's hypothetical comments, and characterizations of Dershowitz's assertions, represented that lawyer's conclusions. As the sworn testimony (Exhibit 13) of Dershowitz's own lawyer, and the facts set forth below, demonstrate, Dershowitz's assertions about what Ms. Roberts' lawyer said are, again, false.

70. In May 2015 Dershowitz requested confidential settlement negotiations with Ms. Roberts' lawyers in which Dershowitz sought to convince Ms. Roberts lawyer that Ms. Roberts was mistaken, and that the person to whom Epstein had lent Ms. Roberts was Nathan Myhrvold, not Dershowitz. Dershowitz claimed that he had been at Epstein's home only once (and that he was there with his family); that he had never been in the vicinity of Epstein's island; that he had not been at Epstein's New York mansion; and that he had been at Epstein's New Mexico ranch only once for a few hours (again with his family). Dershowitz provided a summary of his whereabouts that purported to prove that his assertions were true.

71. Dershowitz was told that, based on what was shown in his summary, it would have been impossible for Ms. Roberts' assertions about him to be true, and that if his assertions proved out, Ms. Roberts counsel would undertake to convince her that she must have made a mistake.

(a) Dershowitz was also told, however, (i) that his assertions would have to be proven, (ii) that Ms. Roberts had always been very clear that she recalled having had sex with Dershowitz multiple times, and (iii) that everyone was convinced that Ms. Roberts was telling the truth as she recalled it.

(b) Dershowitz responded that he did not doubt that Ms. Roberts was telling the truth as she recalled it and that she would have no difficulty passing a lie detector test. He said he simply believed Ms. Roberts had made an honest mistake in confusing him with Nathan Myhrvold.

72. Following Dershowitz' presentations, Dershowitz's representations were investigated and repeatedly proven false.

(a) Dershowitz's alleged backup for his travel summary proved to be incomplete and in some instances apparently altered.

(b) Dershowitz's key claim that he had not stayed at Epstein's house was proven false, including by the testimony of Epstein's household employees Juan Alessi (*see* ¶ 56 above) and Alfredo Rodriguez (*see* ¶¶ 56-57 above) as well as the testimony of Sarah Ransome (Exhibit 14) and Maria Farmer (Exhibit 12).

(c) Dershowitz's claim that Ms. Roberts confused him with Nathan Myhrvold was tested by showing Ms. Roberts pictures of both. She was, and is, clear that it was Dershowitz, not Myhrvold, with whom she had sex.

(d) Dershowitz's claim he had never been on Epstein's plane without his wife was proven false by plane logs.

(e) Dershowitz's claim that he had never seen pictures of young females at Epstein's house was proven false by Palm Beach police and FBI reports.

(f) Dershowitz's claim that he had never been in the presence of young females was proven false by the testimony of Epstein's household employer (*see* ¶¶56-57) and of young women themselves (*see* Exhibit 14 [Ransome] and Exhibit 12 [Farmer].)

73. After Dershowitz's claimed proof of exonerating evidence collapsed, and the evidence of his guilt grew, Roberts' lawyer's told Dershowitz in writing that they "had discovered evidence inconsistent with some of [your] representations", that his travel "records were incomplete", and that he "should have settled the case when he had a chance".

74. Roberts' lawyer explicitly told Dershowitz that neither Roberts nor her lawyer would make any statement saying or implying that Roberts was mistaken in her charge that

Dershowitz participated in her sexual trafficking and abuse. In his public statements, Dershowitz conspicuously omits any reference to the statements by Roberts' lawyers after they had investigated his representations and concluded that they were false.

75. Faced with the mounting evidence of his guilt, Dershowitz abandoned his attempt to get Roberts or her lawyer to concede a mistake or that Roberts had been wrong, and desperately sought even a suggestion that an error was "possible".

76. In December 2015 Ms. Roberts' counsel again told Mr. Dershowitz that "Virginia is adamant about her current recollection" and that neither Ms. Roberts nor her counsel believed she was mistaken in identifying Mr. Dershowitz as one of the men to whom Epstein had lent her out for sex. In response, Mr. Dershowitz did not claim that Ms. Roberts lawyers had told him that they did not believe her.

77. Instead, the morning of December 9, 2015, Mr. Dershowitz pleaded: "David, Have we given up on a mutually acceptable statement from VR or you. Let's keep trying. We are not that far apart." (Exhibit 15). When Ms. Roberts lawyer did not immediately respond, Mr. Dershowitz wrote later the same day:

> "We should be aiming at a short simple statement such as: "The events at issue occurred approximately 15 years ago when I was a teenager. Although I believed then and continued to believe that AD was the person with whom I had sex, recent developments raise the possibility that this may be a case of mistaken identification." (Exhibit 15).

Mr. Dershowitz went on to write: "It would be acceptable if the statement came from you rather than her, if she prefers." (*Id.*)

78. Wholly absent at this point was any assertion by Mr. Dershowitz that Ms. Roberts was lying, or that she made up her charge as part of an extortion claim, or that after investigating his alleged evidence Ms. Roberts' lawyer did not believe her. On the contrary, Mr. Dershowitz expressly recognized that Ms. Roberts' belief was an honest one. All Mr. Dershowitz was pleading for was an acknowledgement that there was a "possibility" that there "may be" a case of mistaken identification. Even that plea was rejected by Ms. Roberts and her lawyers as misleading.

79. Dershowitz's present PR claim that Roberts' lawyers disbelieved their client, and that Roberts intentionally committed perjury as part of an extortion scheme, is just another Dershowitz lie. His reliance on statements taken out of context, his failure to include the statements of Roberts' lawyer after Dershowitz's supposed evidence had been investigated, and the damning admissions of his own lawyers, reveal Dershowitz's total lack of support for his allegation that Roberts and her lawyers concocted knowingly false allegation against him as part of a supposed extortion plot.

80. Dershowitz also lied to attempt to deflect Sarah Ransome's revelations about him. Ms. Ransome revealed that during the time she was a victim of Epstein's sex trafficking, Epstein's arranged for his lawyer, Dershowitz, to also represent Ms. Ransome. Ms. Ransome also described how, during the time Dershowitz was her lawyer, Epstein lent her out to Dershowitz for sex. (Exhibit 14).

81. Dershowitz asserted that he never had sex with Ms. Ransome, that he never represented Ms. Ransome, that he did not even know Ms. Ransome, and that Ms. Ransome's statements about him were fabricated by Ms. Roberts' lawyer in retaliation for a bar complaint that Dershowitz had filed against that lawyer (Exhibit 16). However, as Dershowitz knew:

(a) He did have sex with Ms. Ransome.

(b) He was Ms. Ransome's lawyer.

(c) Ms. Ransome's statements about her involvement with Dershowitz preceded any contact with Roberts' attorneys. For example, Ransome's first contact with any of Roberts' lawyers was in November 2016, and at least as early as October 2016 Ransome had identified Dershowitz in writing to a reporter as someone who had had sex with one or more of the girls provided by Epstein and that Epstein had arranged for Dershowitz to be Ransome's lawyer.

82. After settling the case against him brought by Messrs. Edwards and Cassell, Dershowitz told the media he had been vindicated, while at the same time insisting that the term of the settlement remains confidential. Edwards and Cassell responded: "Following the announcement of the settlement of defamation claims against Alan Dershowitz, he has been making public statements suggesting that he has prevailed in the lawsuit and that the terms of the settlement exonerate him of any wrongdoing. Those statements are at best misleading. It is a mistake for anyone to conclude based upon Mr. Dershowitz's statements that the case against him was abandoned due to lack of factual support. It is a mistake for anyone to conclude based upon Dershowitz's statements that Bradley Edwards and Paul Cassell had determined that the allegations against Alan Dershowitz made by Virginia Roberts Giuffre were false or unfounded. Neither the terms of settlement nor the agreed upon joint public statement issued as part of the settlement support any such conclusion and it is false to state or suggest otherwise." *Dershowitz Settles Sex Case, But is He Vindicated*? The American Lawyer, April 10, 2016.

83. Dershowitz continues to this day to insist that the terms of his settlement with Edwards and Cassell remain confidential -- a position that can only be explained by

Dershowitz's knowledge that revealing how much he had paid to avoid a trial of the allegations against him would reveal his guilt.

84. As described above, Dershowitz has also repeatedly asserted that he wanted to have a trial to establish his innocence. By contrast, he paid to settle the case that would have provided that trial. He even lied about his being willing to waive the statute of limitations so that Roberts could sue him for sex abuse -- a lie almost immediately exposed when he was promptly asked to do so and, equally promptly refused.

COUNT I DEFAMATION

85. Plaintiff Roberts re-alleges paragraphs 1 – 84 as if the same were fully set forth herein. Dershowitz made his false and defamatory statements deliberately and maliciously with the intent to intimidate, discredit and defame Roberts.

86. In December 2018, and thereafter, Dershowitz, on behalf of himself and Epstein, intentionally and maliciously released to the press his false statements about Roberts in an attempt to destroy Roberts' reputation and brand her as a liar and cause her to lose all credibility in her efforts to help victims of sex trafficking.

87. Dershowitz and Epstein knew that Dershowitz's assertions would dilute, discredit, and neutralize Roberts's public and private messages to sexual abuse victims and ultimately prevent Roberts from effectively providing assistance and advocacy on behalf of other victims of sex trafficking, or expose her abusers.

88. Using his role as a powerful lawyer with powerful friends, Dershowitz's statements were published internationally for the malicious purpose of further damaging a sexual abuse and sexual trafficking victim; to destroy Roberts's reputation and credibility; to cause the

world to disbelieve Roberts; and to destroy Roberts's efforts to use her experience to help others suffering as sex trafficking victims.

89. Dershowitz, personally, intentionally, and maliciously made false and damaging statements of fact concerning Roberts, as detailed above, in the Southern District of New York and elsewhere.

90. The false statements that Dershowitz made, personally on behalf of himself and Epstein not only called Roberts's truthfulness and integrity into question, but also exposed Roberts to public hatred, contempt, ridicule, and disgrace.

91. At the time Dershowitz made his false statements, he and Epstein, knew full well that they were completely false.

92. Dershowitz's false statements constitute libel, as he and Epstein knew that they were going to be transmitted in writing, widely disseminated on the internet and in print. Dershowitz intended his false statements to be published by newspaper and other media outlets internationally, and they were, in fact, published globally, including within the Southern District of New York.

93. Dershowitz's false statements constitute libel per se, including that they accused her of a crime, and including that they exposed Roberts to public contempt, ridicule, aversion, and disgrace, and induced an evil opinion of her in the minds of right-thinking persons.

94. Dershowitz's false statements also constitute libel per se, inasmuch, among other reasons, as they tended to injure Roberts in her professional capacity as the president of a non-profit corporation designed to help victims of sex trafficking, and inasmuch as they destroyed her credibility and reputation among members of the community that seeks her help and that she seeks to serve.

95. Dershowitz's false statements directly stated and also implied that in speaking out against sex trafficking Roberts acted with fraud, dishonesty, and unfitness for the task. Dershowitz's false statements directly and indirectly assert that Roberts lied about being sexually trafficked and abused by Epstein and having sex with Dershowitz, and that Roberts committed the crimes of perjury and extortion. Dershowitz's false statements were reasonably understood by many persons who read his statements as conveying that specific intention and meaning.

96. Dershowitz's false statements were reasonably understood by many persons who read those statements as making specific factual claims that Roberts was lying about specific facts, and committed the crimes of perjury and extortion.

97. Dershowitz specifically directed his false statements at Roberts' true public description of factual events, and many persons who read Dershowitz's statements reasonably understood that those statements referred directly to Roberts' account of the abuse she suffered at the hands of Epstein and Dershowitz.

98. Dershowitz and Epstein intended Dershowitz's false statements to be widely published and disseminated on television, through newspapers, by word of mouth, and on the internet. As intended by Dershowitz and Epstein, Dershowitz's statements were published and disseminated around the world.

99. Dershowitz made his false statements on behalf of himself and Epstein in reckless disregard of their truth or falsity and with malicious intent to destroy Roberts's reputation and credibility; to prevent her from further disseminating her life story; and to cause persons hearing or reading Roberts's descriptions of truthful facts to disbelieve her entirely. Dershowitz made his false statements on behalf of himself and Epstein wantonly and with the specific intent to maliciously damage Roberts's good name and reputation in a way that would destroy her efforts

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to administer her non-profit foundation, or share her life story, and thereby help others who have suffered from sexual abuse.

100. As a result of Dershowitz's and Epstein's campaign to spread false, discrediting, and defamatory statements about Roberts, Roberts suffered substantial damages in an amount to be proven at trial.

101. Dershowitz's false statements have caused, and continue to cause, Roberts economic damage, psychological pain and suffering, mental anguish and emotional distress, and other direct and consequential damages and losses.

102. Dershowitz's and Epstein's campaign to spread his false statements nationally and internationally was unusual and particularly egregious conduct. Dershowitz and Epstein sexually abused and trafficked Roberts, conspired to avoid having these crimes properly prosecuted and discovered, and wantonly and maliciously set out to falsely accuse, defame, and discredit Roberts to deny and conceal the scope and scale of their crimes. In so doing, Dershowitz's efforts constituted a public wrong by deterring, damaging, and setting back Roberts' efforts to help victims of sex trafficking. Accordingly, this is a case in which exemplary and punitive damages are appropriate.

103. Punitive and exemplary damages are necessary in this case to deter Dershowitz, Epstein and others from wantonly and maliciously using a campaign of lies to discredit Roberts and other victims of sex trafficking.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Roberts respectfully requests judgment against Defendant Dershowitz, awarding compensatory, consequential, exemplary, and punitive damages in an

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amount to be determined at trial, but in excess of the $75,000 jurisdictional requirement; costs of suit; attorneys' fees; and such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all causes of action asserted within this pleading.

Dated: April 16, 2019.

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EXHIBIT 1

Even from jail, sex abuser manipulated the system. His victims were kept in the dark

BY Julie K. Brown
NOV. 28, 2018

PERVERSION of JUSTICE

A decade before #MeToo, a multimillionaire sex offender from Florida got the ultimate break.

Palm Beach County Courthouse

June 30, 2008

Jeffrey Edward Epstein appeared at his sentencing dressed comfortably in a blue blazer, blue shirt, jeans and gray sneakers. His attorney, Jack Goldberger, was at his side.

At the end of the 68-minute hearing, the 55-year-old silver-haired financier — accused of sexually abusing dozens of underage girls — was fingerprinted and handcuffed, just like any other criminal sentenced in Florida.

But inmate No. W35755 would not be treated like other convicted sex offenders in the state of Florida, which has some of the strictest sex offender laws in the nation.

Ten years before the #MeToo movement raised awareness about the kid-glove handling of powerful men accused of sexual abuse, Epstein's lenient sentence and his extraordinary treatment while in custody are still the source of consternation for the victims he was accused of molesting when they were minors.

Beginning as far back as 2001, Epstein lured a steady stream of underage girls to his Palm Beach mansion to engage in nude massages, masturbation, oral sex and intercourse, court and police records show. The girls — mostly from disadvantaged, troubled families — were recruited from middle and high schools around Palm Beach County. Epstein would pay the girls for massages and offer them further money to bring him new girls every time he was at his home in Palm Beach, according to police reports.

The girls, now in their late 20s and early 30s, allege in a series of federal civil lawsuits filed over the past decade that Epstein sexually abused hundreds of girls, not only in Palm Beach, but at his homes in Manhattan, New Mexico and in the Caribbean.

In 2007, the FBI had prepared a 53-page federal indictment charging Epstein with sex crimes that could have put him in federal prison for life. But then-Miami U.S. Attorney Alexander Acosta signed off on a non-prosecution agreement, which was negotiated, signed and sealed so that no one would know the full scope of Epstein's crimes. The indictment was shelved, never to be seen again.

Epstein instead pleaded guilty to lesser charges in state court, and was required to register as a sex offender. He was sentenced to 18 months incarceration.

But Epstein — who had a long list of powerful, politically connected friends — didn't go to state prison like most sex offenders in Florida. Instead, the multimillionaire was assigned to a private wing of the Palm Beach County stockade, where he was able to hire his own security detail. Even then, he didn't spend much time in a cell. He was allowed to go to his downtown West Palm Beach office for work release, up to 12 hours a day, six days a week, records show.

Read Next

LOCAL

Sex abuser Jeffrey Epstein was surrounded by powerful people. Here's a sampling

He was permitted to hire his own private psychologist for his required sex-offender counseling, and after his release from jail, his subsequent year of probation under house arrest was filled with trips on his corporate jet to Manhattan and to his home in the U.S. Virgin Islands — all approved by the courts with no objections from the state.

On the morning of his sentencing in 2008, none of Epstein's victims were in the courtroom to protest his soft jail term or the unusual provisions of his incarceration and probation — and that was by design.

Palm Beach multimillionaire Jeffrey Epstein is a free man, despite sexually abusing dozens of underage girls according to police and prosecutors. His victims have never had a voice, until now.

By

Emails and letters contained in court filings reveal the cozy, behind-the-scenes dealings between federal prosecutors and Epstein's indomitable legal team during the run-up to his federal plea deal, as they discussed ways to minimize his criminal charges and avoid informing the girls about the details of the deal until after the case was resolved.

That arrangement benefited Epstein in a number of ways. Unlike other high-profile sex crime cases, federal prosecutors agreed to keep his sentencing quiet, thereby limiting media coverage. His underage victims — identified in FBI documents — weren't told about the plea deal so they weren't in court, where they could voice their objections and possibly sway the judge to give Epstein a harsher sentence or reject the agreement altogether.

Most important, Epstein's crimes would be reduced to felony prostitution charges, giving him the ability to argue that the girls weren't victims at all — they were prostitutes.

Four accomplices named in Epstein's non-prosecution agreement — Nadia Marcinkova, Sarah Kellen, Adriana Ross and Lesley Groff — were also given immunity from federal prosecution. Marcinkova was a young girl when Epstein brought her from Yugoslavia to live with him. Several victims told police that she was involved in orgies with Epstein and underage girls. Ross, Groff and Kellen, now known by her married name, Vickers, were schedulers who arranged his underage sex sessions, according to the FBI and police.

Marcinkova and Kellen, through their attorneys, declined to comment for this story. The Herald was unsuccessful in reaching Ross and Groff.

Acosta, who is now President Donald Trump's secretary of labor, told lawmakers last year at his confirmation hearing that he did not know that Epstein would receive such liberal treatment while incarcerated. But court records show that federal prosecutors under his authority acquiesced to many of Epstein's demands, including that he not go to federal or state prison.

"I can't remember how I found out that he had taken a plea," said Courtney Wild, identified by the FBI as one of more than three dozen underage girls — some of them as young as 13 — who had been molested by Epstein at his waterfront estate between 2001 and 2005.

"We were purposefully misled into believing that his sentencing [in state court] had nothing to do with the federal crimes he committed against me or the other girls."

Epstein, now 65, was released in 2009 after serving 13 months.

Wild, who was 14 when she met Epstein, is suing the federal government, alleging that prosecutors kept her and other victims in the dark as part of a conspiracy to give Epstein — described in the lawsuit as "a powerful, politically connected multimillionaire" — one of the most lenient deals for a serial child sex offender in history.

Courtney Wild is suing the federal government, claiming that prosecutors deliberately kept her and other victims of Jeffrey Epstein in the dark about the status of his case. The U.S. Attorney's Office signed a non-prosecution agreement with the multimillionaire. Emily Michot *EMICHOT@MIAMIHERALD.COM*

Now 31, Wild is Jane Doe No. 1 in "Jane Doe 1 and Jane Doe 2 vs. the United States," which seeks to overturn Epstein's plea agreement on the grounds that it was executed in violation of the federal Crime Victims' Rights Act. The measure affords crime victims a series of rights, including to confer with prosecutors and to be notified about plea negotiations and sentencing.

That lawsuit — and an unrelated state court case scheduled for trial on Dec. 4 — could expose more about Epstein's crimes, as well as who else was involved and whether there was any undue influence that tainted the federal case.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

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Some of Epstein's victims will finally have an opportunity to testify for the first time as part of the Dec. 4 case in state court in Palm Beach County. It pits Fort Lauderdale attorney Bradley Edwards against Epstein, who had accused Edwards of malfeasance in his representation of several victims.

Jack Scarola, the attorney representing Edwards, said Epstein should be held accountable for his unrelenting attacks against Edwards — as well as others who were involved in his case.

"We are going to demonstrate through this case that no one — no matter how much money they have — can abuse children and then attempt to bully those who come to the defense of children," said Scarola, a former state prosecutor.

Florida and beyond

Few people had as much insight into Epstein's lifestyle — and its international reach — as Virginia Roberts. By age 16, Roberts had lived a life that was beyond that of most high school girls.

At 11, she says, she was sexually molested by a family friend. At 12, she was smoking pot and skipping school. At 13, she was in and out of foster homes, and at 14, she was on the street.

In Miami, the runaway became a captive of a 65-year-old sex trafficker, Ron Eppinger. For months, she says, she was sexually abused, kept in an apartment and pimped out to pedophiles. After his indictment in 2000 on trafficking charges, Roberts returned to West Palm Beach and tried to heal.

Virginia Roberts, now Giuffre, says she was 16 and working as a locker room attendant at Donald Trump's Mar-a-Lago resort when she was approached by Ghislaine Maxwell, Jeffrey Epstein's associate, about becoming a masseuse for Epstein. *COURTESY OF VIRGINIA ROBERTS*

That summer, when Roberts was 16, she said her father helped her get a job as a locker room attendant at the spa at Donald Trump's Mar-a-Lago resort in Palm Beach, records show. Her father worked at the resort as a maintenance man.

There she said she met Ghislaine Maxwell, an Epstein friend and socialite daughter of the late British publishing magnate Robert Maxwell. She offered Roberts an opportunity to become a massage therapist, working for Epstein.

In a sworn court affidavit and in a recent interview with the Herald, Roberts described how Epstein and Maxwell began grooming her — not just to perform massages, but to sexually pleasure them and others.

"It started with one and it trickled into two and so on," Roberts told the Herald. "And before you know it, I'm being lent out to politicians and academics and royalty."

Roberts, too, was ordered to find Epstein girls — the younger, the better — by trolling areas where teenagers congregated, such as shopping malls, to lure girls to whatever residence Epstein was staying in at the time, she told the Herald.

She began to travel with Epstein and Maxwell to Epstein's other homes, in New York, New Mexico and the U.S. Virgin Islands — and her trips are documented in flight logs that frequently list her name or her initials as a passenger, court records show.

"His appetite was insatiable. He wanted new girls, fresh, young faces every single day — that was just the sickness that he had," Roberts said.

Neither Epstein nor his lead attorney, Goldberger, responded to requests for comment.

Roberts alleges that Epstein had cameras throughout his homes and said he liked her to tell him about the sexual peccadilloes of various important men she had sex with.

"Epstein and Maxwell also got girls for Epstein's friends and acquaintances. Epstein specifically told me that the reason for him doing this was so that they would 'owe him,' they would 'be in his pocket,' and he would 'have something on them,' " Roberts said in a court affidavit. "I understood him to

mean that when someone was in his pocket, they owed him favors.''

Roberts elaborated in her interview with the Herald, saying that Epstein had access to girls through a modeling agency that recruited them from overseas.

Epstein, who was close to Les Wexner, the owner of Victoria's Secret, often talked about his connections to people in the modeling, fashion and acting industries, Roberts told the Herald.

"He [Epstein] would tell the girls, 'Hey, I will give you a modeling contract if you go have sex with this man [whichever acquaintance Epstein designated],' " she said.

Roberts' story about the modeling agency is supported, to a degree, by the sworn statement of a Miami woman named Maritza Vasquez, who was later interviewed in New York by an FBI agent from Miami. Vasquez worked as a bookkeeper for Mc2, owned by Epstein associate Jean-Luc Brunel. He employed scouts in South America, Europe and the former Soviet Union to find him models to bring to the United States, Vasquez said in a 2010 sworn court deposition obtained by the Herald.

Vasquez stated in the deposition that from 2003 to 2006 she handled all the finances and payroll for the agency, including a bank transaction involving Epstein. She said Epstein invested $1 million in Mc2.

The models were often very young — 13, 14 and 15 — and some of them were housed in apartments at 301 E. 66th St. in New York, a building purportedly owned by Epstein, the deposition said.

Epstein didn't charge the girls rent, Vasquez said, but Brunel charged them $1,000 a month, with four of them at a time sharing one apartment. The girls who were the youngest and most beautiful stayed at the 66th Street apartments, which were more luxurious than the other apartments that were used to house models who were not as young and desirable, she said.

Vasquez once let one of the models, who was 14, stay overnight with her after the girl ran into trouble with police for trying to get into a Manhattan nightclub. Vasquez also testified that she helped a lawyer obtain visas for the foreign models, and assisted with their transportation to and from modeling assignments and parties.

Vasquez said that even though the agency employed 200 to 300 models, the company didn't make any money and Brunel was always broke. Brunel would later sue Epstein, alleging that the financier's sex scandal had caused his business to fail, but the suit was eventually dropped.

Vasquez testified it wasn't unusual for the agency to send girls to an assignment with a wealthy client for $100,000 or more, but the girl wouldn't be paid the full amount — or anything at all — if she refused to be "molested.''

Vasquez considered herself a mother figure and often coached the youngest girls to stick to the 9-to-5 modeling assignments because she didn't think it was appropriate for them to be having sex.

She said she met Epstein only once, but she often helped arrange for girls — many of them underage — to be sent to his homes in New York, Palm Beach and his island in the Caribbean for parties. She heard salacious rumors about Epstein's parties, but testified she had no firsthand knowledge about whether they involved sex.

Vasquez said that she was questioned by the FBI and she tried to tell agents where to look for evidence.

Vasquez was eventually let go from the agency after she was accused of stealing money — money she claims was given to her by Brunel. Vasquez said she was placed on probation for the theft. She never heard from the FBI about Epstein again.

The Herald was unsuccessful in reaching Brunel through his former attorney.

In a written statement released in 2015, Brunel denied any involvement in trafficking underage models.

"I strongly deny having participated, neither directly nor indirectly, in the actions Mr. Jeffrey Epstein is being accused of," he said. "I strongly deny having committed any illicit act or any wrongdoing in the course of my work as a scouter or model agencies manager."

Too old at 19

In 2003, when Roberts turned 19, it was clear that Epstein had lost interest because she was too old for him, she said. She convinced him to pay for her to get training to become a real professional masseuse so that she could move on.

In an interview, she explained that Epstein arranged for her to take a class in Thailand, but it came with a hitch: She said she was instructed to pick up a Thai girl he had arranged to come to the States.

Roberts, who showed the Herald the written instructions for the rendezvous, never picked up the girl because Roberts met a man on the trip who would become her husband. The couple married and moved to Australia, where they currently live.

In 2007 — at the same time the FBI was investigating Epstein — Roberts, pregnant with her second child, said she unexpectedly received phone calls from Maxwell and Epstein. She said they were worried that she had told police about them. She assured them she had not spoken to anyone, she said.

Shortly afterward, Roberts said, she was contacted by someone who claimed to be with the FBI. But she was afraid to tell that person details, fearing it was really an Epstein associate posing as an FBI agent.

That agent, identified in court papers as Timothy Slater, confirmed that he and the other agent on the case, Nesbitt Kuyrkendall, called Roberts in January or February 2007. In a sworn statement, Slater said he informed Roberts that they suspected she was a victim of Epstein's.

The agent said Roberts answered basic questions, but became uncomfortable and "asked that I not bother her again."

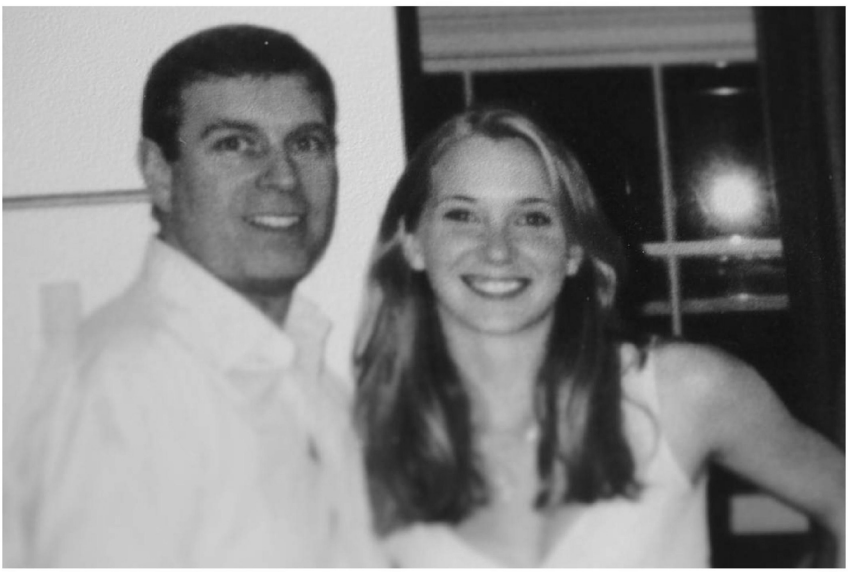
Roberts said the agent didn't try too hard to convince her to talk, and she was surprised when he hung up after asking her a few graphic questions about her sex life. She said she was suspicious, but would have cooperated had the FBI talked to her in person and explained why they were asking about Epstein.

"I was still scared to death," Roberts said. "Jeffrey used to tell me that he owned the entire Palm Beach Police Department. I just didn't want my family harmed."

She nevertheless was listed by federal prosecutors as one of Epstein's Palm Beach victims.

As the years went by and Roberts had a daughter, she would be haunted by a fear that Epstein was still taking advantage of young girls. In 2011, she went public in a paid interview with a British tabloid, the Daily Mail, asserting that she had had sex with Prince Andrew, one of Epstein's friends, several times when she was a teen.

In her 2015 affidavit, she discussed in detail some of her alleged sex encounters with the prince and Epstein's other friends, including lawyer Alan Dershowitz. Edwards included the affidavit in the court file as part of the Jane Does' Crime Victims' Rights Act case, at which time it became public.



Virginia Roberts says she was loaned out by Jeffrey Epstein to his friend Prince Andrew, shown here. He denies they had sex. *COURTESY OF VIRGINIA ROBERTS*

In the affidavit, Roberts claimed that Epstein and Maxwell directed her to have sex with Andrew and Dershowitz and others. She had sex with Andrew three times, she alleged — once in London, when she was 17, again in New York, when she was 17, and a third time, as part of an orgy on Epstein's island, when she was 18. By law, at 17, she would have been above the age of consent in New York and England, but not in Florida, where the age of consent is 18.

As part of the affidavit, Roberts furnished a photograph of her with the prince and Maxwell, which she said was taken in London.

Dershowitz, who was part of Epstein's criminal defense team, was often a guest at Epstein's homes, she said.

"I had sexual intercourse with Dershowitz at least six times," Roberts wrote in the 2015 court affidavit. "The first time was when I was about 16, early on in my servitude to Epstein and it continued until I was 19." She detailed some of those alleged trysts, which she said happened at Epstein's homes in Palm Beach, New Mexico and on Epstein's island.

One of Epstein's housemen, Juan Alessi, testified in a 2009 sworn deposition that Dershowitz visited Epstein's Palm Beach home four or five times a year. He said that Roberts was a frequent visitor as well, but he never placed Dershowitz and Roberts at the house at the same time.

Alessi, who testified he worked for Epstein from 1999 to 2002, said there were often young girls who gave massages at the house, even in the middle of the night. But he said he never checked their ages, and only knew one girl for certain who was underage, because he had picked her up from high school. That girl, who is now an actress, was not one of Epstein's masseuses, Alessi said.

He also said he was Maxwell's driver, and he recalls waiting outside of Mar-a-Lago the day Maxwell met Roberts. He testified he saw Maxwell talking to Roberts and recalls Roberts coming to Epstein's mansion later that day. One of Alessi's jobs was to drive Maxwell to various spas in Palm Beach where she left business cards in order to "recruit" more masseuses, he said in the sworn deposition.

Dershowitz, Prince Andrew and Maxwell have long denied Roberts' allegations.

In an interview with the Herald, Dershowitz reiterated that he had never met Roberts, and never saw Epstein with any underage girls.

"The story was 100 percent flatly categorically made-up," he said, adding that Roberts and her attorneys fabricated the assertion in order to get money from other powerful, wealthy people she alleges she had sex with.

"The only possible reason to accuse me in public and [them] in private is so she could get money," Dershowitz said.

Edwards and his co-counsel in the Crime Victims' lawsuit, University of Utah law professor Paul Cassell, sued Dershowitz for defamation and Dershowitz countersued in 2015. The case was settled out of court, with Dershowitz saying he had been vindicated.

Dershowitz said he received a massage at Epstein's Palm Beach home only once — but that it was just a regular, therapeutic massage by a masseuse — not by Roberts or anyone underage. Dershowitz's wife was there at Epstein's house at the time, Dershowitz said in the deposition taken for the case in 2015.

"I never had any knowledge of Jeffrey Epstein having any contact with any underage women — ever," Dershowitz told the Herald.

Edwards and Cassell admitted making a "tactical mistake" in filing the accusations against Dershowitz as part of a lawsuit not involving him. But they emphasized that the settlement had no bearing on the veracity of Roberts' allegations.

The judge for the Crime Victims' Rights Act lawsuit agreed that the affidavit was misplaced in that case, and it was dropped.

Prince Andrew's spokesman at Buckingham Palace did not respond to an email requesting comment.

Roberts, now 35, said it has taken her a long time to stand up to Epstein. She and 20 other victims received settlements from Epstein, ranging from $50,000 to more than $1 million. The exact amounts have been kept confidential.

"It takes so long until you are able to speak about it. It took me having a daughter and looking at this young, beautiful innocent baby to say I want to speak out about it now. I'm hoping that this will bring out more girls so that they say, Me Too."

The state court hearing

The judge at Epstein's sentencing hearing at the Palm Beach County Courthouse knew very little about Epstein's crimes. The sentencing paperwork was restricted to Epstein's specific charges: one count of solicitation of prostitution and one count of procuring a person under the age of 18 for prostitution.

"Are there more than one victim?" Circuit Court Judge Deborah Dale Pucillo asked the prosecutor at Epstein's sentencing on June 30, 2008.

"There's several," replied assistant state prosecutor Lanna Belohlavek.

"Are all the victims in both of these cases in agreement with the terms of this plea?" Pucillo later asked.

"Yes," Belohlavek replied, telling the judge that she had spoken to "several" of Epstein's victims.

Emails show that federal prosecutors didn't want the judge to know how many victims and accomplices there were.

Federal prosecutor A. Marie Villafaña — in a September 2007 email to Epstein lawyer Jay Lefkowitz — said: "I will mention co-conspirators but I would prefer not to highlight for the judge all the other crimes and all the other persons that we could charge."

Attorney Spencer Kuvin happened to be in court that day because he'd heard Epstein was to appear, but Kuvin didn't know why. He figured he'd use it as an opportunity to serve Epstein with civil court papers involving one of several victims he represented. Instead, he listened to what was happening and couldn't believe that no one had contacted him or his clients.

"I was shocked to learn that the proceeding involved my client's case and there was nothing I could do except watch as they disposed of her case without ever telling her," Kuvin said.

At the hearing, Belohlavek and Epstein's attorney, Goldberger, were in sync, the court transcript shows. Epstein would be required to register as a sex offender, but his probation would not be served under the strict requirements of sex offender probation.

Jeffrey Epstein is a registered sex offender in New York State and Florida. Emily Michot *EMICHOT@MIAMIHERALD.COM*

The judge didn't question those provisions, but she did ask why Epstein was going to serve his sentence in the Palm Beach County stockade instead of in a Florida state prison, like most sex offenders.

After he pleaded guilty in state court, Jeffrey Epstein was assigned to a private section of the Palm Beach County stockade. Soon, however, he was allowed to leave the compound six days a week, 12 hours a day, for what was termed work release. Emily Michot *EMICHOT@MIAMIHERALD.COM*

"We just decided that was the best way to accomplish what needed to be done here and the parties agreed that that sentence satisfied everyone's requirements,'' Goldberger replied.

Said Judge Pucillo: "The taxpayers of Palm Beach County are going to pay 18 months to house this guy instead of DOC [the Department of Corrections]?"

Belohlavek: "Right.''

Pucillo did not respond to a request for comment on the case.

Villafaña, the lead federal prosecutor in Epstein's case, was in the courtroom, but there's no indication she objected to Epstein's cozier jail accommodations.

When he entered jail in July 2008, Epstein was arguably the most well-known inmate there. Records also show that Epstein hired Palm Beach sheriff's deputies for his security details, paying them for the hours they spent monitoring him on work release at his West Palm Beach office, where he often stayed until 10 p.m., jail logs show.

The Herald reviewed their time sheets, showing that the deputies logged visitors coming and going to and from his office throughout the day. A record log of his visitors was kept in a safe, but the log no longer exists, according to a spokeswoman for the Palm Beach County Sheriff's Office.

One deputy who often worked Epstein's detail said that his assignment was to stay in a front reception room of Epstein's office. Epstein was in a separate office — with the door closed — most of the day as he accepted visitors, both male and female, the deputies' logs show.

"It was not our job to monitor what he was doing in that office,'' the deputy, now retired, told the Herald.

In their early reports in July 2008, the deputies referred to Epstein as "inmate'' but within a few weeks the language had changed and he was called a "client." He was occasionally allowed to take a break for lunch by sitting outside in a park, the records show, and they also gave him permission to scout for a new office. While on work release, he was required to wear an ankle bracelet to monitor his whereabouts.

The work release was approved by the Palm Beach County Sheriff's Office, said spokeswoman Therese Barbera.

"Jeffrey Epstein, while in custody, met the criteria for the Work Release Program," Barbera wrote in an email. "There was no factual basis to deny Mr. Epstein the same availability of this program that is offered to other inmates under similar circumstances. Mr. Epstein was closely monitored and there were no problems encountered during his time in the program."

But the sheriff's own work release policy — a copy of which Barbera provided to the Herald — specifically notes that sex offenders aren't eligible for work release.

While officially confined to the Palm Beach County stockade, serving time for his sex offenses, Jeffrey Epstein was allowed to spend half his day at this West Palm Beach office building. It was called work release, although Palm Beach Sheriff's Office rules prohibit work-release status for sexual offenders. Emily Michot *EMICHOT@MIAMIHERALD.COM*

At first, Barbera questioned whether Epstein was a sex offender at all, noting that he didn't have to register officially until after his release from the jail in 2009. But his court papers clearly listed him as a sex offender. In fact, the papers Epstein signed — obtained by the Herald — included all the laws governing registered sex offenders in Florida.

Barbera refused to explain why Epstein was seemingly allowed to deviate from the agency's policies. She also would not respond to requests for an accounting of the amount of money that Epstein paid the sheriff's office for his private details.

Palm Beach Sheriff Ric Bradshaw, who has been in office since 2004 — and is widely considered to be one of the most powerful people in the county — did not respond to requests for comment.

A spokeswoman for Palm Beach County Sheriff Ric Bradshaw declined to say why Jeffrey Epstein was allowed work-release status despite rules prohibiting work release for sex offenders. Taylor Jones *PALM BEACH POST*

Epstein's registration requirements are somewhat confusing, even to those who are responsible for keeping his registration. The Florida Department of Law Enforcement, which keeps the online registry, and the Palm Beach County Sheriff's Office, where Epstein has to register in person twice a year, gave

conflicting explanations over the past six months about who is responsible for ensuring that he is complying with the law.

On Nov. 14, the Herald asked the sheriff's office for a full accounting of Epstein's check-ins for 2018. The record the office supplied two days later showed he registered in January and in July — as required. But PBSO also inexplicably had him registering on Nov. 14 — the very same day that the Herald asked for the records from the sheriff's office.

When asked about this sudden registration, Barbera replied: "The information we provided you was a snapshot from the FDLE website. Perhaps, someone from FDLE can provide a reason for you."

Said FDLE spokeswoman Gretl Plessinger in an email: "The screenshot is not on the public registry. This is information inputted by the local agency when the offender comes into the local sheriff's office to register."

Plessinger said Epstein is not covered by the state's new three-day rule, which requires sex offenders to re-register when they come to stay in Florida for three days or more. His town of Palm Beach home is already on file, as a temporary residence, she said.

So it's not clear why he would have suddenly registered a third time on Nov. 14.

State Sen. Lauren Book, a child sex abuse survivor and vocal advocate for tough sex offender monitoring, called the case an appalling example of how those in the justice system allow wealthy people to skirt the law and bend the rules.

"These prosecutors, and judges and sheriffs who are making these decisions and allowing things to fly — we have to hold these people accountable. They are supposed to uphold the law — regardless of who a person is and how much money they have in the bank or who they had on their airplane."

Piece by piece

Over the years, Courtney Wild, Virginia Roberts and more than a dozen other women who say they were victims of Epstein have been quietly challenging the traditional legal norms that have failed to punish Epstein and other men in positions of power for sexual abuse.

Epstein has paid millions of dollars in civil compensation that, for the most part, has kept the details about his operation out of the public eye. As a result, much — but not all — of the testimony and evidence collected as part of the vast litigation has been sealed or redacted from public court records.

The girls who were abused by Jeffrey Epstein and the cops who championed their cause remain angry over what they regard as a gross injustice, while Epstein's employees and those who engineered his non-prosecution agreement have prospered.

By

Taking a page from Epstein's legal team, lawyers representing Epstein's victims hired private investigators and former police detectives to dig into Epstein's life. Over the past decade, they've tracked down hundreds of people, including dozens of other potential victims; they've interviewed Epstein's recruiters, bookkeepers, housekeepers, butlers, pilots and drivers. They've traveled around the country and the world, taking statements and sworn depositions, coaxing people to talk who had previously been too reticent to come forward.

In short, they did what criminal prosecutors didn't do.

Some of the information they've learned was given to federal authorities in New York. Edwards said those authorities have shown no interest in opening a new investigation focused on crimes he is alleged to have committed in that state, where he is listed as a level 3 sex offender, the most dangerous category, considered at risk to re-offend, records show. In New York, he has to register every 90 days.

Virginia Roberts holds a photo of herself at age 16, when she says Palm Beach multimillionaire Jeffrey Epstein began abusing her sexually. Emily Michot
EMICHOT@MIAMIHERALD.COM

Holding abusers accountable

In 2015, Roberts sued Maxwell for defamation in New York after Maxwell called her a liar in a news interview. The civil lawsuit was an effort by Roberts not just to clear her name, but an attempt to prove that Epstein and Maxwell operated an international underage sex trafficking operation. The lawsuit was settled out of court in 2017 and nearly all the evidence presented in the case has been sealed.

Roberts' attorney, Sigrid McCawley, claims that Roberts received a sizable settlement, although the amount is confidential.

"She wanted to hold her abusers accountable and we were able to do that by bringing this case ... which we ultimately settled very successfully for her," said McCawley, an associate of noted Bush-Gore recount lawyer David Boies, who has also pursued cases against Epstein in federal court in New York.

Maxwell's lawyer, Laura Menninger, declined to comment, referring the Herald to the court history.

"[Roberts] fabricated a story of abuse at the hands of Ms. Maxwell in exchange for hundreds of thousands of dollars from British tabloids with a motive for selling papers and advertisements and without regard for truth, veracity or substantiation," Menninger noted in a 2016 response filed in the case.

In February, the Miami Herald filed a federal court motion in the Southern District of New York, seeking access to documents that were sealed in the Maxwell case. The motion, which was not opposed by Roberts, could have cast light on the full scope of Epstein's possible sex trafficking operation, who was involved and whether it was covered up. Maxwell has opposed the Herald's motion, which was denied in August.

The Herald is appealing.

Today, Epstein has a new private jet, which takes him around the world. Flight records show that he spends most of his time on his private island, Little St. James in the U.S. Virgin Islands, which he now lists as his permanent residence. He is registered in New York and the U.S. Virgin Islands as a sex offender. New Mexico, where he owns a sprawling ranch, does not list him as a convicted sex offender.

As part of its investigation, the Herald learned that in 2013, the federal government conceded that it had given Epstein what it called "valuable consideration" for information he provided to the FBI as part of his plea deal. The documents do not elaborate, but Epstein — a hedge fund manager who once worked for the investment firm Bear Stearns — was listed as a key investor who lost money in the financial crash of 2008.

Francey Hakes, a former federal child sex crimes prosecutor, said any consideration the government gave to Epstein should be made public.

"The public has a right to know why he got a slap on the wrist, and what was the interest that was so great that allowed him to not get prosecuted?"

Nadia Marcinkova, now a professional pilot, worked for Jeffrey Epstein when he was molesting young women. Victims told police Marcinkova would participate in sex acts, often as Epstein choreographed every move. Jerod Harris

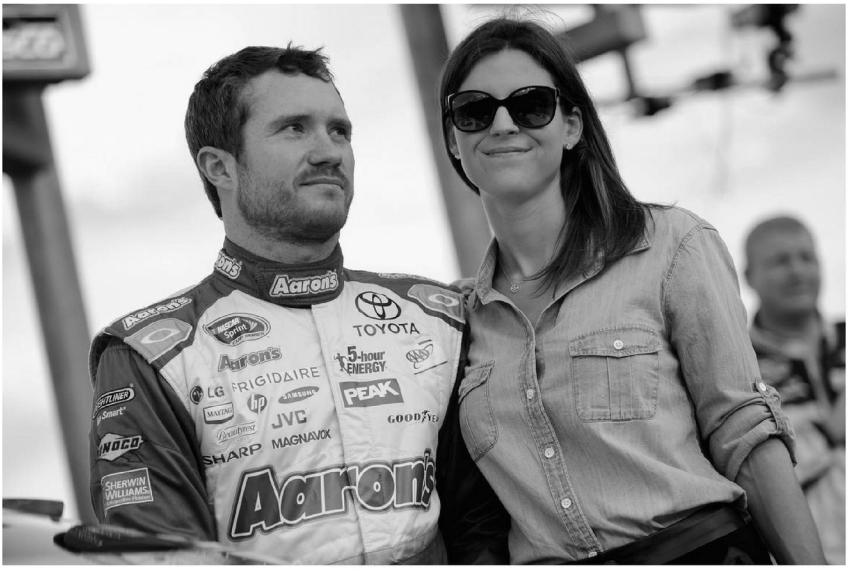
In recent years, Epstein has been traveling the world in his new Gulfstream V jet. He has been active in various charitable causes and scientific research projects. The Jeffrey Epstein VI Foundation, based in the U.S. Virgin Islands, has helped fund NeuroTV, an online network that features interviews with academics and scientists.

Then and now

Both Nadia Marcinkova and Sarah Kellen changed their names after the scandal.

Marcinkova, 32, briefly became Marcinko. She visited Epstein more than 70 times when he was in Palm Beach custody. She went on to a career in real estate. And she is now an FAA-certified commercial pilot and flight instructor who goes by the name "Global Girl" on social media. (www.facebook.com/GlobalGirlAviation/)

Sarah Kellen, who used the name Kensington for a while, is now married to NASCAR driver Brian Vickers. The couple divides their time between homes in North Carolina, New York and Miami Beach.



NASCAR driver Brian Vickers and his wife, Sarah, take part in pre-race ceremonies in Sparta, Ky., on June 28, 2014. She was known as Sarah Kellen when she was an aide to Jeffrey Epstein. According to police, she scheduled visits of underage girls to Epstein's Palm Beach estate for massages that turned sexual. She was not charged with a crime. Will Schneekloth *GETTY IMAGES*

Maxwell, 56, transformed herself into an internationally known environmentalist. In 2012, she founded the TerraMar Project, a nonprofit environmental group that works to protect the world's oceans. In 2013, she gave a TED Talk on ocean conservation, discussing her diving expeditions around the world.

Dershowitz, 80, continues to lecture around the country. A professor emeritus at Harvard Law School, Dershowitz has been a frequent commenter on cable TV programs, often defending President Trump.

Prince Andrew, the Duke of York, 58, remained friends with Epstein, and in 2010, a photograph was taken of the two of them strolling in Manhattan. It was later revealed that Epstein had loaned the prince's ex-wife, Sarah Ferguson, $24,000 to pay off some debts. Ferguson later called the loan a "gigantic error of judgment."

Plain human beings

Crime victims' rights advocates have used the Epstein case to strengthen the federal law in recent years, adding more precise language mandating that prosecutors notify victims about plea bargains and allow victims to be heard at sentencing.

Because some statute-of-limitation laws set deadlines for filing civil and criminal sex crime cases, it's difficult to bring them years later, said Marci Hamilton, a University of Pennsylvania professor who is working to ease

those restrictions across the country.

Ghislaine Maxwell, daughter of a British press magnate and Jeffrey Epstein's close associate when he was inviting underage girls into his bedroom, leads a TED Talk on environmental issues.

But she points out that there has been no statute of limitations for federal sex crimes involving children since 2002.

Children who are sexually abused often take decades to reveal what happened to them, in part because their brains aren't wired at a young age to understand the trauma they've experienced, said Kenneth V. Lanning, a retired FBI agent who investigated and studied child sex crimes for 40 years.

"We want to hold children to some superhuman standard because they behave this way. In reality, police, prosecutors and judges have to understand that children are not all angels from heaven. They are just plain human beings who are emotionally immature so we have to protect them from their own decisions."

Wild, who continues to fight her federal case on behalf of all of Epstein's victims, said she hopes that the federal judge hearing the Crime Victims' Rights case will make a ruling soon, one that will send a message to prosecutors who fail to consider the rights of crime victims.

"Really if you think about this too hard, it's scary because this is our government that is supposed to protect us but has done everything to protect a pedophile," she said.

Support investigative journalism

The Miami Herald obtained thousands of FBI and court records, lawsuits, and witness depositions, and went to federal court in New York to access sealed documents in the reporting of "Perversion of Justice." The Herald also tracked down more than 60 women who said they were victims, some of whom had never spoken of the abuse before.

Your digital subscription, starting at $0.99 for the first month, supports investigative journalism like this.

EXHIBIT 2

Letter to the Editor: Alan Dershowitz responds to Raw Story report

RAW STORY - COMMENTARY
01 DEC 2018 AT 18:36 ET

Alan Dershowitz (Fox News)

Flipboard Facebook Twitter LinkedIn More 49

To the Editor,

In your recent story titled "**Trump Defender Alan Dershowitz is deeply involved in the sordid Jeffrey Epstein scandal**" you level outright false claims that I had sexual encounters with Virginia Roberts. These are exactly the same false claims that were made in 2014 and were thoroughly disproved and withdrawn.

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

After leveling these claims in detail, you say that I "steadfastly denied her claims." Not only did I deny the claims, I conclusively disproved them. I produced my travel, phone, credit card, and TV appearance records conclusively proving I could not have been and was not in any of the places Roberts claims I was during the time that she knew Epstein. The former Director of the F.B.I., assisted by a former assistant U.S. attorney and a chief federal marshal, reviewed these records and the other evidence and concluded that "the totality of the evidence found during the investigation refutes the allegations." The judge struck Robert's affidavit and sanctioned her lawyers for filing it, and her lawyers then withdrew their accusation admitting that it was a mistake. After reviewing the evidence, ABC News cancelled their plan to show an interview with Roberts because she was not credible.

There is other evidence, currently under seal, that directly establishes my innocence. I am seeking to unseal emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons."

There is also irrefutable evidence that Roberts lied about other people for money. She told a British tabloid that she met Al and Tipper Gore on Epstein's Island and she swore that she had dinner with Bill Clinton on the Island. But Secret Service records prove that none of these people were on the Island. Indeed, the Gores didn't even know Epstein.

I have a tape recording of a conversation with Robert's closest friend in which she says that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from a wealthy businessman, and that Roberts had never previously included me among the people with whom she claimed to have had sex.

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

One of Roberts own lawyers has acknowledged in front of witnesses that Roberts' claims against me are "wrong" "simply wrong." The evidence of my innocence is indisputable: I never met Roberts; I never had sex with her; she simply made up the entire story for money.

Roberts made her false claims against me in court documents that immunize her from being sued for defamation. I challenge her to repeat her false accusations out of court, so that I can sue her for defamation and let a jury decide—after seeing all the evidence including the emails and book manuscript—who is telling the truth and who is lying.

*Editors Note: Professor Alan Dershowitz sent the previous response to our story, "**Trump Defender Alan Dershowitz is deeply involved in the sordid Jeffrey Epstein scandal**." In his response, Mr. Dershowitz claims Raw Story accused him of having sexual encounters with Virginia Roberts. Upon careful review of **our story**, both before and after publication, this is not the case. Our story reports the accusations leveled by others.*

https://www.rawstory.com/2018/12/letter-editor-alan-dershowitz-responds-raw-story-report/

EXHIBIT 3

Alan Dershowitz: 'I never had sex with Virginia Roberts' | Miami Herald

miamiherald.com/opinion/letters-to-the-editor/article222532470.html

In its series on the Jeffrey Epstein case, "Perversion of Justice," the Herald quotes an affidavit by Virginia Roberts — a woman I never met — claiming she had sex with me on Epstein's island, ranch, plane and mansion. It then simply says I "denied" it.

In fact, I disproved it. I produced my travel, phone, credit card and TV appearance records, conclusively proving that I could not have been and was not in any of these places during the time Roberts knew Epstein. The former FBI director, assisted by a former assistant U.S. attorney and a chief federal marshal, reviewed these records and the other evidence and concluded that, "The totality of the evidence found during the investigation refutes the allegations."

There is other evidence, currently under seal, that directly establishes my innocence. I am seeking to unseal emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons."

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There is also irrefutable evidence that Roberts lied about other people for money. She told a British tabloid that she met Al and Tipper Gore on Epstein's island and swore that she had dinner with Bill Clinton on the island. But Secret Service records prove that none of these people were on the island. Indeed, the Gores didn't even know Epstein.

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I have a tape recording of a conversation with Roberts' closest friend in which she says that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from a wealthy businessman, and that Roberts had never previously included me among the people with whom she claimed to have had sex.

Finally, one of Roberts' own lawyers has acknowledged in front of witnesses that her claims against me are "wrong" "simply wrong."

The evidence of my innocence is indisputable: I never met Roberts; I never had sex with her; she simply made up the entire story for money.

Roberts made her false claims against me in court documents that immunize her from being sued for defamation. I challenge her to repeat her false accusations out of court, so that I can sue her for defamation and let a jury decide — after seeing all the evidence,

including the suppressed emails and book manuscript — who is telling the truth and who is lying.

EXHIBIT 4

Dershowitz Goes Off on Woman Who Made Underage Sex Allegations: 'She Should Be Seriously Punished'

by Ronn Blitzer | 2:26 pm, December 4th, 2018

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Just hours after convicted pedophile **Jeffrey Epstein** agreed to settle a civil case brought against him by attorney **Bradley Edwards**, Epstein's lawyer from his past criminal case, **Alan Dershowitz**, discussed his former client on the Law&Crime Network. Epstein was accused of trafficking more than 40 underage girls for sex, and one such girl claimed Dershowitz himself had sex with her when she was underage.

Dershowitz vehemently denies the claim, telling host **Brian Ross** that accuser **Virginia Roberts** is a "certified, complete, total liar," and that her allegations are a "complete and total fabrication." He also added that she should be punished by the law for what she did.

The Harvard Law Professor Emeritus noted that Roberts' allegations were eventually withdrawn, and that the FBI recognized the evidence showed he was not where she said he was. He pointed to documented evidence that proves he is innocent.

"I can prove conclusively that she made the whole thing up," Dershowitz said, citing travel records that he says prove where he was at the time she claims she had sex with him. "It's conclusive, conclusive evidence."

"More importantly, I can prove where I wasn't," he said, after stating outright, "Never met her, don't know who she is, never heard of her."

Similarly, Dershowitz said that Roberts claimed that notable figures such as **Bill Clinton**, **Al Gore**, and **Tipper Gore** were present on an

island, when Secret Service records proved they were never even there.

Dershowitz said Roberts' allegations were part of an extortion plot, and that she "should be seriously punished for submitting false information and a false affidavit."

The attorney emphasized that Roberts has not been willing to repeat her allegations against him in public, and that she has only accused him in the context of litigation, which affords certain protections.

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"She simply hides behind litigation privileges," Dershowitz said, encouraging Ross to call Roberts and see if she would repeat her claims. "And if she does, I will be in court the next day suing her for defamation and I will win the case 'cause I can prove conclusively that she made up the whole story from top to bottom."

Ross then turned to the controversial deal that Epstein received from federal prosecutors who were investigating the trafficking case against him. Federal prosecutors agreed not to prosecute him, and let him plead guilty to state charges that resulted in a 13-month prison sentence that allowed Epstein to leave prison during the day for work. Federal prosecutors allegedly did not even inform victims before making the deal, which is now the subject of a request for an Inspector General investigation. Congressional Democrats said in a letter that they want to know more about the circumstances surrounding the deal, which was made by then-U.S. Attorney and current Secretary of Labor **Alex Acosta**.

As Epstein's defense attorney in that case, Dershowitz is not upset about it the deal at all.

"I'm very proud of that deal, that's what lawyers are supposed to do," he said. "Lawyers are supposed to get the best deals they can." If he could have gotten 10 months or no time at all, that would have been even better, he said.

Acosta said in the past that Epstein's lawyers, including Dershowitz, put pressure on his office by investigating his staff. Dershowitz has denied this.

"Acosta was very tough," Dershowitz said, contrary to concerns that he did anything improper. Dershowitz pointed out that the problem feds had was proving that girls were transported in interstate commerce.

"Unless you can prove that, you don't have a federal case, only a state case."

[Image via Law & Crime Network screengrab]

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filed under
Alan Dershowitz, Jefrey Epstein

EXHIBIT 5

Letters

Letter to the Editor: Article Misrepresented Dershowitz

2

By Alan M. Dershowitz
Alan M. Dershowitz is a Professor of Law emeritus at Harvard Law School.

December 5, 2018

To the editor,

The Crimson story regarding Jeffrey Epstein omitted the central point I made in my interview with the reporter. I welcome an investigation by Harvard or any other institution, including prosecutors, into the wilfully false charges made by Virginia Roberts for financial gain. Omitting this crucial statement is irresponsible and unethical journalism.

Virginia Roberts leveled her false accusations four years ago. At the time, I disproved them categorically. The matter was put to rest, with even her lawyers admitting that it was a mistake and wrong. Then four years later the Miami Herald recycled this false accusation and The Crimson reported on the Herald's recycled report. I wrote a letter to the editor of the Herald pointing to the incontrovertible evidence that Roberts made up the accusation out of whole cloth in order to obtain millions of dollars from Leslie Wexner.

I was able to disprove Roberts' false accusation by producing all of my travel, AmEx, and TV appearance records which showed where I was, and, more importantly, where I wasn't during the entire period Virginia Roberts was in contact with Jeffrey Epstein. These records prove incontrovertibly that I could not have been, and was not, where Roberts' falsely claimed to have met me — a Caribbean Island, a New Mexico Ranch, a private jet, a Palm Beach mansion — during the relevant time period.

I also called for an independent investigation by the former Director of the F.B.I., a highly respected former federal judge and assistant U.S. attorney. He reviewed all of the records and other evidence and concluded that "the totality of the evidence ... refutes the allegations."

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In addition, the judge before whom the accusation was made struck the accusation from the record and sanctioned her lawyers for filing it. One of her own lawyers then acknowledged that his client was "wrong" "simply wrong," and her other lawyers formally withdrew the accusation, admitting it was a "mistake."

Not only did Virginia Roberts lie about me, she lied about Al and Tipper Gore and President Bill Clinton claiming that she met the three of them on Jeffrey Epstein's island — a claim refuted by secret service records that established that none of the three were on that island during that period of time.

There is evidence that directly proves I was framed. These include emails between Roberts and a journalist, a book manuscript by Roberts and a legal brief that are smoking guns showing that I was "deliberately framed for financial reasons." These exculpatory documents have been sealed by Roberts' lawyers and I am seeking to make them public.

Roberts' closest friend told me that Roberts told her she "felt pressure to go after [Dershowitz]" in order to obtain money from Leslie Wexner and that Roberts had never previously included me among the people with whom she claimed to have had sex. I have a tape recording of this conversation.

Not surprisingly, Roberts made her false claims against me only in court documents that immunize her from being sued for defamation. When she was interviewed by the Miami Herald, she refused to repeat her false allegations outside of court. The Crimson did not ask her directly to repeat her false allegations to them. As a matter of journalistic ethics, The Crimson should not have published an accusation without interviewing the accuser on the record. I now challenge Roberts to repeat her false accusations to The Crimson or other media, so that I can sue her for defamation and let a jury decide — after seeing all the evidence including the emails and book manuscript — who is telling the truth and who is lying.

I want an investigation or trial to finally prove that Roberts made up the entire story, so that it can finally be put to rest.

Alan M. Dershowitz is a Professor of Law emeritus at Harvard Law School.

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EXHIBIT 6

https://twitter.com/AlanDersh

EXHIBIT 7

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SENT VIA FACSIMILE TRANSMISSION

January 13, 2006

Lanna Belohlavek, ASA
Office of the State Attorney
401 N. Dixie Highway
West Palm Beach, FL 33401

Re: Jeffrey Epstein

Dear Lanna:

Please allow this letter to serve as formal notice that I represent Mr. Jeffrey Epstein in regard to the investigation your office is conducting of Mr. Epstein. Additionally, Alan Dershowitz, Esq., who is a close friend of Mr. Epstein's, is serving as counsel to me in my representation of Mr. Epstein. Mr. Dershowitz is working closely with me on this matter and, in the event charges are filed, will likely petition to enter an appearance Pro Hac Vice along with other counsel.

I appreciate the dialogue you have permitted throughout this investigation. I trust you will still invite me for a pre-filing interview in the event the State decides it has enough evidence to charge Mr. Epstein with a crime.

I look forward to continuing to work with you on this matter.

Very truly yours,

Guy P. Fronstin, Esq.
GPF/mw

EXHIBIT 8

http://www.vanityfair.com/news/2003/03/jeffrey-epstein-200303

Society

The Talented Mr. Epstein

Lately, Jeffrey Epstein's high-flying style has been drawing oohs and aahs: the bachelor financier lives in New York's largest private residence, claims to take only billionaires as clients, and flies celebrities including Bill Clinton and Kevin Spacey on his Boeing 727. But pierce his air of mystery and the picture changes. Vicky Ward explores Epstein's investment career, his ties to retail magnate Leslie Wexner, and his complicated past.
by

- Vicky Ward

June 27, 2011 12:00 am

On Manhattan's Upper East Side, home to some of the most expensive real estate on earth, exists the crown jewel of the city's residential town houses. With its 15-foot-high oak door, huge arched windows, and *nine* floors, it sits on—or, rather, commands—the block of 71st Street between Fifth and Madison Avenues. Almost ludicrously out of proportion with its four- and five-story neighbors, it seems more like an institution than a house. This is perhaps not surprising—until 1989 it was the Birch Wathen private school. Now it is said to be Manhattan's largest private residence.

Inside, amid the flurry of menservants attired in sober black suits and pristine white gloves, you feel you have stumbled into someone's private Xanadu. This is no mere rich person's home, but a high-walled, eclectic, imperious fantasy that seems to have no boundaries.

The entrance hall is decorated not with paintings but with row upon row of individually framed eyeballs; these, the owner tells people with relish, were imported from England, where they were made for injured soldiers. Next comes a marble foyer, which does have a painting, in the manner of Jean Dubuffet … but the host coyly refuses to tell visitors who painted it. In any case, guests are like pygmies next to the nearby twice-life-size sculpture of a naked African warrior.

Despite its eccentricity the house is curiously impersonal, the statement of someone who wants to be known for the scale of his possessions. Its occupant, financier Jeffrey Epstein, 50, admits to friends that he likes it when people think of him this way. A good-looking man, resembling Ralph Lauren, with thick gray-white hair and a weathered face, he usually dresses in jeans, knit shirts, and loafers. He tells people he bought the house because he knew he "could never live anywhere bigger." He thinks 51,000 square feet is an appropriately large space for someone like himself, who deals mostly in large concepts—especially large sums of money.

Guests are invited to lunch or dinner at the town house—Epstein usually refers to the former as "tea," since he likes to eat bite-size morsels and drink copious quantities of Earl Grey. (He does not touch alcohol or tobacco.) Tea is served in the "leather room," so called because of the cordovan-colored fabric on the walls. The chairs are covered in a leopard print, and on the wall

hangs a huge, Oriental fantasy of a woman holding an opium pipe and caressing a snarling lionskin. Under her gaze, plates of finger sandwiches are delivered to Epstein and guests by the menservants in white gloves.

Upstairs, to the right of a spiral staircase, is the "office," an enormous gallery spanning the width of the house. Strangely, it holds no computer. Computers belong in the "computer room" (a smaller room at the back of the house), Epstein has been known to say. The office features a gilded desk (which Epstein tells people belonged to banker J. P. Morgan), 18th-century black lacquered Portuguese cabinets, and a nine-foot ebony Steinway "D" grand. On the desk, a paperback copy of the Marquis de Sade's *The Misfortunes of Virtue* was recently spotted. Covering the floor, Epstein has explained, "is the largest Persian rug you'll ever see in a private home—so big, it must have come from a mosque." Amid such splendor, much of which reflects the work of the French decorator Alberto Pinto, who has worked for Jacques Chirac and the royal families of Jordan and Saudi Arabia, there is one particularly startling oddity: a stuffed black poodle, standing atop the grand piano. "No decorator would ever tell you to do that," Epstein brags to visitors. "But I want people to think what it means to stuff a dog." People can't help but feel it's Epstein's way of saying that he always has the last word.

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In addition to the town house, Epstein lives in what is reputed to be the largest private dwelling in New Mexico, on an $18 million, 7,500-acre ranch which he named "Zorro." "It makes the town house look like a shack," Epstein has said. He also owns Little St. James, a 70-acre island in the U.S. Virgin Islands, where the main house is currently being renovated by Edward Tuttle, a designer of the Amanresorts. There is also a $6.8 million house in Palm Beach, Florida, and a fleet of aircraft: a Gulfstream IV, a helicopter, and a Boeing 727, replete with trading room, on which Epstein recently flew President Clinton, actors Chris Tucker and Kevin Spacey, supermarket magnate Ron Burkle, Lew Wasserman's grandson, Casey Wasserman, and a few others, on a mission to explore the problems of AIDS and economic development in Africa.

Epstein is charming, but he doesn't let the charm slip into his eyes. They are steely and calculating, giving some hint at the steady whir of machinery running behind them. "Let's play chess," he said to me, after refusing to give an interview for this article. "You be white. You get the first move." It was an appropriate metaphor for a man who seems to feel he can win no matter what the advantage of the other side. *His* advantage is that no one really seems to know him or his history completely or what his arsenal actually consists of. He has carefully engineered it so that he remains one of the few truly baffling mysteries among New York's moneyed world. People know snippets, but few know the whole.

"He's very enigmatic," says Rosa Monckton, the former C.E.O. of Tiffany & Co. in the U.K. and a close friend since the early 1980s. "You think you know him and then you peel off another ring of the onion skin and there's something else extraordinary underneath. He never reveals his hand.... He's a classic iceberg. What you see is not what you get."

Even acquaintances sense a curious dichotomy: Yes, he lives like a "modern maharaja," as Leah Kleman, one of his art dealers, puts it. Yet he is fastidiously, almost obsessively private—he lists

himself in the phone book under a pseudonym. He rarely attends society gatherings or weddings or funerals; he considers eating in restaurants like "eating on the subway"—i.e., something he'd never do. There are many women in his life, mostly young, but there is no one of them to whom he has been able to commit. He describes his most public companion of the last decade, Ghislaine Maxwell, 41, the daughter of the late, disgraced media baron Robert Maxwell, as simply his "best friend." He says she is not on his payroll, but she seems to organize much of his life—recently she was making telephone inquiries to find a California-based yoga instructor for him. (Epstein is still close to his two other long-term girlfriends, Paula Heil Fisher, a former associate of his at the brokerage firm Bear Stearns and now an opera producer, and Eva Andersson Dubin, a doctor and onetime model. He tells people that when a relationship is over the girlfriend "moves up, not down," to friendship status.)

Some of the businessmen who dine with him at his home—they include newspaper publisher Mort Zuckerman, banker Louis Ranieri, Revlon chairman Ronald Perelman, real-estate tycoon Leon Black, former Microsoft executive Nathan Myhrvold, Tom Pritzker (of Hyatt Hotels), and real-estate personality Donald Trump—sometimes seem not all that clear as to what he actually does to earn his millions. Certainly, you won't find Epstein's transactions written about on Bloomberg or talked about in the trading rooms. "The trading desks don't seem to know him. It's unusual for animals *that* big not to leave any footprints in the snow," says a high-level investment manager.

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Unlike such fund managers as George Soros and Stanley Druckenmiller, whose client lists and stock maneuverings act as their calling cards, Epstein keeps all his deals and clients secret, bar one client: billionaire Leslie Wexner, the respected chairman of Limited Brands. Epstein insists that ever since he left Bear Stearns in 1981 he has managed money only for billionaires—who depend on him for discretion. "I was the only person crazy enough, or arrogant enough, or misplaced enough, to make my limit a billion dollars or more," he tells people freely. According to him, the flat fees he receives from his clients, combined with his skill at playing the currency markets "with very large sums of money," have afforded him the lifestyle he enjoys today.

Why do billionaires choose him as their trustee? Because the problems of the mega-rich, he tells people, are different from yours and mine, and his unique philosophy is central to understanding those problems: "Very few people need any more money when they have a billion dollars. The key is not to have it do harm more than anything else.... You don't want to lose your money."

He has likened his job to that of an architect—more specifically, one who specializes in remodeling: "I always describe [a billionaire] as someone who started out in a small home and as he became wealthier had add-ons. He added on another addition, he built a room over the garage ... until you have a house that is usually a mess.... It's a large house that has been put together over time where no one could foretell the financial future and their accompanying needs."

He makes it sound as though his job combines the roles of real-estate agent, accountant, lawyer, money manager, trustee, and confidant. But, as with Jay Gatsby, myths and rumor swirl around Epstein.

Here are some of the hard facts about Epstein—ones that he doesn't mind people knowing: He grew up middle-class in Brooklyn. His father worked for the city's parks department. His parents viewed education as "the way out" for him and his younger brother, Mark, now working in real estate. Jeffrey started to play the piano—for which he maintains a passion—at five, and he went to Brooklyn's Lafayette High School. He was good at mathematics, and in his early 20s he got a job teaching physics and math at Dalton, the elite Manhattan private school. While there he began tutoring the son of Bear Stearns chairman Ace Greenberg and was friendly with a daughter of Greenberg's. Soon he went to Bear Stearns, where, under the mentorship of both Greenberg and current Bear Stearns C.E.O. James Cayne, he did well enough to become a limited partner—a rung beneath full partner. He abruptly departed in 1981 because, he has said, he wanted to run his own business.

Thereafter the details recede into shadow. A few of the handful of current friends who have known him since the early 1980s recall that he used to tell them he was a "bounty hunter," recovering lost or stolen money for the government or for very rich people. He has a license to carry a firearm. For the last 15 years, he's been running his business, J. Epstein & Co.

Since Leslie Wexner appeared in his life—Epstein has said this was in 1986; others say it was in 1989, at the earliest—he has gradually, in a way that has not generally made headlines, come to be accepted by the Establishment. He's a member of various commissions and councils: he is on the Trilateral Commission, the Council on Foreign Relations, the New York Academy of Sciences, and the Institute of International Education.

His current fan club extends to Cayne, Henry Rosovsky, the former dean of Harvard's Faculty of Arts and Sciences, and Larry Summers, Harvard's current president. Harvard law professor Alan Dershowitz says, "I'm on my 20th book.... The only person outside of my immediate family that I send drafts to is Jeffrey." Real-estate developer and philanthropist Marshall Rose, who has worked with Epstein on projects in New Albany, Ohio, for Wexner, says, "He digests and decodes the information very rapidly, which is to me terrific because we have shorter meetings."

Also on the list of admirers are former senator George Mitchell and a gaggle of distinguished scientists, most of whom Epstein has helped fund in recent years. They include Nobel Prize winners Gerald Edelman and Murray Gell-Mann, and mathematical biologist Martin Nowak. When these men describe Epstein, they talk about "energy" and "curiosity," as well as a love for theoretical physics that they don't ordinarily find in laymen. Gell-Mann rather sweetly mentions that "there are always pretty ladies around" when he goes to dinner *chez* Epstein, and he's under the impression that Epstein's clients include the Queen of England. Both Nowak and Dershowitz were thrilled to find themselves shaking the hand of a man named "Andrew" in Epstein's house. "Andrew" turned out to be Prince Andrew, who subsequently arranged to sit in the back of Dershowitz's law class.

Epstein gets annoyed when anyone suggests that Wexner "made him." "I had really rich clients before," he has said. Yet he does not deny that he and Wexner have a special relationship. Epstein sees it as a partnership of equals. "People have said it's like we have one brain between two of us: each has a side."

"I think we both possess the skill of seeing patterns," says Wexner. "But Jeffrey sees patterns in politics and financial markets, and I see patterns in lifestyle and fashion trends. My skills are not in investment strategy, and, as everyone who knows Jeffrey knows, his are not in fashion and design. We frequently discuss world trends as each of us sees them."

By the time Epstein met Wexner, the latter was a retail legend who had built a $3 billion empire—one that now includes Victoria's Secret, Express, and Bath & Body Works—from $5,000 lent him by his aunt. "Wexner saw in Jeffrey the type of person who had the potential to realize his [Jeffrey's] dreams," says someone who has worked closely with both men. "He gave Jeffrey the ball, and Jeffrey hit it out of the park."

Wexner, through a trust, bought the town house in which Epstein now lives for a reported $13.2 million in 1989. In 1993, Wexner married Abigail Koppel, a 31-year-old lawyer, and the newlyweds relocated to Ohio; in 1996, Epstein moved into the town house. Public documents suggest that the house is still owned by the trust that bought it, but Epstein has said that he now owns the house.

Wexner trusts Epstein so completely that he has assigned him the power of fiduciary over all of his private trusts and foundations, says a source close to Wexner. In 1992, Epstein even persuaded Wexner to put him on the board of the Wexner Foundation in place of Wexner's ailing mother. Bella Wexner recovered and demanded to be reinstated. Epstein has said they settled by splitting the foundation in two.

Epstein does not care that he comes between family members. In fact, he sees it as his job. He tells people, "I am there to represent my client, and if my client needs protecting—sometimes even from his own family—then it's often better that people hate me, not the client."

"You've probably heard I'm vicious in my representation of my clients," he tells people proudly; Leah Kleman describes his haggling over art prices as something like a scene out of the movie *Mad Max: Beyond Thunderdome*. Even a former mentor says he's seen "the dark side" of Epstein, and a Bear Stearns source recalls a meeting in which Epstein chewed out a team making a presentation for Wexner as being so brutal as to be "irresponsible."

One reporter, in fact, received three threats from Epstein while preparing a piece. They were delivered in a jocular tone, but the message was clear: There will be trouble for your family if I don't like the article.

On the other hand, Epstein is clearly very generous with friends. Joe Pagano, an Aspen-based venture capitalist, who has known Epstein since before his Bear Stearns days, can't say enough nice things: "I have a boy who's dyslexic, and Jeffrey's gotten close to him over the years.... Jeffrey got him into music. He bought him his first piano. And then as he got to school he had difficulty ... in studying ... so Jeffrey got him interested in taking flying lessons."

Rosa Monckton recalls Epstein telling her that her daughter, Domenica, who suffers from Down syndrome, needed the sun, and that Rosa should feel free to bring her to his house in Palm Beach anytime.

Some friends remember that in the late 80s Epstein would offer to upgrade the airline tickets of good friends by affixing first-class stickers; the only problem was that the stickers turned out to be unofficial. Sometimes the technique worked, but other times it didn't, and the unwitting recipients found themselves exiled to coach. (Epstein has claimed that he paid for the upgrades, and had no knowledge of the stickers.) Many of those who benefited from Epstein's largesse claim that his generosity comes with no strings attached. "I never felt he wanted anything from me in return," says one old friend, who received a first-class upgrade.

Epstein is known about town as a man who loves women—lots of them, mostly young. Model types have been heard saying they are full of gratitude to Epstein for flying them around, and he is a familiar face to many of the Victoria's Secret girls. One young woman recalls being summoned by Ghislaine Maxwell to a concert at Epstein's town house, where the women seemed to outnumber the men by far. "These were not women you'd see at Upper East Side dinners," the woman recalls. "Many seemed foreign and dressed a little bizarrely." This same guest also attended a cocktail party thrown by Maxwell that Prince Andrew attended, which was filled, she says, with young Russian models. "Some of the guests were horrified," the woman says.

"He's reckless," says a former business associate, "and he's gotten more so. Money does that to you. He's breaking the oath he made to himself—that he would never do anything that would expose him in the media. Right now, in the wake of the publicity following his trip with Clinton, he must be in a very difficult place."

According to S.E.C. and other legal documents unearthed by *VANITY FAIR,* Epstein may have good reason to keep his past cloaked in secrecy: his real mentor, it might seem, was not Leslie Wexner but Steven Jude Hoffenberg, 57, who, for a few months before the S.E.C. sued to freeze his assets in 1993, was trying to buy the *New York Post.* He is currently incarcerated in the Federal Medical Center in Devens, Massachusetts, serving a 20-year sentence for bilking investors out of more than $450 million in one of the largest Ponzi schemes in American history.

When Epstein met Hoffenberg in London in the 1980s, the latter was the charismatic, audacious head of the Towers Financial Corporation, a collection agency that was supposed to buy debts that people owed to hospitals, banks, and phone companies. But Hoffenberg began using company funds to pay off earlier investors and service a lavish lifestyle that included a mansion on Long Island, homes on Manhattan's Sutton Place and in Florida, and a fleet of cars and planes.

Hoffenberg and Epstein had much in common. Both were smart and obsessed with making money. Both were from Brooklyn. According to Hoffenberg, the two men were introduced by Douglas Leese, a defense contractor. Epstein has said they were introduced by John Mitchell, the late attorney general.

Epstein had been running International Assets Group Inc. (I.A.G.), a consulting company, out of his apartment in the Solo building on East 66th Street in New York. Though he has claimed that he managed money for billionaires only, in a 1989 deposition he testified that he spent 80 percent of his time assisting people recover stolen money from fraudulent brokers and lawyers.

He was also not above entering into risky, tax-sheltered oil and gas deals with much smaller investors. A lawsuit that Michael Stroll, the former head of Williams Electronics Inc., filed against Epstein shows that in 1982 I.A.G. received an investment from Stroll of $450,000, which Epstein put into oil. In 1984 Stroll asked for his money back; four years later he had received only $10,000. Stroll lost the suit, after Epstein claimed in court, among other things, that the check for $10,000 was for a horse he'd bought from Stroll. "My net worth never exceeded four and a half million dollars," Stroll has said.

Hoffenberg, says a close friend, "really liked Jeffrey…. Jeffrey has a way of getting under your skin, and he was under Hoffenberg's." Also appealing to Hoffenberg were Epstein's social connections; they included oil mogul Cece Wang (father of the designer Vera) and Mohan Murjani, whose clothing company grew into Gloria Vanderbilt Jeans. Epstein lived large even then. One friend recalls that when he took Canadian heiress Wendy Belzberg on a date he hired a Rolls-Royce especially for the occasion. (Epstein has claimed he owned it.)

In 1987, Hoffenberg, according to sources, set Epstein up in the offices he still occupies in the Villard House, on Madison Avenue, across a courtyard from the restaurant Le Cirque. Hoffenberg hired his new protégé as a consultant at $25,000 a month, and the relationship flourished. "They traveled everywhere together—on Hoffenberg's plane, all around the world, they were always together," says a source. Hoffenberg has claimed that Epstein confided in him, saying, for example, that he had left Bear Stearns in 1981 after he was discovered executing "illegal operations."

Several of Epstein's Bear Stearns contemporaries recall that Epstein left the company very suddenly. Within the company there were rumors also that he was involved in a technical infringement, and it was thought that the executive committee asked that he resign after his two supporters, Ace Greenberg and Jimmy Cayne, were outnumbered. Greenberg says he can't recall this; Cayne denies it happened, and Epstein has denied it as well. "Jeffrey Epstein left Bear Stearns of his own volition," says Cayne. "It was never suggested that he leave by any member of management, and management never looked into any improprieties by him. Jeffrey said specifically, 'I don't want to work for anybody else. I want to work for myself.'" Yet, this is not the story that Epstein told to the S.E.C. in 1981 and to lawyers in a 1989 deposition involving a civil business case in Philadelphia.

In 1981 the S.E.C.'s Jonathan Harris and Robert Blackburn took Epstein's testimony and that of other Bear Stearns employees in part of what became a protracted case about insider trading around a tender offer placed on March 11, 1981, by the Seagram Company Ltd. for St. Joe Minerals Corp. Ultimately several Italian and Swiss investors were found guilty, including Italian financier Giuseppe Tome, who had used his relationship with Seagram owner Edgar Bronfman Sr. to obtain information about the tender offer.

After the tender offer was announced, the S.E.C. began investigating trades involving St. Joe at Bear Stearns and other firms. Epstein resigned from Bear Stearns on March 12. The S.E.C. was tipped off that Epstein had information on insider trading at Bear Stearns, and it was therefore obliged to question him. In his S.E.C. testimony, given on April 1, 1981, Epstein claimed that he had found "offensive" the way Bear Stearns management had handled a disciplinary action

following its discovery that he had committed a possible "Reg D" violation—evidently he had lent money to his closest friend. (In the 1989 deposition he said that he'd lent approximately $20,000 to Warren Eisenstein, to buy stock.) Such an action could have been considered improper, although Epstein claimed he had not realized this until afterward.

According to Epstein, Bear Stearns management had questioned him about the loan around March 4. The questioners, Epstein said, were Michael (Mickey) Tarnopol and Alvin Einbender. In his 1989 deposition Epstein recalled that the partner who had made an "issue" of the matter was Marvin Davidson. On March 9, Epstein said, he had met with Tarnopol and Einbender again, and the two partners told him that the executive committee had weighed the offense, together with previous "carelessness" over expenses, and he would be fined $2,500.

"There was discussion whether, in fact, I had ever put in an airline ticket for someone else and not myself and I said that it was possible, … since my secretary handles my expenses," Epstein told the S.E.C. In his 1989 testimony he stated that the "Reg D" incident had cost him a shot at partnership that year.

What the S.E.C. seemed to be especially interested in was whether there was a connection between Epstein's leaving and the alleged insider trading in St. Joe Minerals by other people at Bear Stearns:

Q: Sir, are you aware that certain rumors may have been circulating around your firm in connection with your reasons for leaving the firm?

A: I'm aware that there were many rumors.

Q: What were the rumors you heard?

A: Nothing to do with St. Joe.

Q: Can you relate what you heard?

A: It was having to do with an illicit affair with a secretary.

Q: Have you heard any other rumors suggesting that you had made a presentation or communication to the Executive Committee concerning alleged improprieties by other members or employees of Bear Stearns?

A: I, in fact, have heard that rumor, but it's been from Mr. Harris in our conversation last week.

Q: Have you heard it from anyone else?

A: No.

A little later the interview focuses on James Cayne:

Q: Did you ever hear while you were at Bear Stearns that Mr. Cayne may have trader or insider information in connection with St. Joe Minerals Corporation?

Q: Did Mr. Cayne ever have any conversation with you about St. Joe Minerals?

Q: Did you happen to overhear any conversations between Mr. Cayne and anyone else regarding St. Joe Minerals?

And still later in the questioning comes this exchange:

Q: Have you had any type of business dealings with Mr. Cayne?

A: There's no relationship with Bear Stearns.

Q: Pardon?

A: Other than Bear Stearns, no.

Q: Have you been a participant in any type of business venture with Mr. Cayne?

Q: Do you have any expectation of participating in any business venture with Mr. Cayne?

Q: Have you had any business participations with Mr. Theram?

A: No; nor do I anticipate any.

Q: Mr. Epstein, did anyone at Bear Stearns tell you in words or substance that you should not divulge anything about St. Joe Minerals to the staff of the Securities and Exchange Commission?

Q: Has anyone indicated to you in any way, either directly or indirectly, in words or substance, that your compensation for this past year or any future monies coming to you from Bear Stearns will be contingent upon your not divulging information to the Securities and Exchange Commission?

A: No.

Despite the circumstances of Epstein's leaving, Bear Stearns agreed to pay him his annual bonus—which he anticipated as being approximately $100,000.

The S.E.C. never brought any charges against anyone at Bear Stearns for insider trading in St. Joe, but its questioning seems to indicate that it was skeptical of Epstein's answers. Some sources have wondered why, if he was such a big producer at Bear Stearns, he would have given it up over a mere $2,500 fine.

Certainly the years after Epstein left the firm were not obviously prosperous ones. His luck didn't seem to change until he met Hoffenberg.

One of Epstein's first assignments for Hoffenberg was to mastermind doomed bids to take over Pan American World Airways in 1987 and Emery Air Freight Corp. in 1988. Hoffenberg claimed in a 1993 hearing before a grand jury in Illinois that Epstein came up with the idea of financing these bids through Towers's acquisition of two ailing Illinois insurance companies, Associated Life and United Fire. "He was hired by us to work on the securities side of the insurance companies and Towers Financial, supposedly to make a profit for us and for the companies," Hoffenberg reportedly told the grand jury. He also alleged that Epstein was the "technician," executing the schemes, although, having no broker's license, he had to rely on others to make the trades. Much of Hoffenberg's subsequent testimony in his criminal case has proven to be false, and Epstein has claimed he was merely asked how the bids could be accomplished and has said he had nothing to do with the financing of them. Yet Richard Allen, the former treasurer of United Fire, recalls seeing Epstein two or three times at the company. He and another executive say they had direct dealing with Epstein over the finances. And in his deposition of 1989, Epstein stated that he was the one who executed "all" Hoffenberg's instructions to buy and sell the stock. He called it "making the orders." He could not recall whether he had chosen the brokers used.

To win approval from the Illinois insurance regulators for Towers's acquisition of the companies, Hoffenberg promised to inject $3 million of new capital into them. In fact, in his grand-jury testimony Hoffenberg claimed that he, his chief operating officer, Mitchell Brater, and Epstein came up with a scheme to steal $3 million of the insurance companies' bonds to buy Pan Am and Emery stock. "Jeffrey Epstein and Mitch Brater arranged the various brokerage accounts for the bonds to be placed with in New York, and I think one in Chicago, Rodman & Renshaw," Hoffenberg reportedly said. Then, said Hoffenberg, while making it appear as though they were investing the bonds in much safer financial instruments, they used them as collateral to buy the stock. "Epstein was the person in charge of the transactions, and Mitchell Brater was assisting him with it in coordination on behalf of the insurance companies' money," Hoffenberg claimed at the time.

At one point, according to Hoffenberg, a broker forged the documents necessary for a $1.8 million check to be written on insurance-company funds. The check was used to buy more stock in the takeover targets. Meanwhile, in order to throw the insurance regulators off, the $1.8 million was reported as being safely invested in a money-market account.

United Fire's former chief financial officer Daniel Payton confirms part of Hoffenberg's account. He says he recalls making one or two telephone calls to Epstein (at Hoffenberg's direction) about the missing bonds. "He said, 'Oh, yeah, they still exist.' But we found out later that he had sold those assets … leveraged them … [and] used some margin account to take some positions in … Emery and Pan Am," says Payton.

Epstein's extraordinary creativity was, according to Hoffenberg, responsible for the purchase by the insurance companies of a $500,000 bond, with no money down. "Epstein created a great scheme to purchase a $500,000 treasury bond that would not be shown … [as] margined or collateralized," he reportedly told the grand jury. "It looked like it was free and clear but it actually wasn't," he said.

Epstein has denied he ever had any dealings with anyone from the insurance companies. But Richard Allen says he recalls talking to Epstein at Hoffenberg's direction and telling him it was urgent they retrieve the missing bonds for a state examination. According to Allen, Epstein said, "We'll get them back." He had "kind of a flippant attitude," says Allen. "They never came back."

Epstein, according to Hoffenberg, also came up with a scheme to manipulate the price of Emery Freight stock in an attempt to minimize the losses that occurred when Hoffenberg's bid went wrong and the share price began to fall. This was alleged to have involved multiple clients' accounts controlled by Epstein.

Eventually, in 1991, insurance regulators in Illinois sued Hoffenberg. He settled the case, and Epstein, who was only a paid consultant, was never deposed or accused of any wrongdoing. Barry Gross, the attorney who was handling the suit for the regulators, says of Epstein, "He was very elusive.... It was hard to really track him down. There were a substantial number of checks for significant dollars that were paid to him, I remember.... He was this character we never got a handle on. Again we presumed that he was involved with the Pan Am and Emery run that Hoffenberg made, but we never got a chance to depose him."

"From the government's discovery in the main sentencing against Hoffenberg it would seem the government was perhaps a bit lazy," says David Lewis, who represented Mitchell Brater. "They went for what they knew they could get ... and that was the fraudulent promissory notes [i.e., the much larger and unrelated part of Hoffenberg's fraud, based in New York State].... What they couldn't get, they didn't bother with."

Another lawyer involved in the criminal prosecution of Hoffenberg says, "In a criminal investigation like that, when there is a guilty plea, to be quick and dirty about it, discovery is always incomplete.... They don't have to line up witnesses; they don't have to learn every fact that might come out on cross-examination."

Epstein was involved with Hoffenberg in other questionable transactions. Financial records show that in 1988 Epstein invested $1.6 million in Riddell Sports Inc., a company that manufactures football helmets. Among his co-investors were the theater mogul Robert Nederlander and attorney Leonard Toboroff. A source close to this transaction claims that Epstein told Nederlander and Toboroff that he had raised his share of the money from a Swiss banker, whose identity they could not be allowed to know. But Hoffenberg has claimed the money came from him, and Towers's financial statements for that year show a loan to Epstein of $400,000. (Epstein has said he can't remember the details and has disputed the accuracy of the Towers financial reports.)

Around the same time, Nederlander and Toboroff let Epstein come in with them on a scheme to make money out of Pennwalt, a Pennsylvania chemical company. The plan was to group together with two other parties to take a substantial declared position in the stock. According to a source, Epstein was supposed to help Nederlander and Toboroff raise $15 million. He seemed to fail to find other investors, say those familiar with the deal. (Epstein has said he was merely an investor.) He invested $1 million, which he told his co-investors was his own money. But in his

1989 deposition he said that he put in only $300,000 of his own money. Where did the rest come from? Hoffenberg has said it came from him, in a loan that Nederlander and Toboroff didn't know about.

Two things happened that alarmed Nederlander and Toboroff. After the group signaled a possible takeover, the Pennwalt management threatened to sue the would-be raiders. Epstein was reluctant initially to give a deposition about his share of the money, telling Toboroff there were "reasons" he didn't want to. Then, after the opportunity for new investors was closed, co-investors recall Epstein announcing that he'd found one at last: Dick Snyder, then C.E.O. of the publisher Simon & Schuster, who wanted to put up approximately $500,000. (Neither Epstein nor Snyder can now recall the investment. Yet in the 1989 deposition Epstein said that he had recruited Snyder, whom he had met socially, into the deal.)

According to a source, Toboroff and Nederlander told Epstein that Snyder was too late, but, without their realizing it, Hoffenberg has claimed, Snyder wrote a check to Hoffenberg and bought out some of his investment. But then Snyder wanted out.

"Nederlander started to get these irate calls from [Snyder,] who wasn't part of the deal, saying he was owed all this money," says someone close to the deal. Toboroff and Nederlander were baffled.

Eventually, a source close to Hoffenberg says, Hoffenberg paid Snyder off.

Just as Nederlander and Toboroff were growing wary of Epstein, he became increasingly involved with Leslie Wexner, whom he had met through insurance executive Robert Meister and his late wife. Epstein has told people that he met Wexner in 1986 in Palm Beach, and that he won his confidence by persuading him not to invest in the stock market, just as the 1987 crash was approaching. His story has subsequently changed. When asked if Wexner knew about his connection to Hoffenberg, Epstein said that he began working for Wexner in 1989, and that "it was certainly not the same time."

Wherever and whenever it was that Epstein and Wexner actually met, there was an immediate and strong personal chemistry. Wexner says he thinks Epstein is "very smart with a combination of excellent judgment and unusually high standards. Also, he is always a most loyal friend."

Sources say Epstein proved that he could be useful to Wexner as well, with "fresh" ideas about investments. "Wexner had a couple of bad investments, and Jeffrey cleaned those up right away," says a former associate of Epstein's.

Before he signed on with Wexner, Epstein had several meetings with Harold Levin, then head of Wexner Investments, in which he enunciated ideas about currencies that Levin found incomprehensible. "In fact," says someone who used to work very closely with Wexner, "almost everyone at the Limited wondered who Epstein was; he literally came out of nowhere."

"Everyone was mystified as to what his appeal was," says Robert Morosky, a former vice-chairman of the Limited.

Much of Epstein's work is related to cleaning up, tightening budgets, and efficiencies. One person who worked for Wexner and who saw a contract drawn up between the two men says Epstein is involved in "everything, not just a little here, a little there. Everything!" In addition, he says, "Wexner likes having a hatchet man.... Whenever there is dirty work to be done he'd stick Jeffrey on it.... He has a reputation for being ruthless but he gets the job done."

Epstein has evidently been asked to fire personal-staff members when needed. "He was that mysterious person that everyone was scared to death of," says a former employee.

Meanwhile, he is also less than popular with some people outside Wexner's company with whom he now deals. "He 'inserted' himself into the construction process of Leslie Wexner's yacht.... That resulted in litigation down the road between Mr. Wexner and the shipyard that eventually built the vessel," says Lars Forsberg, a lawyer whose firm at the time, Dickerson and Reily, was hired to deal with litigation stemming from the construction of Wexner's *Limitless*—at 315 feet, one of the largest private yachts in the world. Evidently, Epstein stalled on paying Dickerson and Reily for its work. "It's probably once or twice in my legal career that I've had to sue a client for payment of services that he'd requested and we'd performed ... without issue on the performance," says Forsberg. In the end the matter was settled, but Epstein claims he now has no recollection of it.

The incident is one of a number of disputes Epstein has become embroiled in. Some are for sums so tiny as to be baffling; for instance, Epstein sued investment adviser Herbert Glass, who sold him the Palm Beach house in 1990, for $13,444—Epstein claimed this was owed him for furnishings removed by Glass.

In 1998 the U.S. Attorney's Office sued Epstein for illegally subletting the former home of the deputy consul general of Iran to attorney Ivan Fisher and others. Epstein paid $15,000 a month in rent to the State Department, but he charged Fisher and his colleagues $20,000. Though the exact terms of the agreement are sealed, the court ruled against Epstein.

Wexner offers some insight into his friend's combative style. "Many times people confuse winning and losing," Wexner says. "Jeffrey has the unusual quality of knowing when he is winning. Whether in conversations or negotiations, he always stands back and lets the other person determine the style and manner of the conversation or negotiation. And then he responds in their style. Jeffrey sees it in chivalrous terms. He does not pick a fight, but if there is a fight, he will let you choose your weapon."

One case is rather more serious. Currently, Citibank is suing Epstein for defaulting on loans from its private-banking arm for $20 million. Epstein claims that Citibank "fraudulently induced" him into borrowing the money for investments. Citibank disputes this charge.

The legal papers for another case offer a rare window into Epstein's finances. In 1995, Epstein stopped paying rent to his landlord, the nonprofit Municipal Arts Society, for his office in the Villard House. He claimed that they were breaking the terms of the lease by not letting his staff in at night. The case was eventually settled. However, one of the papers filed in this dispute is Epstein's financial statement for 1988, in which he claimed to be worth $20 million. He listed

that he owned $7 million in securities, $1 million in cash, zero in residential property (although he told sources that he had already bought the home in Palm Beach), and $11 million in other assets, including his investment in Riddell. A co-investor in Riddell says: "The company had been bought with a huge amount of debt, and it wasn't public, so it was meaningless to attach a figure like that to it … the price it cost was about $1.2 million." The co-investors bought out Epstein's share in Riddell in 1995 for approximately $3 million. At that time, when Epstein was asked, as a routine matter, to sign a paper guaranteeing he had access to a few million dollars in case of any subsequent disputes over the sale price, Wexner signed for him. Epstein has explained that this was because the co-investors wanted an indemnity against being sued by Wexner. One of the investors calls this "bullshit."

Epstein's appointment to the board of New York's Rockefeller University in 2000 brought him into greater social prominence. Boasting such social names as Nancy Kissinger, Brooke Astor, and Robert Bass, the board also includes such pre-eminent scientists as Nobel laureate Joseph Goldstein. "Epstein was thrilled to be elected," says someone who knows him.

After one term Epstein resigned. According to *New York* magazine, this was because he didn't like to wear a suit to meetings. A spokesperson for the Rockefeller board says Epstein left because he had insufficient time to commit; a board member recalls that he was "arrogant" and "not a good fit." The spokesperson admits that it is "infrequent" for board members not to be renominated after only one term.

Still, the recent spate of publicity Epstein has inspired does not seem to have fazed him. In November he was spotted in the front row of the Victoria's Secret fashion show at New York's Lexington Avenue Armory; around the same time the usual coterie of friends and beautiful women were whisked off to Little St. James (which he tells people has been renamed Little St. Jeff) for a long weekend.

Thanks to Epstein's introductions, says Martin Nowak, the biologist finds himself moving from Princeton to Harvard, where he is assuming the joint position of professor of mathematics and professor of biology. Epstein has pledged at least $25 million to Harvard to create the Epstein Program for Mathematical Biology and Evolutionary Dynamics, and Epstein will have an office at the university. The program will be dedicated to searching for nature's algorithms, a pursuit that is a specialty of Nowak's. For Epstein this must be the summit of everything he has worked toward: he has been seen proudly displaying Harvard president Larry Summers's letter of commitment as if he can't quite believe it is real. He says he was reluctant to have his name attached to the program, but Summers persuaded him. He rang his mentor Wexner about it, and Wexner told him it was all right.

An insatiable, restless soul, always on the move, Epstein builds a tremendous amount of downtime into his hectic work schedule. Yet there is something almost programmed about his relaxation: it's as if even pleasure has to be measured in terms of self-improvement. Nowak says that, when he goes to stay with Epstein in the Caribbean, they'll get up at six and, as the sun rises, have three-hour conversations about theoretical physics. "Then he'll go off and do some work, re-appear, and we'll talk some more."

http://www.vanityfair.com/news/2003/03/jeffrey-epstein-200303

Another person who went to the island with Epstein, Maxwell, and several beautiful women remembers that the women "sat around one night teasing him about the kinds of grasping women who might want to date him. He was amused by the idea…. He's like a king in his own world."

Many people comment there is something innocent, almost childlike about Jeffrey Epstein. They see this as refreshing, given the sophistication of his surroundings. Alan Dershowitz says that, as he was getting to know Epstein, his wife asked him if he would still be close to him if Epstein suddenly filed for bankruptcy. Dershowitz says he replied, "Absolutely. I would be as interested in him as a friend if we had hamburgers on the boardwalk in Coney Island and talked about his ideas."

EXHIBIT 9

Alan Dershowitz says he's still advising Jeffrey Epstein

Alan Dershowitz still provides legal advice to serial pedophile Jeffrey Epstein, he confirmed to Axios.

What he's saying: "He has called me a couple of times about legal issues, because I'm still technically his lawyer," Dershowitz told me in a phone interview on Saturday. "But I haven't had any social, or any other kind of contact. ... You never stop being a person's lawyer."

Background: Dershowitz helped Epstein get a sweetheart plea deal from then-U.S. Attorney Alexander Acosta (now Donald Trump's labor secretary and a rumored long-shot contender for attorney general).

- A bombshell Miami Herald investigative series last week highlighted for the first time the extent of Epstein's alleged crimes and the soft treatment he received from federal prosecutors.
- The Palm Beach multimillionaire would "serve just 13 months in the county jail, but the deal — called a non-prosecution agreement — essentially shut down an ongoing FBI probe into whether there were more victims and other powerful people who took part in Epstein's sex crimes," according to a Miami Herald examination of thousands of emails, court documents and FBI records.

Dozens of women alleged that Epstein molested and raped them when they were underaged using a sophisticated human trafficking network. A civil trial is scheduled to begin on Tuesday in Palm Beach County that may finally let these women tell their stories in court.

Behind the scenes: While he was allegedly raping teenage girls, Epstein cultivated cozy relationships with America's elites.

- Bill Clinton flew on Epstein's plane, nicknamed the "Lolita Express," numerous times, according to flight logs.
- And Donald Trump, in a profile with *New York* magazine written several years before the police caught up with Epstein, praised his friend as a "terrific guy." "It is even said that he likes beautiful women as much as I do," Trump said of Epstein, "and many of them are on the younger side."
- Dershowitz was also friendly with Epstein before the broader public knew he was a pedophile.

Dershowitz confirmed to me that he received a massage at Epstein's Palm Beach home, adding that the woman who provided it was of legal age.

- "What happened was I, um, he lent us, this was well before any of this thing came out, he lent us his house once. And I was there, my grandchildren were there, my daughter was there, and we all got massages."
- "And, um, it was therapeutic. I had a therapeutic massage with an old old Russian, but I never never ... and that was part of when we had his house for about a week during I think it was Christmas vacation."
- "Believe me, if I had known that anything improper had ever taken place in that house, I never would have allowed my children, my grandchildren, my wife, my daughter-in-law, my son, to have spent time there. I can tell you categorically there were no inappropriate pictures, no inappropriate anythings. It was like any other house."

One of Epstein's accusers, Virginia Roberts, has claimed Dershowitz had sex with her when she was underage. Dershowitz has denied the allegation and told the Miami Herald "the story was 100 percent flatly categorically made-up" so "she could get money."

Go deeper: Trump defender Dershowitz shunned by Martha's Vineyard

SEXUAL ASSAULT

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EXHIBIT 10

LETTER

Jeffrey Epstein's Attorneys: A Fair Plea Deal

The attorneys for a man accused of sexual abuse of young women defend the prosecutors' decision to drop federal charges against him.

March 4, 2019

To the Editor:

Re "The Cowardly Labor Secretary" (editorial, March 3):

Your editorial's conclusions are in profound conflict with the reality as we, Jeffrey Epstein's current and former lawyers, knew it.

When he was United States attorney for the Southern District of Florida in 2007, Alexander Acosta, the current labor secretary, oversaw a plea deal for Mr. Epstein involving charges of solicitation of prostitution involving young women. Your underlying premise is that Mr. Acosta had capitulated and not filed federal charges because Mr. Epstein had a "high-priced defense team."

This was categorically denied by the Southern District's then first assistant, Jeffrey H. Sloman, in an Op-Ed article in The Miami Herald on Feb. 15. Mr. Sloman correctly represented the existence of "significant legal impediments to [federally] prosecuting" what was a quintessentially state case.

He also correctly represented that the government had achieved its principal objectives — a felony plea, incarceration, millions of dollars in restitution and monetary settlements, and lifetime sex offender registration — through its agreement with Mr. Epstein. That agreement was reviewed at multiple levels of the Justice Department. An agreement rather than a trial is how over 97 percent of federal cases get resolved, through negotiations by two teams of experienced professionals. The case lacked the credible and compelling proof that is required by federal criminal statutes.

That the guilty plea was required in a state, not federal, court reflected the absence of evidence that Mr. Epstein used the internet, traveled to a location away from his home for the purpose of having illegal sex, commercially trafficked women to others, engaged in force, fraud or coercion, used drugs or alcohol to entice young women who came to his house to exchange sexual massages for money, possessed child pornography or in other ways violated federal law.

The number of young women involved in the investigation has been vastly exaggerated, there was no "international sex-trafficking operation" and there was never evidence that Mr. Epstein "hosted sex parties" at his home.

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Finally, Mr. Epstein has gone to prison and made enormous monetary settlements relying on his negotiated agreement. He is entitled to finality like every other defendant.

Kenneth W. Starr
Martin G. Weinberg
Jack Goldberger
Lilly Ann Sanchez

A version of this article appears in print on March 5, 2019, on Page A26 of the New York edition with the headline: Jeffrey Epstein's Attorneys: A Fair Plea Deal

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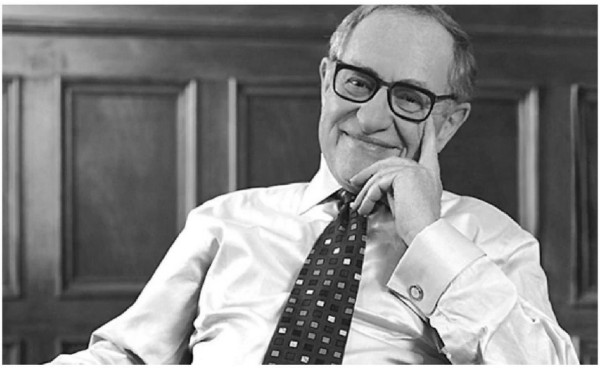
EXHIBIT 11

Prof. Dershowitz, Tell Me How You Really Feel

Harvard's legendary law professor chats with the Careerist about the recent sex allegations, his enemies and the "cesspool."

By **Vivia Chen** | January 15, 2015 at 06:19 PM | Originally published on **The American Lawyer**



(Alan Dershowitz)

Alan Dershowitz, arguably the most famous—and maybe infamous—law professor in the land, wants to set the record straight. When he heard that I was writing about his relationship with billionaire Jeffrey Epstein and the related allegation that Dershowitz engaged in sex with a minor, he tracked me down to tell his side of the story.

The backdrop: Dershowitz was part of a legal team that had negotiated a plea deal in 2008 in which Epstein pleaded guilty to felony charges in Florida for soliciting prostitution from a minor. Epstein served 13 months in prison but was spared federal charges under the deal. Last December, lawyers **Bradley Edwards** and **Paul Cassell** filed suit against the U.S. government, arguing that the plea deal violated the rights of Epstein's alleged sex victims; the suit also alleges that Dershowitz had sex with one of the victims when she was under age. Dershowitz has denied all the allegations, and Edwards and Cassell have **filed a defamation suit against Dershowitz** for calling them liars.

The following are excerpts from my two phone conversations with Dershowitz:

From what I've read, your relationship with Epstein seemed chummy. You socialized with him and you and your family stayed at his various homes. Isn't it a bad idea for a lawyer to be so close to a notorious client?

Let me tell you how I met him. I was introduced to him by Lady de Rothschild as an academic colleague. He was friendly with Larry Summers . . . He was in the process of contributing $50 million to Harvard for evolutionary biology.

So Epstein was friendly with all sorts of Harvard muckety-mucks.

The fact that he was giving money didn't hurt. We went to events that he was involved in but none of us suspected that he had another side until later. Jeffrey loved academics. My conversations with him were only about academic subjects. We never discussed females or our social life.

Did your relationship change with Epstein when you took him on as a client?

Virtually all my social contact with him was of an academic nature, and it was prior to the time he was indicted. My relationship with him was entirely professional. It is a total bum rap to say that I "cavorted" with him or was "chummy" with him. I teach my students never, never get too close to clients—and certainly don't do anything improper with them.

The suit says that Jane Doe No. 3 was forced to have sex with you, Prince Andrew and "many other powerful men," including unnamed politicians, foreign presidents and world leaders. Why were you and the Prince singled out by name?

They want to void the plea agreement and needed to find a lawyer who knew Epstein before [the indictment], and had been on his island, his home in New Mexico, Palm Beach. I fit the bill. It was lawyer profiling.

And the Prince?

They claimed that Prince Andrew was using his influence to get Epstein a better deal with the government. What's more laughable than suggesting that the U.S. Attorney would listen to the Prince to go easy on Epstein!

Why bother responding if you think the allegations are so outrageous? Why not just let the facts come out during the legal process?

I have to respond to everything. That's the way I am. Imagine having an unblemished personal life then reading graffiti scrawled on the bathroom door that gets picked up in every paper based on the assertions of a woman who's a serial liar.

Brad Edwards, one of the lawyers bringing this suit, has a history of legal entanglement with Epstein, as does his former partner Scott Rothstein, who's now in prison for his role in a Ponzi scheme. But the other lawyer in this case, Paul Cassell, is a former federal judge and a law professor. Why is he getting involved?

Everyone is shocked that he would be part of this. I think he's always hated me because I'm his opposite. I'm the conventional liberal he hates: I'm against the death penalty, I'm pro abortion rights, pro gun control.

Seems risky to bring a lawsuit for just ideological differences.

No one can understand Cassell's motive. Either he will be disbarred or I will be. And if I knowingly had sex with a sex slave then I would deserve disbarment.

What about the reaction? Do you feel you've been treated fairly by the press and the public?

I've been treated particularly harshly by lawyers and law professors. They are so quick to say that I might be guilty. They're getting too much pleasure out of this. There's a dose of schadenfreude.

Why do you think people like getting you upset?

I'm controversial and more famous than they are. There's a lot of jealousy.

I gather you're talking about legal academia.

Yes, it's a cesspool of jealousy. People in it lack courage.

But you're no stranger to harsh criticism. People weren't exactly nominating you for a justice award for getting O.J. Simpson and Claus von Bulow off the hook.

Some of the criticisms against me have been just. I'm a tough lawyer. But charging me with one of the most heinous crimes is on a different level. I've never been attacked like this. I don't know any lawyer or professor who's had these accusations waged against them. It's worse than what Clarence Darrow had to face.

You retired from Harvard Law School a year ago. Did you expect so much excitement at this stage of your career?

This is an absolute shock. I'm living my little life here [in Florida, New York and Martha's Vineyard]. I lead a boring life. I've been married to the same woman for 28 years. She goes with me everywhere. People know that I won't argue a case or give a speech unless my wife travels with me. This is not the profile of someone who screws around.

You take all this very, very personally, don't you?

Wouldn't you? I've got two grandchildren in college and they are reading this about me. This is the fight of my life.

Note: We have been in contact with Edwards and Cassell and hope to get their sides of the story soon.

EXHIBIT 12

United States District Court
Southern District of New York

VIRGINIA L. GIUFFRE,

Plaintiff, Case No.: _____

v.

ALAN DERSHOWITZ,

Defendant.
_____/

AFFIDAVIT

I, Maria Farmer, swear and affirm as follows:

1. I am currently over the age of 18 and presently reside in Kentucky.

2. In approximately 1995, I was an artist and a graduate student and I met Jeffrey Epstein and Ghislaine Maxwell at an art show where I was displaying some of my art. Epstein said that if I sold him one of my paintings for half price he would help me with my career. I sold him the painting that night for half price which was approximately $6000.00. In 1996, Jeffrey Epstein called me and told me he was looking for someone to help him with acquiring art. I took the job with Epstein but ultimately my job responsibilities were not simply to purchase art but included manning the front door at his New York mansion and keeping records of people who came to the home.

3. During the time I was supervising the door at Epstein's mansion, I witnessed a number of school age girls coming to the home, some of the young girls would be wearing their school uniforms. The girls would come into the NY mansion and then would be escorted upstairs. When I asked Maxwell why these young girls were coming over to the house so often she said that the girls were interviewing for modeling positions. At the time, based on my observations at the home, it did not seem credible to me that these young girls were interviewing for modeling positions.

4. Alan Dershowitz was an individual who came to visit Epstein at his New York mansion a number of times when I was working for Epstein. Dershowitz was very comfortable at the home and would come in and walk upstairs. On a number occasions I witnessed Dershowitz at the NY mansion going upstairs at the same time there were young girls under the age of 18 who were present upstairs in the house.

5. During the time that I worked for Epstein, he arranged for me to work on a special art project at the Ohio mansion of Leslie Wexner. This was in approximately the summer of 1996. I went to Ohio and stayed at the property to work on the art projects. I was also babysitting my two younger brother's and they were staying with me at Wexner's mansion.

6. In addition to my two younger brothers, I also had a younger sister who was fifteen (15) years old. Maxwell and Epstein took an interest in my younger sister. Epstein took us to a movie in New York and during the movie he held my younger sister's hand and was rubbing her in a sexual manner without my knowledge. He then contacted my mother and said he wanted to help put my younger sister through a special school program in Thailand. During the summer of 1996, Epstein and Maxwell flew my younger sister to their ranch in New Mexico. She was only fifteen (15) at the time and they directed her take off all of her clothes and get on a massage table. Maxwell and Epstein then touched her inappropriately on the massage table. It was not until later in the summer when I called my sister in Thailand where she was studying that I learned what had happened to her at Epstein's New Mexico ranch.

7. During that same summer of 1996 when I was working on my art project at Wexner's mansion, Ghislaine Maxwell and Jeffrey Epstein came to Wexner's mansion. They asked me to come into a bedroom with them and then proceeded to sexually assault me against my will. I fled from the room and called the sheriff's office but did not get any response. The Wexner's security staff refused to let me leave the property. I pleaded with them and my father drover up from Kentucky to Ohio to help me. I was held against my will for approximately twelve (12) hours until I was ultimately allowed to leave with my father. Upon my return to New York, I went to the New York Sixth Precinct police department for help and they counseled me to contact the FBI to make a report about the assault in Ohio. I called the FBI and made the report but to my knowledge, the FBI did not take any action against Epstein or Maxwell. To my knowledge I was the first person to report Maxwell and Epstein to the FBI. It took a significant amount of bravery for me to make that call because I knew how incredibly powerful and influential both Epstein and Maxwell were particularly in the art community.

8. After the sexual assault, Maxwell and Epstein called me multiple times threatening me. Maxwell and Epstein contacted my art clients and individuals in the art community in an effort to ruin my art career. Maxwell and Epstein were successful and I was shut out of all art related opportunities. Maxwell and Epstein worked in concert to make sure that my career and my life was ruined. I was terrified of Maxwell and Epstein and I moved a number of times to try to hide from them.

9. I have struggled throughout my life as a direct result of Epstein and Maxwell's actions against me and my hope is that they will be held accountable for their crimes. While I am still afraid, I am coming forward because I think it is so important to do so.

Dated: 4/12/19

Maria Farmer

Maria Farmer

STATE OF FLORIDA)
)
COUNTY OF BROWARD)

On the 12th day of April in the year of 2019, before me, Deborah C. Knowlton the undersigned authority, appeared to me by video conference Maria Farmer, who is personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her individual capacity, and that by her signature in the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Witness my hand and official seal

Deborah C. Knowlton

Notary Public

Notary Public State of Florida
Deborah C Knowlton
My Commission GG 133867
Expires 11/29/2021

EXHIBIT 13

United States District Court
Southern District of New York

VIRGINIA L. GIUFFRE,

Plaintiff, Case No.: _____

v.

ALAN DERSHOWITZ,

Defendant.
_____/

AFFIDAVIT OF DAVID S. STONE

1. I am a member of the Bars of New Jersey and New York and am the Senior Managing Partner of the Stone & Magnanini Law Firm.

2. I am acquainted with Alan Dershowitz having worked with him professionally on the Claus Von Bulow matter and we have remained friendly ever since. Approximately from November 2002 to March 2009, I was a Partner at Boies Schiller Flexner LLP's New Jersey office.

3. I make this affidavit to set forth what my testimony would be if called to testify concerning my knowledge of the events described herein.

4. In or about May 2015, I received a call from Mr. Dershowitz who told me that a client of Mr. Boies' law firm was accusing Mr. Dershowitz of having had sexual relations with her when she was under the age of consent. Mr. Dershowitz said he had been trying to contact Mr. Boies with no success and he knew that Mr. Boies and I had worked together. Mr. Dershowitz told me that the accusations were absolutely false and asked me if I would contact Mr. Boies and arrange for them to meet so that he could attempt to convince Mr. Boies that the accusations were false. I agreed to do so, and in that connection attended at least three meetings that included both Mr. Boies and Mr. Dershowitz and spoke to Mr. Dershowitz separately. I believe Ms. McCawley attended at least two of the meetings.

5. I am informed that Mr. Dershowitz has asserted that at a meeting on May 19th, at which I was present Mr. Boies stated "Roberts was mistaken in naming me as someone with whom she had sex" and "that if he failed to persuade her of that fact, he would leave her representation to Edwards and Cassell and no longer represent her." Mr. Boies did not say that on May 19th or at any other time when I was present.

6. In fact, the purpose of the May 19th meeting with Mr. Boies was for Mr. Dershowitz to propose a method to persuade Mr. Boies that his client was mistaken about having sex with Mr. Dershowitz. Mr. Dershowitz proposed to show using his own records of travel and calendars that he could not have been present at the times alleged as he was demonstratively elsewhere. However, Mr. Dershowitz did not have the records with him at that meeting and a later meeting was scheduled for Mr. Dershowitz and his paralegal to present the records. Neither at or prior to the May 19th meeting, had Mr. Dershowitz given anything for Mr. Boies to evaluate the issue further.

7. I am informed that Mr. Dershowitz has also asserted that at a meeting on June 1, 2015, "Boies said his goal was to persuade Virginia Roberts that she was mistaken in identifying me as a person with whom she had sex." Mr. Boies never said that in my presence, and what he did say in my presence both before and after June 1, 2015 was inconsistent with what Mr. Dershowitz ascribes to Mr. Boies. Mr. Boies said he would discuss Mr. Dershowitz presentation with his client and see if it changed the client's mind regarding her recollections but he also said that the client strongly believed what she was saying.

8. At Mr. Dershowitz's request I attended a meeting on July 6, 2015, at the Boies Schiller Flexner offices in New York City with David Boies and Sigrid McCawley with Mr. Dershowitz participating by Skype. The purpose of the meeting as stated at the meeting, and as stated to me by Mr. Dershowitz prior to the meeting, was to continue his efforts to persuade Mr. Boies and Ms. McCawley that Mr. Dershowitz had not been in any of the places where the client said Mr. Dershowitz had sex with her at any relevant time. The assertion by Mr. Dershowitz that Mr. Boies had, by this time, stated that he was convinced that Mr. Dershowitz had not had sex with the client or had expressed this view in my presence, is not accurate.

   (a) Mr. Boies indicated at the July 6th meeting that while the information was "useful" he had open questions about what he was given, and that there were gaps in what he was being given. Moreover, there were locations where Mr. Dershowitz was alleged to have had sex with the client with respect to which Mr. Dershowitz had not yet produced sufficient documentation.

   (b) The meeting ended with Mr. Dershowitz promising to produce additional materials to BSF and with the parties planning to have another meeting to review those materials.

9. Throughout this process, Mr. Dershowitz appeared determined that the outcome of those meetings would vindicate him. At various points, Mr. Boies did say that if he became convinced that his client was honestly mistaken about Mr. Dershowitz that he would convey that view to his client and that if he could not convince her, his firm would consider withdrawing from her representation. However, Mr. Boies also said that while he had an open mind on this matter, in light of the steps his firm had taken to verify the client's accounts, and the other evidence of which he was aware, Mr. Dershowitz would have to produce compelling proof to convince him the client was mistaken. Following

HOUSE_OVERSIGHT_018032

the July 6, 2015 meeting, Mr. Dershowitz expressed to me that he believed he was making progress in convincing Mr. Boies that the client was mistaken in identifying Mr. Dershowitz as someone with whom she had sex. I told Mr. Dershowitz that I thought he was overly optimistic and reading things into what Mr. Boies was saying and hearing what he wanted to hear. I truly believe this was the case, i.e., that Mr. Boies was making careful and guarded statements consistent with statements lawyers often make in settlement discussions and that Mr. Dershowitz, who urgently wanted the case to go away, was reading things into those statements that weren't there.

10. My recollection is that, at all times, Mr. Boies remained adamant that the client's assertions about Mr. Dershowitz represented her best, honest recollection. For example, at one point, Mr. Dershowitz told Mr. Boies that Ms. Roberts could well believe that she had sex with Mr. Dershowitz because she might be confusing Mr. Dershowitz with Nathan Myhrvold who spent a lot of time with Mr. Epstein and who looked a lot like Mr. Dershowitz. Mr. Dershowitz urged Mr. Boies to convince his client that she was mistaken and that she had actually had sex with Mr. Myhrvold. Mr. Boies told Mr. Dershowitz that he obviously did not have personal knowledge as to what had or had not happened, but that he had taken steps to verify that Ms. Roberts was telling the truth as she believed it. Shortly thereafter, I came to understand that Ms. Roberts had taken, and passed, a lie detector test.

11. At no time in my presence, whether in the presence of Mr. Dershowitz or outside of it, did Mr. Boies ever say that he believed or was convinced that Ms. Roberts was mistaken or that Mr. Dershowitz did not have sex with Ms. Roberts. Ms. McCawley said very little at the meetings. Furthermore, I do not recall Ms. McCawley ever expressing any doubt that Mr. Dershowitz had sex with Ms. Roberts and I am confident that I would recall such a statement if it was made, given the circumstances. In addition, Mr. Dershowitz never suggested to me that Ms. McCawley doubted that Ms. Robert's allegations were false.

David S. Stone

4/5/2019

Date

KAITLIN MAY LUZZI
ID # 2448450
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires July 31, 2019

EXHIBIT 14

United States District Court
Southern District of New York

VIRGINIA L. GIUFFRE,

Plaintiff, Case No.: _____

v.

ALAN DERSHOWITZ,

Defendant.
_____/

AFFIDAVIT

I, Sarah Ransome, swear and affirm as follows:

1. I am currently over the age of 18 and presently reside in the country of Spain.

2. In the summer of 2006, when I was twenty-two years old and living in New York, I was introduced to Jeffrey Epstein by a girl I had met named Natalya Malyshov. Shortly after meeting Jeffrey he invited me to fly to his private island in the US Virgin Islands, which I did. After that first trip I traveled to the island several more times, usually on one of Jeffrey's private airplanes, and always at his direction. I am told that my name appears on the flight logs of one or more of those trips. On a few occasions, Jeffrey also arranged to have me flown to the island on commercial flights. As it turned out, the primary purpose of those visits was to have me have sexual relations with Jeffrey, Nadia Macinkova, and various other girls and guests he brought to the island.

3. During one of my visits to the island I met Ghislaine Maxwell. Watching her interact with the other girls on the island, it became clear to me that she recruited all or many of them to the island. Once they were there, she appeared to be in charge of their activities, including what they did, who they did it with, and how they were supposed to stay in line. She assumed the same supervisory role with me as soon as I arrived. Some of the girls appeared to be 18 or older, but many appeared to be young teenagers. I recall seeing a particularly young, thin girl who looked well under 18 and recall asking her age. I later learned was a ballerina. She refused to tell me or let me see her passport.

4. In addition to spending time with Jeffrey on his island, I spent time with him in New York City. At his town house I was also lent out by him to his friends and associates to have sex. Among the people he lent me to was his friend, Alan Dershowitz. On one occasion I was in a bedroom at Jeffrey's New York townhouse

with Jeffrey and Nadia Marcinkova. After a short time, Alan Dershowitz entered the room, after which Jeffrey left the room and Nadia and I had sex with Dershowitz. I recall specific, key details of his person and the sex acts and can describe them in the event it becomes necessary to do so.

I affirm under penalty of perjury that the foregoing is true and correct.

Dated: 8-04-2019

Sarah Ransome

STATE OF FLORIDA)
)
COUNTY OF BROWARD)

On the 8th day of April in the year of 2019, before me, Deborah C. Knowlton, the undersigned authority, appeared to me by video conference SARAH RANSOME, who is personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her individual capacity, and that by her signature in the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Witness my hand and official seal

Notary Public

Notary Public State of Florida
Deborah C Knowlton
My Commission GG 133867
Expires 11/29/2021

EXHIBIT 15

Christopher Arborn

From: Alan Dershowitz <dersh@law.harvard.edu>
Date: December 9, 2015 at 2:50:58 PM EST
To: David Boies <DBoies@BSFLLP.com>
Cc: David Boies2 <xboies@gmail.com>
Subject: Re: Possible Statement

We should be aiming at a short simple statement such as:
"The events at issue occurred approximately 15 years ago when I was a teenager. Although I believed then and continued to believe that AD was the person with whom I had sex, recent developments raise the possibility that this may be a case of mistaken identification. "
Alternative:
"that it may have been someone else".
"That someone mistakenly told me it was him."
We should be able to come up with a mutually acceptable statement. It would be acceptable if the statement came from you rather than her, if she prefers.
Sent from my iPhone

On Dec 9, 2015, at 10:21 AM, Alan Dershowitz <dersh@law.harvard.edu> wrote:

David
Have we given up on a mutually acceptable statement from VR or you. Let's keep trying. We are not THAT far apart.
Alan.

Sent from my iPhone

Christopher J Arborn
Personal Assistant to David Boies
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(t) (914) 749-8301
(m) (914) 843-0989
carborn@bsfllp.com
www.bsfllp.com

EXHIBIT 16

Miami Herald

An Epstein sex case is settled; Dershowitz denies latest allegation

BY JULIE K. BROWN

DECEMBER 19, 2018 8:30 PM, UPDATED DECEMBER 27, 2018 7:55 AM

Accused sex traffickers Jeffrey Epstein and Ghislaine Maxwell have settled a federal civil lawsuit filed by a woman who says she was ordered under threat of violence to have sex with them and other influential individuals when she was in her early 20s, sources confirmed Wednesday.

Sarah Ransome, who now lives in Barcelona, claimed that she was recruited and trafficked for sex by the pair in 2006 and 2007 — at the same time that Epstein, a wealthy New York hedge fund manager, was under federal investigation for molesting dozens of underage girls at his Palm Beach mansion.

Women who say they were victims of sexual abuse at the hands of Palm Beach multimillionaire Jeffrey Epstein want a judge to throw out his lenient plea deal. AP

According to a recent court transcript, among those people Ransome claims she was directed to have sex with was Epstein's lawyer, Alan Dershowitz, who helped negotiate a controversial plea

deal that gave the eccentric multimillionaire — and co-conspirators employed by Epstein — federal immunity in 2008.

Dershowitz, 80, told the Miami Herald that he has never met Ransome nor has he ever had sex with her. He accused Ransome's attorney, powerhouse lawyer David Boies, of inventing the story and using her and another woman, Virginia Roberts, to frame him. Roberts asserted in a federal court affidavit in 2015 that Epstein forced her to have sex with Dershowitz when she was 16 years old.

"I am the victim. David Boies and these women are the perpetrators," Dershowitz said. "They have willfully and deliberately concocted stories in order to make money — millions and millions of dollars. And I will not rest until the entire story comes out," said Dershowitz, a professor at Harvard Law School and frequent Fox news guest commentator.

Nowhere in the court case or the transcript does Ransome or anyone else allege that Ransome had sex with Dershowitz — only that she was directed to.

The Ransome settlement, which is confidential, comes two weeks after Epstein settled another lawsuit in Palm Beach, filed by an attorney who represented several women who said they were coerced into sex acts with Epstein when they were underage. As part of the settlement, Epstein, 65, issued an apology to Fort Lauderdale attorney Bradley Edwards, admitting that he leveled false claims in a lawsuit as part of an effort to intimidate Edwards into abandoning his aggressive advocacy for the women, who are now in their late 20s and early 30s.

The developments follow a series of stories published by the Miami Herald in late November that detailed how state and federal prosecutors worked with Epstein's lawyers to conceal the extent of Epstein's crimes, and secretly negotiated an unusual plea agreement that allowed him to escape federal sex trafficking charges that could have sent him to prison for life. The agreement, by design, was kept from his victims so that they could not appear at his sentencing.

Last week, more than two dozen lawmakers in Washington demanded a federal investigation into that plea deal, which was negotiated, signed and sealed by former Miami U.S. Attorney Alexander Acosta, now President Donald Trump's secretary of labor.

Acosta has not commented on the Herald story or on the calls for a probe into how he handled the Epstein case.

This week, a decade after defending Epstein, Dershowitz once again found himself in the spotlight amid the new allegations, mentioned briefly in a court filing on Nov. 28, and first reported on Tuesday by the New York Daily News.

During a Nov. 7 hearing, Maxwell's lawyer, Laura Menninger, mentioned Dershowitz's name as among those "third parties" that Ransome claims she was instructed to have sex with, according to a transcript of the hearing obtained by the Herald.

On Tuesday, after the Daily News published its story, Dershowitz lashed out in dozens of posts on Twitter, denouncing Ransome as "delusional" and claiming that her lawyer, Boies, was retaliating against him because Dershowitz had filed a bar complaint against him.

Alan Dershowitz says he has never met the woman who alleges in a lawsuit she was ordered to have sex with influential men, including the famous lawyer. John Lamparski GETTY IMAGES/TNS

"Attorney David Boies threatened that unless I withdrew a bar complaint I had filed against him for falsely accusing me of sexual misconduct, he would find another woman to accuse me of similar misconduct. He has

now found an unbalanced woman who has delusions of having sex tapes of Donald Trump, Hillary Clinton, Bill Clinton and other prominent figures," Dershowitz said in a tweet.

Boies, best known for arguing on behalf of Vice President Al Gore in the 2000 Florida election recount, responded in an interview with the Herald:

"[Dershowitz's] charges are absurd. Either he has become totally unhinged or he thinks that if he says things that are loud enough and crazy enough it will distract attention from what he has done. There is no support — none — for what he says."

Ransome claimed that, in her early 20s, she was recruited to work as a masseuse for Epstein who, in exchange, promised he would help her get into fashion design in New York, according to her civil lawsuit, filed in January 2017. Epstein and Maxwell then kept her passport and threatened to ruin her life and physically harm her if she didn't have sex with them and others in 2006 and 2007, Ransome said in the complaint.

The complaint alleges that this all occurred at the same time as Epstein's lawyers were negotiating with Acosta and other federal prosecutors for a deal to avoid federal sex trafficking charges in connection with a scheme in which he lured underprivileged girls, mostly 13 to 16, to his home in Palm Beach under the pretense that he would pay them $200 to $300 for massages. Instead, police in Palm Beach found that he had been molesting and sexually abusing dozens of girls between 2001 and 2007.

In this photograph, Virginia Roberts socializes with Prince Andrew as Jeffrey Epstein associate Guislaine Maxwell stands in the background. Roberts claims she was effectively used as a sex slave by Epstein. In that capacity she had sex with the prince, Roberts says. The prince denied that. COURTESY OF VIRGINIA ROBERTS

Under the plea deal, known as a non-prosecution agreement, Epstein was allowed to plead guilty in state court to two prostitution charges. He served 13 months in a private wing of the Palm Beach County jail, where he was given liberal work release privileges. The deal also quashed an FBI investigation into whether Epstein was operating an international sex trafficking organization, the Herald found as part of its yearlong investigation.

"Even as [Epstein, Maxwell and other defendants] and their attorneys were busy arguing Epstein's innocence and publicly defaming his victims as liars...defendants merely changed their location" from Palm Beach to "other places in the U.S. [including the Southern District of New York] and abroad and brought them to Epstein's mansion in New York City and his private island in the Virgin Islands," Ransome's complaint alleged.

Dershowitz, in interviews with the Herald, and in recent public statements, said he has never met Ransome. He also said she initially tried to interest the New York Post in her story, but a reporter whom he said he spoke with told him Ransome was not credible. He said he has a trove of emails between Ransome and the reporter that prove she is a "lunatic."

"There are hundreds of emails in which she claimed to have sex with everybody in the world and also claimed she has video of Hillary Clinton, Bill Clinton, Donald Trump and others having sex with underage girls — but she never ever accused me in these emails," Dershowitz said.

The emails are under seal, he said, and therefore cannot be made public. Dershowitz said he has asked the court to unseal them but his efforts thus far have been unsuccessful.

In the recent court transcript, however, it is Maxwell's attorney, Laura Menninger — not Ransome or her attorneys — who named Dershowitz.

"[Ransome] has alleged not only that my client [Maxwell] ran a sex trafficking organization but she claims also that she was directed by my client and the Epstein defendants to have sex with third parties, including Alan Dershowitz, for example," Menninger said. "And so to the extent my client or Mr. Dershowitz or anyone else is going to be asked about their private sexual activity, I believe that would implicate their privacy rights..."

Roberts, who now lives in Australia, said that Epstein ordered her to have sex with Dershowitz six times, according to a 2015 affidavit, which was filed in connection with an unrelated Epstein federal lawsuit.

At that time, Dershowitz launched a media blitz on TV asserting that Roberts made up the story. He also called for Roberts' lawyers — Edwards and University of Utah law professor Paul Cassell — to be disbarred. The lawyers sued Dershowitz for defamation, and the case was settled last year.

Dershowitz publicly declared he was vindicated after a federal judge ordered Roberts' affidavit stricken from the court record. But the judge did not address the veracity of her sexual misconduct claims; he instead ruled that the affidavit was misplaced in a case not involving Dershowitz.

Boies, whose firm represented Roberts pro bono, addressed Dershowitz's longstanding contention that he had been exonerated.

"Anytime in a lawsuit where you were the defendant and you paid the plaintiff $900,000 to settle it — that's a strange kind of vindication," Boies said, asserting that Dershowitz paid that amount as part of the defamation settlement with Edwards and Cassell.

In 2016, Dershowitz released a statement following what he said was "an independent investigation" that had been conducted by former FBI Director Louis Freeh, who is now a private consultant.

"Our investigation found no evidence to support the accusations of sexual misconduct against Professor Dershowitz. In fact, in several instances, the evidence directly contradicted the accusations made against him," Freeh wrote.

Most of the court records in the Roberts case are sealed. In February, the Miami Herald filed a motion in the Southern District of New York, seeking access to documents. The motion, which was not opposed by Roberts, could shed more light on the full scope of Epstein's crimes and who was involved.

The motion was denied. The Herald is appealing.

https://www.miamiherald.com/latest-news/article223315075.html

From: Jeffrey Epstein [jeevacation@gmail.com]
Sent: 9/10/2010 4:01:03 PM
To: Lesley Groff [redacted]
Subject: Re: List of Events from Siegel

I only wanted what peggy was hositng

On Fri, Sep 10, 2010 at 11:54 AM, Lesley Groff <[redacted]> wrote:

From: Margaux Rogers [mailto[redacted]
Sent: Friday, September 10, 2010 11:53 AM
To: Lesley Groff
Subject: RE: List for JE only from now till Sept 23!!!!!!

Calendar of Major Events, Openings, and Fundraisers

Saturday, September 11, 2010

Kids Fashion Week

Petite Parade Opening Day. Childrens fashion shows. (Continues through September 13.). Metropolitan Pavilion. New York. Contact: Sale Stojanovic. sale@funkshion.com. (305) 673-2756.

Event address: 125 West 18th St., New York. Event web address:www.kidsfashionweekny.com.

Tags: Children Industry Beauty Industry Fashion Industry Media Industry Retail Fashion Event Fashion Show.

Couture Fashion Week

Couture Show. 8:00 am. Couture fashion show, cocktails, and after party. Benefiting the NYC Affiliate of Susan G. Komen For the Cure. Elegant chic. Honoring Dara Richardson-Heron. Tickets from $75.00. Waldorf=Astoria. New York. Contact: Andres Aquino. newyorkfashionshows@yahoo.com. (917) 749-8421.

Waldorf=Astoria: Grand Ballroom. Event address: 301 Park Avenue, New York. Sponsored by Couture Fashion Week. Fax: (212) 202-4604. Event web address:www.couturefashionweek.com/susankomennyc.htm.

Tags: After party Cocktail party Fashion Show Fundraiser Arts Patron Collector Exclusive Mix Food and Wine Lover Industry Fashion Social Patron Health Cancer Medical Research.

New York City - Office of the Mayor

Official Memorial Ceremony and Remebrance 2010. 8:46 am. Zuccotti Park. New York. (212) 442-8953.

Event address: Liberty Street between Broadway and Church Streets, New York.

Tags: Reception Children Family Industry Diplomatic Industry Government Relations Industry Media Industry Military Industry Political/Government Social Patron Civic.

Norman Ambrose

Fashion Week Presentation. 9:00 am. Spring/summer 2011 collection. Invitation only. The Pierre Hotel. New York. info@normanambrose.com.

Event address: 2 East 61st St., New York. Event web address: normanambrose.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Yuna Yang

Fashion Week Presentation. 9:30 am. Spring/summer 2011 collection. Invitation only. Hudson Hotel. New York. press@yunayang.com.

Event address: 356 West 58th St., New York. Event web address: yunayang.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Lacoste Show. 10:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York. Event web address:www.wiseandcomp.com/lacoste.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Showtime Networks

Third Annual Showtime House Opening Day. 10:00 am. (Continues through October 27.) Featuring rooms inspired by Dexter, Nurse Jackie, Weeds, United States of Tara, The Big C, The Borgias, and Californication. Tickets from $15.00. Cassa Hotel and Residences. New York. Contact: Johanna Fuentes. johanna.fuentes@showtime.net. (212) 708-1590.

Event address: 70 West 45th Street, New York. Sponsored by CNET,Lonny Magazine,The New Yorker,Wired Magazine. Event web address: www.sho.com/showtimehouse.

Tags: Designer Showcase Festival Tour Industry Design Industry TV Social Patron.

Mercedes Benz Fashion Week

Cynthia Rowley Show. 11:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Michelle Finocchi. finocchi@cynthiarowley.com. (212) 242-0847.

Event address: West 65th St. and Broadway, New York. Event web address:www.cynthiarowley.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

September Concert Foundation

Various Performances. 11:00 am. Tribute concerts around the city. Various venues. New York.

Event address: , New York. Event web address: www.septemberconcert.org.

Tags: Benefit Performance Concert Children Family Industry Music Social Patron Civic.

United Bamboo

Fashion Week Show. 11:00 am. Spring 2011 collection. Invitation only. Hosfelt Gallery. New York. ub@kruppgroup.com.

Event address: 531 West 36th Street, New York. Event web address: unitedbamboo.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Catholic Big Sisters & Big Brothers of New York

Second Annual Family Polo Day. 12:00 pm. Polo match, lunch, cocktails, designer showcase, silent auction and children's activity field. Tickets from $50.00. Haviland Hollow Farm. Patterson. Contact: Anna Bruning. (212) 475-3291.

Event address: 815 East Branch Road, Patterson. Event web address:www.cbsbb.org/events/fundraising-events/family-polo-event.

Tags: Equestrian Fundraiser Luncheon Children Family Lifestage Kids Social Patron Child Advocacy.

Ohne Titel

Fashion Week Show. 12:00 pm. Spring 2011 collection. Invitation only. Exit Art. New York. Contact: Stephen Courter. stephen@ohnetitel.com. (646) 243-1887.

Event address: 475 10th Ave., New York. Event web address: www.ohnetitel.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Prabal Gurung Show. 1:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Kristen Roller. kristen@prabalgurung.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.prabalgurung.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Juan Carlos Obando

Fashion Week Show. 2:00 pm. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. Contact: Dominique Lafaurie. dominique@jcobando.com.

Event address: 450 West 15th St., New York. Event web address: jcobando.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Adam Show. 2:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Alex Neff. an@adamlippes.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Yoana Baraschi Presentation. 2:30 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. requests@laforce-stevens.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Mik Cire By Eric Kim Presentation. 3:00 pm. Spring 2011 men's collection. Invitation only. Lincoln Center Plaza. New York. Contact: Brynne. brynne@maopr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Alexander Wang

Fashion Week Show. 5:00 pm. Spring 2011 collection. Invitation only. Pier 94. New York. request@kcdworldwide.com.

Event address: 711 12th Avenue @ 55th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Isabella Tonchi

Fashion Week Presentation. 6:00 pm. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. itonchi@kaleidescopepr.net.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Charlotte Ronson Show. 6:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@seventhhousepr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

French Institute/Alliance Francaise

Skyroom Project and Sans-titre. 6:30 pm. Dance theater workshop. French Institute Alliance Francaise. New York. jkutsher@fiaf.org. (646) 388-6677.

Event address: 22 E 60 St., New York. Event web address: www.crossingtheline.org.

Tags: Performing Arts Supporter Social Patron Arts Performing Arts.

A Detacher Collection

Fashion Week Show. 7:00 pm. Spring 2011 collection. Invitation only. Pier 59 Studios, Art and Fashion Group. New York. info@adetacher.com.

Event address: Pier 59, at Chelsea Piers, New York. Event web address: adetacher.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Cocktails and Couture

Bi-annual Event. 7:00 pm. Discussions, light fare, shopping and product preview. Invitation only. Ted Gibson Salon & Spa. New York.

Event address: 184 5th Avenue, New York. Sponsored by HTC,Ralph Lauren,Stila Cosmetics,Suave,Tarte Cosmetics,Unilever,Visine. Noted attendees: Ted Gibson,Zoe Saldana,Robert Verdi. Event web address: www.cocktailsandcouture.net.

Tags: Industry Fashion Industry Media Cocktail party Fashion Event Fashion Show Artist Industry Beauty.

Mercedes Benz Fashion Week

Z Spoke by Zac Posen Show. 7:00 pm. Spring 2011 collection. Lincoln Center Plaza. New York. info@zacposen.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.zacposen.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Robert Geller

Fashion Week Show. 7:00 pm. Spring 2011 collection. Invitation only. Exit Art. New York. rgrsvp@laforce-stevens.com.

Event address: 475 10th Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Suno NY

Fashion Week Presentation. 7:00 pm. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. suno@bpcm.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Altuzarra

Fashion Week Show. 8:00 pm. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. coline@altuzarra.com.

Event address: 450 West 15th St., New York. Event web address: altuzarra.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Elle Magazine

Opening Day. 8:00 pm. Featuring Kardashians for Beach Bunny Swimwear and Joonbug. com after-party. Griffin. New York.

Event address: 50 Gansevoort Street, New York. Event web address:www.elle.com/Runway/Fashion-Week-Style-360-Schedule3.

Tags: After party Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Manuel de la Cruz

Fashion Week Presentation. 8:00 pm. Spring 2011 collection. Invitation only. Metropolitan Pavilion. New York. Contact: Press: Daniella Asantewaa. mdlc.pr@gmail.com.

Event address: 125 West 18th St., New York.

Tags: Industry Media Industry Retail Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion.

September Concert Foundation

Second Annual Gala. 8:00 pm. Cocktails, and dinner. Olympic Tower Atrium. New York. Contact: Jeaninne. rsvp@septemberconcert.org. (212) 333-3399.

Event address: 645 Fifth Avenue, New York. Event web address:www.septemberconcert.org/index.php?option=com_content&view=article&id=105% 3Aour-2nd-annual-gala-even.

Tags: Gala Industry Music Social Patron Civic.

Whitney Eve

Fashion Week Presentation. 8:00 pm. Spring 2011 collection. Invitation only. Industria - Studio 6. New York. Contact: Caitlin Kelly. caitline@alisonbrodpr.com.

Event address: 89 Jane Street, New York. Event web address: whitneyeve.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

John Varvatos

Tenth Anniversary Party. 9:00 pm. Cocktails and entertainment. Invitation only. John Varvatos Boutique. New York.

Event address: 315 Bowery, New York.

Tags: Cocktail party Fashion Event Exclusive Mix Industry Beauty Industry Fashion Industry Media.

Sunday, September 12, 2010

Susan G. Komen for the Cure

20th Annual Komen NYC Race for the Cure. 9:00 am. 5k run/walk. Tickets from $30.00. Central Park. New York. info@komennyc.org. (212) 560-9590.

Event address: , New York. Event web address: www.komennyc.org.

Tags: Walks Social Patron Sports Supporter Sports-Athlete Health Cancer Fundraiser Run.

ASD

2010 New York Expo Opening Day. 9:30 am. Exhibits and shopping. (Continues through September 14.). Jacob K. Javits Convention Center. New York. registration@asdonline.com. (800) 748-5058.

Event address: 655 West 34th St., New York. Event web address:www.asdonline.com/september.

Tags: Consumer Shows Industry Conference Industry Retail.

Mercedes Benz Fashion Week

Derek Lam Fashion Show. 10:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@kcdworldwide.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Timo Weiland Presentation. 10:30 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. rsvp@maguiresteele.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Elle Magazine

Second Day. 11:00 am. Featuring: Gudnitz Couture; Belle Parish by Ali Landry; WALTER presented by Sebastian; followed by Sebastian 25th Anniversary Party at the Griffin. Invitation only. Metropolitan Pavilion. New York.

Event address: 125 West 18th St., New York. Event web address:www.elle.com/Runway/Fashion-Week-Style-360-Schedule3.

Tags: After party Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Lela Rose Fashion Show. 11:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. lelarose@kruppgroup.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Simon Spurr Inc

Fashion Week Show. 11:00 am. Spring 2011 men's collection. Invitation only. Exit Art. New York. Contact: Chris Martinelli. simonspurr@starworksny.com.

Event address: 475 10th Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

VPL by Victoria Bartlett

Fashion Week Show. 11:00 am. Spring 2011 collection. Invitation only. Pier 59 Studios, Art and Fashion Group. New York. vpl@companyagenda.com.

Event address: Pier 59, at Chelsea Piers, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Broadway League

Broadway on Broadway 2010. 11:30 am. Concert. Times Square-43rd and 7th Avenue. New York.

Event address: 43rd Street and 7th Avenue, New York. Sponsored by Continental Airlines,Hue Leggings,New York Times. Event web address: www.ilovenytheater.com.

Tags: Benefit Performance Concert Industry Music Industry Theater Performing Arts Supporter Social Patron Arts Performing Arts.

Preen by Thornton Bregazzi

Fashion Week Show. 11:30 am. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. preen@bpcm.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

DKNY

Fashion Week Show. 1:00 pm. Spring 2011 collection. Invitation only. Stephan Weiss Studio. New York. guestrequests@dkintl.com.

Event address: 711 greenwich st, New York. Event web address: dkny.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media.

Marlon Gobel

Fashion Week Presentation. 1:30 pm. Spring 2011 men's collection. Invitation only. Four Seasons Restaurant. New York. marlongobal@gmail.com.

Event address: 99 East 52nd St., New York. Event web address: www.marlongobel.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Elise Overland

Fashion Week Show. 2:00 pm. Spring/summer 2011 collection. Invitation only. Exit Art. New York. rsvp@maguiresteele.com.

Event address: 475 10th Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Rebecca Taylor Show. 2:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. requests@lsagency.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Rebecca Minkoff Presentation. 2:30 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Meredith Viollis. meredith@rebeccaminkoff.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.rebeccaminkoff.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Herve Leger by Max Azria Show. 3:00 pm. Spring 2010 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Antonio Azzuolo

Fashion Week Show. 3:30 pm. Spring 2011 men's collection. Invitation only. Jack Studios - Studio 6. New York. nicole@bradburylewis.com.

Event address: 601 West 26th Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Designer's Collective

Fashion Week Show. 4:00 pm. Spring/summer 2011 collection. Invitation only. Skylight Studios - West. New York. collective@s30pr.com. (212) 252-2529.

Event address: 500 West 36th St, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Eric Carle Museum of Picture Book Art

Auction Preview Reception. 4:00 pm. Books of Wonder. New York. (413) 658-1100.

Event address: 18 West 18th Street, New York. Event web address: www.carlemuseum.org.

Tags: Reception Artist Arts Patron Collector Industry Publishing Social Patron Arts Museums Arts Visual Arts.

Mercedes Benz Fashion Week

Diane Von Furstenberg Show. 4:00 pm. Spring/summer 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@kcdworldwide.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Araks

Fashion Week Presentation. 5:00 pm. Spring 2011 collection. Invitation only. 303 Gallery. New York. araks@sirenpr.com.

Event address: 525 West 22nd St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Carmen Marc Valvo

Fashion Week Show. 5:00 pm. Spring 2011 collection. Invitation only. NASDAQ Building. New York. pr@lcel.com.

Event address: 4 Times Square, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Cynthia Steffe

Fashion Week Show. 5:00 pm. Spring 2011 collection. Invitation only. Eyebeam. New York. sstiles@cynthiasteffe.com.

Event address: 540 West 21st St., New York. Event web address: cynthiasteffe.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Trias Show. 5:00 pm. Spring/summer 2011 collection. Invitation only. Lincoln Center Plaza. New York. trias@lindagaunt.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Y-3

Fashion Week Show. 5:00 pm. Spring 2011 men's and women's collection. Invitation only. Park Avenue Armory. New York. y-3@adidas.com.

Event address: 643 Park Avenue, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Staerk

Fashion Week Presentation. 6:30 pm. Spring 2010 collection. Invitation only. Milk Gallery-Studios. New York. julissa@bradburylewis.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Tom Ford

Cocktail Party. 6:30 pm. Invitation only. Private Location.

Event web address: tomfordinternational.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion.

Boudoir D'huitres

Fashion Week Show. 7:00 pm. Spring/summer 2011 collection. Invitation only. Exit Art. New York. request@acicognani.com.

Event address: 475 10th Ave., New York. Event web address: boudoir-dhuitres.com.

Tags: Fashion Event Fashion Show Exclusive Mix Food and Wine Lover Industry Fashion Industry Media.

Erickson Beamon

Fashion Week Presentation. 7:00 pm. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. request@seventhhousepr.com.

Event address: 450 West 15th St., New York. Event web address:www.ericksonbeamon.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Erin Fetherston

Fashion Week Show. 7:00 pm. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. erinfetherston@bpcm.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Custo Barcelona Show. 7:00 pm. Spring 2011 men's and women's collections. Invitation only. Lincoln Center Plaza. New York. Contact: Press: Minerva Arboleya. mini@asi-mkt.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Tommy Hilfiger Show. 8:00 pm. Spring/summmer 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@kcdworldwide.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Pamela Love

Fashion Week Preview. 8:00 pm. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. grace.healy@peoplesrevolution.com.

Event address: 450 West 15th St., New York. Event web address: www.pamelalovenyc.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Design Industry Fashion Industry Media Industry Retail.

Peter Jensen

Fashion Week Presentation. 8:00 pm. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. peterjenson@kruppgroup.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Green Shows

Fashion Week: Opening Night Party. 9:00 pm. Cocktails and green fashion. Metropolitan Pavilion. New York. ryan@statepr.com. (646) 714-2520.

Event address: 125 West 18th St., New York. Event web address:www.thegreenshows.com.

Tags: Cocktail party Designer Showcase Fashion Event Fashion Show Opening Exclusive Mix Industry Beauty Industry Design Industry Fashion Industry Media Industry Retail Environmental.

Monday, September 13, 2010

Broadcasters Foundation of America

Celebrity Golf Fundraiser. Siwanoy Country Club. Bronxville. info@thebfoa.org. (212) 373-8250.

Event address: Pondfield Road, Bronxville. Event web address:www.broadcastersfoundation.org.

Tags: Fundraiser Golf Industry Media Association.

AHRC - Association for the Help of Retarded Children

Margiotta Memorial Golf Outing. 8:00 am. Tickets from $400.00. Lake Success Golf Club. Lake Success. Contact: Marcia Pulewitz. (516) 626-1075.

Event address: 318 Lakeville Road, Lake Success. Event web address:www.ahrc.org/events.0.html.

Tags: Fundraiser Golf Social Patron.

Mercedes Benz Fashion Week

William Tempest Presentation. 8:30 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. (212) 242-9353.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Jenny Packham Show. 9:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. pr@jennypackham.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.jennypackham.com.

Tags: Industry Fashion Industry Media Industry Retail Fashion Event Fashion Show Exclusive Mix Industry Beauty.

HELP USA

12th Annual Golf Tournament & Auction. 10:00 am. Brunch, competition, cocktails, and dinner. Chaired by Kenneth Cole. Co-chaired by Neil Cole,David Simon. Tickets from $3,000.00. The Golf Club of Purchase. Purchase. Contact: Elizabeth Litsch. elitsch@innovativephilanthropy.net. (212) 867-1117.

Event address: 10 Country Club Drive, Purchase. Sponsored by Kenneth Cole Productions Inc.,Risk Strategies Company. Fax: (212) 867-3720.

Tags: Cocktail party Dinner Fundraiser Golf Social Patron.

Mercedes Benz Fashion Week

Carolina Herrera Show. 10:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Richard Chai

Fashion Week Show. 10:00 am. Spring 2011 men's collection. Invitation only. Milk Gallery-Studios. New York. request@kcdworldwide.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Elle Magazine

Third Day. 11:00 am. Featuring: Malan Breton presented by Rado; Rajvi Mohan presented by New Era; and Indashio. Metropolitan Pavilion. New York.

Event address: 125 West 18th St., New York. Event web address:www.elle.com/Runway/Fashion-Week-Style-360-Schedule3.

Tags: Industry Media Industry Retail Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion.

Essence Magazine

"Fierce & Fabulous Awards" Luncheon. 11:00 am. Program. Honoring Beverly Bond,Esi Eggleston Bracey,Roslyn M. Brock,Dr. Wafaa El-Sadr,Valerie Jarrett,Sheryl Lee Ralph, Susan Rice, Faith Ringgold, Anika Noni Rose,Cicely Tyson,Kerry Washington,Wendy Williams. Mandarin Oriental New York. New York. Contact: Dana Baxter. dbaxter@essence.com.

Event address: 80 Columbus Circle, New York. Sponsored by Buick,Clinique. Noted attendees: Gayle King, Gabrielle Union. Event web address: essence.com.

Tags: Awards/Awards Shows Luncheon Social Patron Women.

Graeme Armour

Fashion Week Presentation. 11:00 am. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. graemearmour@exposure.net.

Event address: 450 West 15th St., New York. Event web address: www.graemearmour.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Lulu Frost

Fashion Week Presentation. 11:00 am. Spring 2011 jewelry collection. Invitation only. Milk Gallery-Studios. New York. Sandra@lulufrost.com.

Event address: 450 West 15th St., New York. Event web address: lulufrost.com.

Tags: Designer Showcase Fashion Event Exclusive Mix Industry Beauty Industry Design Industry Fashion Industry Media Industry Retail.

Malan Breton Collection

Fashion Week Show. 11:00 am. Spring 2011 collection. Invitation only. Metropolitan Pavilion. New York. Spring11@malanbreton.com.

Event address: 125 West 18th St., New York. Event web address: malanbreton.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Carlos Miele Show. 11:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Emilia Cima. emilia@carlosmiele.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.carlosmiele.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Zero + Maria Cornejo

Fashion Week Show. 11:00 am. Spring/summer 2011 collection. Invitation only. Hosfelt Gallery. New York. zeromariacornejo@prconsulting.net.

Event address: 531 West 36th Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Reem Acra

Fashion Week Presentation. 11:30 am. Spring 2011 collection. Invitation only. Reem Acra. New York. rsvp@reemacra.com.

Event address: 730 Fifth Avenue, New York. Event web address: reemacra.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Diesel - Black Gold

Fashion Week Show. 12:00 pm. Spring 2011 collection. Invitation only. Pier 92. New York.

Event address: 51st Street at 12th Avenue, New York. Event web address: diesel.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Marisol Henriquez

Fashion Week Show. 1:00 pm. Spring/summer 2011 collection. Invitation only. Skylight Studios - West. New York. marisolhenriquez@s30pr.com.

Event address: 500 West 36th St, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Tracy Reese Show. 1:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. requests@lsagency.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Donna Karan Collection

Fashion Week Show. 2:00 pm. Spring 2011 collection. Invitation only. Donna Karen's Studio. New York. slane@dkintl.com.

Event address: 711 Greenwich Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Jenni Kayne

Fashion Week Presentation. 3:00 pm. Spring/summer 2011 collection. Invitation only. Industria Superstudio. New York. brendan@bradburylewis.com.

Event address: 775 Washington St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Monique Lhuiller Show. 3:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Melissa Duren. melissa@starworksny.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Linda Rowe Thomas

Fashion Week Show. 4:00 pm. Spring/summer 2011 collection. Invitation only. Skylight Studios - West. New York. romas@s30pr.com.

Event address: 500 West 36th St, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Chris Benz

Fashion Week Presentation. 4:30 pm. Spring/summer 2011 collection. Invitation only. David Rubenstein Atrium. New York. chrisbenz@kruppgroup.com.

Event address: 61 West 62nd Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Alexandre Herchcovitch Show. 5:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. ahshow@bpcm.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Temperley London

Fashion Week Presentation. 5:00 pm. Spring/summer 2011 collection. Invitation only. Milk Gallery-Studios. New York. scarlett@starworksgroup.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Asia Society

Benefit Dinner. 6:00 pm. Cocktail reception, exhibition viewing of "Yoshitomo Nara: Nobody's Fool" and dinner. Asia Society and Museum. New York. Contact: Wenxiao Guo. wguo@asiasociety.org. (212) 327-9247.

Event address: 725 Park Avenue, New York.

Tags: Dinner Fundraiser Arts Patron Collector Ethnic Asian American Social Patron Arts Libraries.

Chado Ralph Rucci

Fashion Week Show. 6:00 pm. Spring 2010 collection. Invitation only. 536 Broadway. New York. rsvp@chadoralphrucci.net.

Event address: 536 Broadway, New York. Event web address: chadoralphrucci.net.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Harper's Bazaar

Accessories Bazaar Cocktail Party. 6:00 pm. Invitation only. Lincoln Center-Avery Fisher Hall. New York. bazaarrsvp@hearst.com.

Event address: 10 Lincoln Center Plaza, New York. Sponsored by Willow Club.

Tags: Awards/Awards Shows Cocktail party Fashion Event Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Publishing Industry Retail.

Mercedes Benz Fashion Week

Betsey Johnson Show. 6:00 pm. Spring/summer 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Katelyn Brehony. katelyn@betseyjohnson.com. (212) 244-3400.

Event address: West 65th St. and Broadway, New York. Event web address:www.betseyjohnson.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Food Industry Media Industry Retail.

Michael Bastian

Fashion Week Show. 6:00 pm. Spring/summer 2011 men's collection. Invitation only. Exit Art. New York. eugenia@michaelbastiannyc.com.

Event address: 475 10th Ave., New York. Event web address: michaelbastiannyc.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Vogue Magazine

Cocktail Party. 6:00 pm. Book preview of "Ruben Toledo's Fashion Almanac". Invitation only. Private Location.

Noted attendees: Ruben Toledo.

Tags: Cocktail party Exclusive Mix Industry Beauty Industry Fashion Industry Publishing.

Mercedes Benz Fashion Week

Perry Ellis Show. 7:00 pm. Spring 2011 men's collection. Invitation only. Lincoln Center Plaza. New York. persvp@lsagency.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Marc Jacobs

Fashion Week Show. 8:00 pm. Spring 2011 collection. Invitation only. 69th Regiment Armory. New York. request@kcdworldwide.com.

Event address: 68 Lexington Ave., New York. Event web address: marcjacobs.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Tuesday, September 14, 2010

Adweek Magazine

Marketer of the Year Event. Cocktails, dinner and program. Museum of Arts & Design. New York.

Event address: 40 West 53rd St., New York. Event web address:www.adweekmedia.com/aw/events/index.html.

Tags: Awards/Awards Shows Cocktail party Dinner Industry Marketing Industry Media.

Mercedes Benz Fashion Week

Elie Tahari Show. 9:00 am. Spring 2011 men's and women's collections. Invitation only. Lincoln Center Plaza. New York. Contact: Carrie Drazan. carried@elietahari.com.

Event address: West 65th St. and Broadway, New York. Event web address: elietahari.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Karen Walker

Fashion Week Show. 10:00 am. Spring/summer 2011 collection. Invitation only. Exit Art. New York. nicole@bradburylewis.com.

Event address: 475 10th Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Badgley Mischka Show. 10:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Tara Levy. (212) 730-0030.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Elle Magazine

Closing Day. 10:30 am. Featuring: Bobi / Boy Meets Girl / Caravan presented by Starbucks Frappuccino; SACHIKA presented by Alisa Maria; bebe and bebe after party at Griffin. Invitation only. Metropolitan Pavilion. New York.

Event address: 125 West 18th St., New York. Event web address:www.elle.com/Runway/Fashion-Week-Style-360-Schedule3.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Vera Wang Show. 11:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. verawand@prconsulting.net.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Hudson Union Society

Discussion Event. 1:00 pm. Speaker(s): Bill OReilly. Private Location.

Event web address: www.runmyclub.com/hudson/eventcalendar.asp?id=206108.

Tags: Discussion Industry Government Relations Industry Media Social Patron.

Matthew Ames

Fashion Week Show. 1:00 pm. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. info@fashionhaus.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Rosa Cha Show. 1:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: TJ Allers. tallers@greatpress.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Film Supporter Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Bibhu Mohapatra. 1:30 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mulberry

Fashion Week Presentation. 1:30 pm. Spring/summer 2010 rtw collection. Invitation only. Soho House New York. New York. request@kcdworldwide.com.

Event address: 29-35 Ninth Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Max Azria Show. 2:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Patrick McGregor.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Dennis Basso Show. 3:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. dennisbasso@bpcm.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

TSE

Fashion Week Presentation: Jason Wu for Tse. 3:00 pm. Spring 2011 collection. Invitation only. Industria Superstudio. New York. request@tse-us.com.

Event address: 775 Washington St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Marc by Marc Jacobs

Fashion Week Show. 4:00 pm. Spring 2011 collection. Invitation only. 69th Regiment Armory. New York.

Event address: 68 Lexington Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Pamella Roland

Fashion Week Presentation. 5:30 pm. Spring 2011 collection. Invitation only. Whitney Museum of American Art. New York.

Event address: 945 Madison Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Hunter College

Wedding Contracts 101. 6:00 pm. Discussions and workshops. Tickets from $50.00. Hunter College. New York. Contact: Tye Robertson. events@efyp.com. (917) 597-7343.

Event address: 71 East 94th Street, New York. Fax: (516) 616-5053. Event web address:www.hunter.cuny.edu/ce.

Tags: Discussion Lecture Networking Weddings Industry Marketing Industry Meetings and Events.

Jones Magazine

Inaugural Jones Awards. 6:00 pm. Program. Alvin Ailey American Dance Theater. New York. Contact: Media: Marie Dasaro. mdasaro@thinkpublicrelations.com. (212) 343-3920.

Event address: 405 West 55th St., New York. Sponsored by My Black is Beautiful. Event web address: jonesmag.com.

Tags: Awards/Awards Shows Industry Media Industry Publishing Social Patron.

Mercedes Benz Fashion Week

Luca Luca Show. 6:00 pm. Spring/summer 2011 collection. Invitation only. Lincoln Center Plaza. New York. rsvp@lucaluca.com.

Event address: West 65th St. and Broadway, New York. Event web address: lucaluca.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Yigal Azrouel

Fashion Week Show. 6:00 pm. Spring 2011 collection. Invitation only. Exit Art. New York. yigalazrouel@lindagaunt.com.

Event address: 475 10th Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

American Friends of the Hebrew University - President's Council

Maimonides Award Dinner. 6:30 pm. Cocktails and program. Honoring George Barrett. Location to be determined. jglodstein@afhu.org.

Event address: More information to come shortly,. Event web address:www.afhu.org/civicrm/event/info?reset=1&id=76.

Tags: Awards/Awards Shows Dinner Fundraiser Industry Diplomatic Religious Jewish Social Patron Faith Jewish.

Cooper Union for the Advancement of Science and Art

Lecture. 6:30 pm. "Promise Me", book signing and q&a. Speaker(s): Honorable Nancy Goodman Brinker. Cooper Union's Great Hall. New York. (212) 353-4195.

Event address: 7 East 7th St., New York. Event web address: www.cooper.edu.

Tags: Book Launch Party Lecture Reception Industry Media Social Patron Health Cancer.

Maimonides Medical Center

Annual Award Dinner. 6:30 pm. Cocktails and program. Honoring George Barrett. Chaired by Marc N. Casper, Phillip Frost, MD,Harvey M. Krueger,Lee Perlman, Marvin Samson, Abigail Wexner, Leslie Wexner, Shlomo Yanai. Tickets from $500.00. Tables from $10,000.00. The Pierre Hotel. New York. nsmook@afhu.org. (212) 607-8517.

Event address: 2 East 61st St., New York. Event web address:www.afhu.org/civicrm/event/info?reset=1&id=76.

Tags: Awards/Awards Shows Dinner Fundraiser Religious Jewish Social Patron Association Civil/Human Rights Education University Faith Jewish Health Clinics/Health Care.

Mercedes Benz Fashion Week

Sophie Theallet Presentation. 6:30 pm. Spring/summer 2011 collection. Invitation only. Lincoln Center Plaza. New York. sophietheallet@cmmediapr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail Fashion Event Fashion Show.

G-Star

Fashion Week Show. 7:00 pm. Spring 2011 collection. Invitation only. Pier 94. New York. g-star@hlgrp.com.

Event address: 711 12th Avenue @ 55th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

TIBI Show. 7:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Press: Liz Walker. liz.walker@tibi.com.

Event address: West 65th St. and Broadway, New York. Event web address: tibi.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Narciso Rodriguez Show. 8:00 pm. Spring/summer 2011 collection. Invitation only. Lincoln Center Plaza. New York. narcisorodriguez@prconsulting.net.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Toni Francesc Show. 8:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. requests@peoplesrevolution.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Style.com

Tenth Anniversary Party. 9:00 pm. Invitation only. Private Location. info_style@style.com.

Event web address: style.com.

Tags: Cocktail party Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Publishing.

Rachel Roy

Fashion Week Presentation. 9:30 pm. Spring 2011 collection. Invitation only. Lincoln Center for the Performing Arts. New York. rachelroy@hlgrp.com.

Event address: 10 Lincoln Center Plaza, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Wednesday, September 15, 2010

Min Online

Integrated Marketing Awards. Program. Grand Hyatt New York. New York. Contact: Saun Sayamongkhun. saun@accessintel.com. (301) 354-1610.

Event address: Park Ave. at Grand Central Terminal, New York. Event web address:www.minonline.com/awards/ima2010.html.

Tags: Awards/Awards Shows Industry Media Industry Publishing.

Business Development Institute

Mobile Social Communications Conference. 8:00 am. Discussions and networking. Speaker(s): BJ Emerson, Kevin Lee, Nihal Mehta, Rick Wion. The Graduate Center, City University of New York. New York. Contact: Maria Feola. mfeola@bdionline.com. (800) 830-6687.

Event address: 365 Fifth Ave., New York. Sponsored by KIT Digital,PR Newswire,Tasti D-Lite,Yelp. Event web address: guest.cvent.com/EVENTS/Info/Summary.aspx?e=d2a52a68-23a0-4e2e-9028-ed9b039 04ce2.

Tags: Discussion Industry Conference Networking Panel Industry Internet Industry Marketing.

The Economist

"Ideas Economy: Human Potential" Conference Opening Day. 8:00 am. Discussions, workshops and networking. (Continues through September 16.). Speaker(s): David Brooks, Jordi Canals,Chancellor Joel I. Klein, Jeff Lehman, Paul Romer,John Sexton,Dr. Shirley M. Tilghman, Vijay Vaitheeswaran, Adrian Wooldridge. Tickets from $1,595.00. Chelsea Piers. New York. humanpotentialevent@economist.com.

Chelsea Piers: Pier Sixty. Event address: 23rd St. at the Hudson River, New York. Sponsored by Innocentive,Society for Human Resource Management. Event web address:ideas.economist.com/content/programme.

Tags: Discussion Industry Conference Networking Panel Industry Financial Industry Marketing Industry Media Industry Meetings and Events Industry Publishing.

Mercedes Benz Fashion Week

Bill Blass Presentation. 8:30 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Tory Burch Presentation. 9:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. spring2011@toryburch.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.toryburch.com.
Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Michael Kors Show. 10:00 am. Spring 2011 men's and women's collections. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.
Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Nanette Lepore Show. 11:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. nanettelepore@lindagaunt.com.

Event address: West 65th St. and Broadway, New York.
Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Kingsbrook Jewish Medical Center

Tenth Annual Celebrity Golf & Tennis Classic. 11:30 am. Tournament, cocktails and dinner. Tickets from $400.00. North Hempstead Country Club. Great Neck. Contact: Joyce Leiz. KJMCFdn@kingsbrook.org. (718) 604-5479.

Event address: 75 N Station Plaza, Great Neck. Event web address: www.kingsbrook.org.
Tags: Cocktail party Dinner Fundraiser Golf Tennis Health Clinic Health Hospitals.

Douglas Hannant

Fashion Week Show. 12:00 pm. Spring 2011 collection. Invitation only. The Plaza Hotel. New York. runwayshow@douglashannant.com.

Event address: 770 Fifth Ave, New York. Event web address: douglashannant.com.
Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Jeremy Scott

Fashion Week Show. 1:00 pm. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. requests@peoplesrevolution.com.

Event address: 450 West 15th St., New York.
Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

General Idea Show. 1:00 pm. Spring 2011 men's collection. Invitation only. Lincoln Center Plaza. New York. jess@williamsonpr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Vittadini Presentation. 1:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. vittadini@companyagenda.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

3.1 Phillip Lim

Fashion Week Show. 2:00 pm. Spring 2011 women's collection. Invitation only. Park Avenue Armory. New York. request@kcdworldwide.com.

Event address: 643 Park Avenue, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Gottex Show. 2:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. gottex@atelierpr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Yigal Azrouel

Fashion Week Show. 2:00 pm. Spring 2011 men's collection. Invitation only. Pier 59 Studios, Art and Fashion Group. New York.

Event address: Pier 59, at Chelsea Piers, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Milly by Michelle Smith Show. 3:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. requests@laforce-stevens.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Marchesa

Fashion Week Presentation. 3:30 pm. Spring 2011 collection. Invitation only. Chelsea Art Museum. New York.

Event address: 556 West 22nd St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Eva Minge

Fashion Week Show. 4:00 pm. Spring 2011 collection. Invitation only. Exit Art. New York. requests@peoplesrevolution.com.

Event address: 475 10th Ave., New York. Event web address: www.evaminge.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Loris Diran Couture

Fashion Week Presentation. 5:00 pm. Spring/summer 2011 collection. Invitation only. Audi Forum. New York. pr@lorisdiran.com.

Event address: 250 Park Ave., New York. Event web address: lorisdiran.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Odd Molly Show. 5:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@seventhhousepr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Cosmetic Executive Women

Newsmaker Forum. 5:30 pm. Cocktails and discussion. Tickets from $175.00. Harmonie Club. New York. Contact: Tara Russo. trusso@cew.org. (646) 929-8026.

Event address: 4 East 60th St., New York. Event web address:www.cew.org/eweb/DynamicPage.aspx?webcode=EventInfo&Reg_evt_key=AD2B92A4-1 18C-4A7A-94A7-7241F0BFF81F.

Tags: Discussion Networking Industry Beauty Industry Marketing.

Mercedes Benz Fashion Week

Anna Sui Show. 6:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@kcdworldwide.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

United Cerebral Palsy Association of Nassau County

Annual Taste & Toast the Town. 6:00 pm. Tastings. Chaired by Joe Mandaro,Kathy Wilson. Tickets from $100.00. Chateau Briand. Carle Place. Contact: Michelle Gevirtz. mgevirtz@ucpn.org. (516) 377-2063.

Event address: 440 Old Country Road , Carle Place. Event web address:www.ucpn.org/index.php/site/events_detail/2010_taste_toast_the_town/.

Tags: Fundraiser Tasting Industry Medical Profession Social Patron Health Neurological.

Village Alliance

A Taste of the Village 2010. 6:00 pm. Wine and culinary tastings. Tickets from $40.00. Washington Square Park. New York. bid@villagealliance.org. (212) 777-2173.

Event address: , New York. Event web address: www.villagealliance.org.

Tags: Festival Tasting Wine Tasting Family Food and Wine Lover Industry Food Industry Restaurant Social Patron Association Economic Development.

Mercedes Benz Fashion Week

Mackage Presentation. 6:30 pm. Spring 2011 women's rtw and men's and women's outerwear. Invitation only. Lincoln Center Plaza. New York. pr@mackage.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

United Cerebral Palsy of New York City

Volunteer Appreciation Event "Celebrating 65 Years of Volunteerism". 6:30 pm. Cocktails and awards program. Speaker(s): Donna Hanover, Timothy Mandala. Prince George Ballroom. New York. Contact: James Grant. James@michaelrussellgroup.com. (917) 626-1300.

Event address: 15 East 27th St., New York. Noted attendees: John Lombardo, Edward R. Matthews.

Tags: Awards/Awards Shows Reception Social Patron Civic Health Misc.

Althea Harper

Fashion Week Presentation. 7:00 pm. Spring 2011 collection. Invitation only. Red Bull Space. New York. press@altheaharper.com.

Event address: 40-42 Thompson St, New York. Event web address: altheaharper.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Stanley Adams Couture

Fashion Week Show. 7:30 pm. Spring 2011 collection. Invitation only. Jimmy Crystal. New York. pr@jimmycrystal.com.

Event address: 260 West 35th Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Adrienne Zernich

Fashion Week Show. 8:30 pm. Spring 2011 collection. Invitation only. National Arts Club. New York. aazinnyc@aol.com.

Event address: 15 Gramercy Park South, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Imitation

Fashion Week Show. 9:00 pm. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. request@seventhhousepr.com.

Event address: 450 West 15th St., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Zang Toi Show. 9:00 pm. Spring 2010 collection. Invitation only. Lincoln Center Plaza. New York. zangtoi@houseoftoi.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Thursday, September 16, 2010

POSSIBLE THREATS: 84th Annual San Gennaro Fest: Mulberry St

New York Botanical Garden

Lillian and Amy Goldman Stone Mill Grand Opening. New York Botanical Garden. Bronx. (718) 817-8700.

Event address: Bronx River Parkway at Fordham Road, Bronx. Event web address:www.nybg.org.

Tags: Opening Social Patron Environmental.

Latin Vision Media

Marketing to Latinos: Travel & Hospitality. 8:00 am. Conference and business networking. TBD. info@latinvision.com.

Event address: T BD,. Event web address: www.latinvision.com/conference/travel.

Tags: Discussion Industry Conference Networking.

Feast of San Gennaro

84th Annual Festival. 9:00 am. Light fare, concerts, ceremonies and parade. (Continues through September 26.). Mulberry Street between Canal and Houston. New York. (212) 768-9320.

Event address: 125 Mulberry St., New York. Event web address: sangennaro.org.

Tags: Concert Festival Children Ethnic Italian American Family Lifestage Kids Faith Catholic.

Mercedes Benz Fashion Week

J Mendel Show. 9:00 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. jmendel@lindagaunt.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Ralph Lauren

Fashion Week Show. 10:00 am. Spring 2011 collection. Invitation only. Skylight Studios. New York. Contact: Melanie Fisher. fashionshow@poloralphlauren.com. (212) 857-2584.

Event address: 275 Hudson St., New York. Event web address: www.poloralphlauren.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Helen Yarmak

Fashion Week Presentation. 10:30 am. Spring 2011 collections. Invitation only. Helen Yarmak Penthouse Showroom. New York. Contact: Sandy Blye. sandyblye@helenyarmak.com.

Event address: 730 Fifth Avenue, New York. Event web address: helenyarmak.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Jeremy Laing

Fashion Week Show. 11:00 am. Spring 2011 collection. Invitation only. Milk Gallery-Studios. New York. rsvp@jeremylaing.com.

Event address: 450 West 15th St., New York. Event web address: www.jeremylaing.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Andy & Debb Presentation. 11:30 am. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. request@seventhhousepr.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Isaac Mizrahi Show. 12:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Meghan Horstmann. meghan@isaacmizrahiny.com.

Event address: West 65th St. and Broadway, New York. Event web address:www.isaacmizrahiny.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Davidelfin Show. 1:00 pm. Spring 2011 men's and women's collection. Invitation only. Lincoln Center Plaza. New York. requests@peoplesrevolution.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Angel Sanchez

Fashion Week Presentation. 2:00 pm. Spring 2011 collection. Invitation only. 148 West 37th Street. New York. rsvp@angelsanchez.com.

Event address: 148 West 37th Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Consulate General & Promotion CTR. of Argentina in NY. 2:00 pm. Spring 2011 collections. Invitation only. Lincoln Center Plaza. New York. press@acicgnani.com.

Event address: West 65th St. and Broadway, New York.

Tags: Designer Showcase Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Diplomatic Industry Fashion Industry Government Relations Industry Media Industry Retail.

Stephen Burrows

Fashion Week Presentation. 2:00 pm. Spring 2011 collection. Invitation only. 209 West 38th Street. New York. kendra@citygirlconcepts.com.

Event address: 209 West 38th Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Joanna Mastroianni

Fashion Week Presentation. 2:30 pm. Spring 2011 collection. Invitation only. 230 West 38th Street. New York. joannMST@aol.com.

Event address: 230 West 38th Street, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Calvin Klein

Fashion Week Show. 3:00 pm. Spring 2011 collection. Invitation only. Calvin Klein. New York. womensrunwayshow@ck.com.

Event address: 205 West 39th Street, New York. Event web address: www.ck.com.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Elene Cassis

Fashion Week Show. 5:00 pm. Spring 2011 collection, followed by after-party. Invitation only. Exit Art. New York. elenecassis@lapresspr.com.

Event address: 475 10th Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Oscar de la Renta

Fashion Week Show. 5:00 pm. Spring 2011 collection. Invitation only. 583 Park Avenue. New York.

Event address: 583 Park Ave., New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

New York Times

T Magazine Cocktail Reception. 6:00 pm. Invitation only. Location to be determined. Contact: Leslie Johnson. leslie@karlaotto.com.

Event address: More information to come shortly,.

Tags: Cocktail party Industry Media Industry Publishing.

New York Times

Cocktail Reception. 6:30 pm. Invitation only. Location to be determined.

Event address: More information to come shortly,.

Tags: Cocktail party Fashion Event Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Publishing.

New-York Historical Society

Nueva York VIP Opening. Invitation only. El Museo del Barrio. New York. bbotwinick@nyhistory.org. (212) 873-3400.

Event address: 1230 Fifth Ave., New York. Event web address: www.nyhistory.org.

Tags: Opening Reception Artist Arts Patron Collector Social Patron Arts Museums.

Nexus Showroom

Press & Buyers Cocktail Reception. 6:30 pm. Invitation only. Nexus Showroom. New York. Contact: Sasha Wolfe. info@nexusshowroom.com.

Event address: 39 West 56th Street, New York. Event web address: nexusshowroom.com.

Tags: Cocktail party Industry Beauty Industry Design Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Naeem Khan Show. 7:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Dom Perignon

Celebration. 8:00 pm. Invitation only. Private Location. ursula@nadinejohnson.com.

Tags: Fashion Event Reception Exclusive Mix.

Mercedes Benz Fashion Week

L.A.M.B. Show. 8:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Calvin Klein

Post-Show Dinner. 9:00 pm. Invitation only. Private Location.

Tags: After party Dinner Fashion Event Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Mercedes Benz Fashion Week

Ivana Helsinki. 9:00 pm. Spring 2011 collection. Invitation only. Lincoln Center Plaza. New York. Contact: Keri Ingvarsson. ivanahelsinki@thekingcollective.com.

Event address: West 65th St. and Broadway, New York.

Tags: Fashion Event Fashion Show Exclusive Mix Industry Beauty Industry Fashion Industry Media Industry Retail.

Saturday, September 18, 2010

Women's Health Magazine

Are You Game? Festival. 10:00 am. Featuring workout classes, virtual kayaking, cooking demonstrations, a makeover cabana, mechanical bull, one-on-one golf instruction, and reception. Hudson River Park at Pier 46. Contact: Shay Pantano. Shay.Pantano@Coburnww.com. (212) 730-7277.

Event address: 46 Charles Street,.

Tags: Festival Reception Social Patron Sports Supporter Sports-Athlete Health Misc. Social Services Food Banks.

Opportunities for a Better Tomorrow

Second Annual "Battle of the Badges" Charity Softball Game. 11:00 am. Tournament, family activities, K-9 demonstrations, health screenings, and performances. Tickets from $10.00. MCU Park - Coney Island. Contact: Deborah Roman. info@obtjobs.org. (718) 869-6772.

Event address: 1904 ,. Fax: (718) 369-1518. Event web address:www.obtjobs.org/index.php/101.

Tags: Competition Fundraiser Reception Children Family Social Patron Civic.

Sunday, September 19, 2010

Actors Fund

Special Performance. 8:00 pm. "Promises, Promises". Tickets from $61.50. Broadway Theatre. New York. Contact: Stephen Joseph. sjoseph@actorsfund.org. (212) 221-7300.

Event address: 1681 Broadway, New York. Event web address: wwww.actorsfund.org.

Tags: Benefit Performance Fundraiser Social Patron Arts Performing Arts Arts Visual Arts Civil/Human Rights Family/Social Services Gay Rights Health Aging Health AIDS Health Clinic Health Misc. Social Services Counseling.

Monday, September 20, 2010

POSSIBLE THREATS: UN Summit: Midtown

New York Public Library

President's Council Dinner. Cocktails and program. Invitation only. New York Public Library. New York. klaino@nypl.org. (212) 930-0553.

Event address: Fifth Ave. & 42nd St., New York. Event web address: www.nypl.org.

Tags: Dinner Lecture Arts Patron Social Patron Arts Libraries.

United Nations

Millenium Development Goals Summit Opening Day. Discussions. (Continues through September 22.). Speaker(s): Sec. Gen. Ban Ki-Moon. United Nations. New York.

Event address: First Avenue at 46th Street, New York. Event web address:www.un.org/en/mdg/summit2010/.

Tags: Discussion Lecture Industry Diplomatic Industry Political/Government Child Advocacy Civic Civil/Human Rights Health Misc.

SHARE - Self Help for Women with Breast or Ovarian Cancer

Seventh Annual "A Second Helping of Life'. 7:00 am. Cocktails, dinner, silent and live auction. Honoring Joanne Minieri,Muriel Siebert. Tickets from $300.00. Tables from $5,000.00. Pier 60. Contact: Beth Kling. bkling@sharecancersupport.org. (212) 719-0364.

Event address: Westside Highway between 19th and 20th Streets,. Noted attendees: Alex Guarnaschelli, Julie Reiner.

Tags: Auction Cocktail party Dinner Fundraiser Food and Wine Lover Industry Food Industry Restaurant Social Patron Health Cancer.

Molteni&C

Reception. 6:00 pm. Cocktails. Invitation only. Molteni&C Dada Unifor - Flagship Store. New York. rsvp@moltenidada.com.

Event address: 60 Greene Street, New York. Event web address: www.moltenidada.com.

Tags: Opening Reception Industry Design Industry Fashion Industry Media Industry Real Estate/Architecture.

Friends of the Upper East Side Historic Districts

Seventh Annual Award Dinner. 6:30 pm. Cocktails and program. Business attire. Speaker(s): William J. Higgins. Honoring David W. Levinson. Tickets from $200.00. Tables from $5,000.00. Location to be determined. info@friends-ues.org. (212) 535-2526.

Event address: More information to come shortly,. Fax: (212) 535-2155. Event web address:www.friends-ues.org/events.

Tags: Awards/Awards Shows Dinner Fundraiser Social Patron Association.

Rosie O'Donnell's Broadway Kids Foundation

Annual Building Dreams for Kids Gala. 6:30 pm. Reception and program. Honoring Neil Friedman,Michael Goldstein. Co-chaired by Robert A. Eckert, Jim Fogarty, Curt Forsythe,James M. Nederlander,James L. Neederlander,Eileen Newman,Arthur Newman, Catherine Oppenheimer,Lee Perlman,Ruthe Ponturo,Tony Ponturo,Marva Smalls,Reuven Spiegel. Tickets from $500.00. Tables from $10,000.00. New York Marriott Marquis. New York. (914) 579-1000.

Event address: 1535 Broadway, New York. Event web address:www.rosiesbroadwaykids.org.

Tags: Awards/Awards Shows Gala Industry Theater Performing Arts Supporter Social Patron.

New York Television Festival

Sixth Annual Festival Opening Night. 7:30 pm. ABC's "Detroit 1-8-7" screening. (Festival continues through September 25.). SVA Theatre. New York. (718) 350-8519.

Event address: 333 West 23rd St., New York. Event web address: www.nytvf.com.

Tags: Festival Opening Screenings Industry Film Industry Media Industry TV Arts Visual Arts.

Tuesday, September 21, 2010

AccessoriesTheShow

2010 Show Opening Day. 9:00 am. Exhibits and shopping. (Continues through September 23.). Jacob K. Javits Convention Center. New York. (212) 686-4412.

Event address: 655 West 34th St., New York. Event web address:www.accessoriestheshow.com/contact.html.

Tags: Consumer Shows Industry Conference Industry Beauty Industry Fashion.

ENK International Trade Events

Sole Commerce 2010 Show Opening Day. 9:00 am. Exhibits, discussions, fashion previews, shopping. (Continues through September 23.). Jacob K. Javits Convention Center. New York. enkshows@enkshows.com. (212) 759-8055.

Event address: 655 West 34th St., New York. Event web address:www.enkshows.com/acic/.

Tags: Consumer Shows Industry Conference.

ENK International Trade Events

Coterie Show Opening Day. 9:00 am. Presentations and exhibits. (Continues through September 23.). Jacob K. Javits Convention Center. New York. coterie@enkshows.com. (212) 759-8055.

Event address: 655 West 34th St., New York. Event web address: enkshows.com/coterie.

Tags: Consumer Shows Fashion Event Industry Conference Industry Design Industry Fashion Industry Retail.

Capsule

Capsule Show. 10:00 am. Women's summer and spring 2011 collections. Continues through September 22. Angel Orensanz Foundation for the Arts. New York. info@capsuleshow.com. (212) 206-8310.

Event address: 172 Norfolk St., New York. Event web address: www.capsuleshow.com.

Tags: Discussion Shopping/Sample Sale Trade Shows Industry Beauty Industry Fashion.

Appeal of Conscience Foundation

2010 Dinner. 6:00 pm. Reception and program. Speaker(s): Rabbi Arthur Schneier. Honoring John Elkann,Stephen Schwarzman,Hon. Dr. Manmohan Singh. Waldorf=Astoria. New York. hcannon@rubenstein.com. (212) 843-8072.

Waldorf=Astoria: Grand Ballroom. Event address: 301 Park Avenue, New York.

Tags: Awards/Awards Shows Dinner Fundraiser Industry Diplomatic Industry Government Relations Industry Political/Government Social Patron Civil/Human Rights.

Institute of International Education

2010 International Awards Gala. 6:00 pm. Cocktail reception, dinner and awards. Cocktail attire. Honoring Denise Benmosche, Amy Brandt,Chuck Close, Pamela S. Passman,Hon. Kapil Sibal. Chaired by Mark A. Angelson,Maryam Panahy Ansary, Judy Beraka, George Beraka, Neica Goldberg, Peter M. Gottesegen,Ruth Hinerfeld,S.A. Ibrahim,Henry G. Jarecki,Thomas S. Johnson, Henry Kaufman,Laya Khadjavi, Linda R. Meier, Sam Pitroda, Thomas A. Russo, Tom Sandall. Tickets from $1,250.00. Tables from $12,500.00. Mandarin Oriental New York. New York. Contact: Ashleigh Troccoli. ashleigh@bradleyevents.com. (914) 834-2868.

Event address: 80 Columbus Circle, New York.

Tags: Awards/Awards Shows Gala Industry Diplomatic Social Patron Education K-12.

Food and Beverage Association of America

Reception and Dinner. 6:15 pm. Cocktails and cruise. Tickets from $85.00. Bateaux New York/Spirit City Cruises. New York. Contact: Hermann Reiner. office@fbassoc.com.

Event address: Chelsea Piers, Pier 61, Suite 200A, New York. Event web address:www.fbassoc.com.

Tags: Cruise Ship Dinner Reception Industry Food Industry Hospitality Industry Restaurant Association.

American Federation of Arts

ArtTalks Series. 6:30 pm. Lecture and Q&A. Tickets from $10.00. Christie's Rockefeller Center. New York. arttalks@afaweb.org. (212) 988-7700.

Event address: 20 Rockefeller Plaza, New York. Event web address: www.afaweb.org.

Tags: Discussion Lecture Reception Artist Arts Patron Collector Social Patron Arts Visual Arts.

Day One

Seventh Annual Benefit to End Dating Violence Among Youth. 6:30 pm. Cocktails and dinner. Honoring Cyrus R. Vance, Jr. Co-chaired by Wendy Amstutz, Martin B. O'Connor, II Esq., William C. Silverman, Esq. Tickets from $200.00. Puck Building. New York. benefit@dayoneny.org.

Event address: 295 Lafayette St., New York. Event web address:www.dayoneny.org/dayone/2010_benefit/.

Tags: Cocktail party Dinner Fundraiser Social Patron Social Services Counseling.

New Yorkers for Children

Eleventh Annual Fall Gala. 6:30 pm. Cocktails, dinner, live Auction. Black tie. Tickets from $1,000.00. Tables from $12,500.00. Cipriani 42nd Street. New York. Contact: Jennifer Houston. jhouston@innovativephilanthropy.net. (212) 867-1117.

Event address: 110 East 42nd Street, New York.

Tags: Cocktail party Dinner Fundraiser Social Patron Child Advocacy.

Chamber Music Society of Lincoln Center

Opening Night Celebration. 7:30 pm. Concert followed by a champagne and dessert reception. Business or cocktail attire. Tickets from $250.00. Alice Tully Hall. New York. Contact: Fred Murdock. fmurdock@chambermusicsociety.org. (212) 875-5216.

Event address: 65th and Broadway, New York. Noted attendees: David Finckel,Wu Han,Gil Shaham. Event web address: chambermusicsociety.org.

Tags: After party Benefit Performance Cocktail party Concert Fundraiser Reception Arts Patron Industry Music Performing Arts Supporter Social Patron.

Wednesday, September 22, 2010

DCCC-Democratic Congressional Campaign Committee

Fundraising Dinner. Location to be determined. (202) 863-1500.

Event address: More information to come shortly,. Noted attendees: Pres. Barack Obama,Speaker Nancy Pelosi. Event web address: dccc.org.

Tags: Dinner Fundraiser Industry Government Relations Industry Political/Government Politics Democratic.

Latin Vision Media

Investing in Latin America and in the U.S. Hispanic Market. 8:00 am. Conference, discussion, and business networking. Speaker(s): Gabriel Abaroa,Maria Teresa Arnal,Mario L Baeza,Lucia Ballas-Traynor,Don Browne,Chiqui Cartagena,Tomas Cookman,Patrick Dolan,Janet Robinson. TBD. info@latinvision.com.

Event address: TBD,. Event web address: www.latinvisionfinance.com/conference.

Alzheimer's Drug Discovery Foundation

Hope on the Horizon: New Drugs for Alzheimer's Disease. 11:00 am. Inaugural fall luncheon. Tickets from $350.00. Tables from $7,500.00. The Pierre Hotel. New York. Contact: Pat Steele. psteele@alzdiscovery.org. (212) 901-8008.

Event address: 2 East 61st St., New York. Fax: (212) 935-2408. Event web address:www.alzdiscovery.org.

Tags: Fundraiser Luncheon Social Patron Health Alzheimer's.

BOMA/NY

Annual Membership Event. 5:30 pm. Cocktails and entertainment. 230 FIFTH. New York. Contact: Maria Kaminskiy. maria@bomany.com. (212) 239-3662.

Event address: 230 Fifth Ave., New York. Event web address:www.bomany.org/i4a/calendar/index.cfm?category=5.

Tags: Cocktail party Fundraiser Industry Real Estate/Architecture Social Patron.

New York Philharmonic

Opening Night Celebration of the 169th Season. 6:00 pm. Reception, concert, including performances by Wynton Marsalis, followed by dinner in the tent. Black tie attire. Co-chaired by Judith M. Carson,Russell L. Carson,Carol Sutton Lewis, William M. Lewis, Jr. Tickets from $1,500.00. Tables from $15,000.00. Lincoln Center-Avery Fisher Hall. New York. Contact: Courtney Ford. fordc@nyphil.org. (212) 875-5757.

Event address: 10 Lincoln Center Plaza, New York. Sponsored by BNY Mellon,Credit Suisse. Event web address: nyphil.org/gala.

Tags: Benefit Performance Fundraiser Gala Opening Performing Arts Televised Event Arts Patron Music Supporter Performing Arts Supporter Social Patron Arts Performing Arts.

World Yacht Cruises

Chinese Moon Festival. 6:00 pm. Cocktails, light fare and festivities. (Also taking place on September 23.). World Yacht. New York. Contact: Alyssa Carroll. Alyssa@rcourihaycpr.com.

Event address: World Yacht Marina, Pier 81, West 41st St. at the Hudson River, New York. Event web address: www.worldyacht.com.

Tags: Concert Festival Reception Ethnic Chinese American Social Patron.

Thursday, September 23, 2010

WGirls

Fourth Annual Bachelor and Bachelorette Auction. Cocktails. Location to be determined.

Event address: More information to come shortly,. Event web address: wgirls.org/what-we-do/upcoming-recent-events.

Tags: Auction Cocktail party Fundraiser Lifestage Young Professional Social Jr. Committee Social Patron Association.

New York Building Congress

34th Annual Transportation & Construction Luncheon. 11:45 am. Reception and program. Hon. chair: Dominick Servedio. MC, Otis Livingston. Honoring Husam Ahmad,Janette Sadik-Khan,Jay H. Walder,Richard Wood. Chaired by Thomas E. Diana. Co-chaired by Majid Hedayati,Gregory A. Kelly, Ira A. Levy, Bernard London, Frank T. MacInnis. Cipriani Wall Street. New York. jcarlo@marchofdimes.com. (212) 353-1143.

Event address: 55 Wall St., New York. Event web address: www.buildingcongress.com.

Tags: Awards/Awards Shows Luncheon Industry Real Estate/Architecture Industry Technology Health Pediatrics.

Sotheby's

Art of Farming Auction Opening Day. (Continues through September 24.). Sotheby's. New York. molly@mollymiddletonevents.com. (646) 483-6721.

Event address: 1334 York Ave., New York.

Tags: Auction Arts Patron Collector.

Vanidades Magazine

50th Anniversary Gala. 7:00 pm. Cocktails, dinner, entertainment and dancing. Honoring Oscar de la Renta,Carolina Herrera,Narciso Rodriguez. Trump SoHo Hotel. New York. Contact: Alexandra Akshar. aakshar@televisapublishing.com. (305) 871-6400.

Event address: 246 Spring St., New York. Sponsored by Continental Airlines,Moet & Chandon,Sprint,Tansitions,TechnoMarine,The Estee Lauder Companies Inc. Event web address: www.vanidades.com.

Tags: Gala Industry Media Industry Publishing Social Patron.

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Special tax benefits could help founders and investors

by Craig Sherman and Andrew Bryant on Tuesday, October 26, 2010, 9:10am PDT

Craig Sherman and Andrew Bryant: A little noticed provision of a recently enacted federal tax law may lead to a significant increase in the formation of new startups and angel investing before the end of this year. If you have been thinking about founding or investing in a technology startup, there is no better time to jump in and take advantage of a recently enacted federal income tax benefit.

President Obama recently signed into law changes to tax law that may, under certain circumstances, exempt profits from investments in startup companies from ALL federal income tax, including alternative minimum tax. Yes, that's right, if you start a new company now and sell it more than five years from now and make a $10 million profit on the sale, you may owe NO federal income taxes on your profit.

This special tax benefit will apply only to stock issued to founders or investors between September 28 and December 31, 2010, so time is of the essence.

The founder or investor would have to buy and hold shares of a "qualified small business" for five or more years. A "qualified small business" is a C corporation engaged in an active trade or business with less than $50 million in aggregate gross assets.

If you satisfy the above requirements and certain other conditions, you may not have to pay federal income taxes on your first $10 million of gain. If there is a liquidity event within five years of your purchase of qualified small business stock, you may still be eligible to "roll over" any gains from sale of the shares tax-free within 60 days into another qualified small business.

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17 June, 2011

Article 1.	The Guardian **Where the Arab spring will end is anyone's guess** Ian Black
Article 2.	Al-Ahram Weekly **Netanyahu and the Arab spring** Abdel-Moneim Said
Article 3.	The New Yorker **Zawahiri at the Helm** Lawrence Wright
Article 4.	NYT **Does Foreign Policy Matter?** Roger Cohen
Article 5.	Los Angeles Times **European Union: Everywhere you look, a crisis** Timothy Garton Ash
Article 6.	The American Interest **What Would War with Iran Look Like?** Jeffrey White

Article 1.

The Guardian

Where the Arab spring will end is anyone's guess

Ian Black

June 17, 2011 -- Tunisia's Jasmine revolution will always be remembered as the event that triggered the Arab spring, which has shattered the status quo from Libya to Syria and is widely seen as the biggest transformative event of the 21st century so far. But, six months on, progress has been patchy.

Mohammed Bouazizi, the young Tunisian who started it all by burning himself to death in December 2010, had his desperate imitators in Egypt, where revolution erupted days after Zine el-Abidine Ben Ali's flight into Saudi exile; and in Jordan, which has seen sporadic unrest but no uprising.

But if the politics of the Arab spring are local, many factors are common across: young people angry and frustrated at the lack of freedoms, opportunities and jobs, unaccountable and corrupt governments, cronyism and, in a few places, grinding poverty.

Rich and poor alike lived in fear of the secret police. But Tunisia, one of the most repressive regimes, fell quickly. The decision by the army to dump the president and not crush the protests was a vital lesson for the Egyptian generals. The alternative is the cruelty of the dictators' fightbacks in Tripoli and Damascus. Regional differences were ignored in the chain reaction that followed. Yemen's protests were galvanised by the drama in Cairo's Tahrir Square but they also involved tribalism, elite rivalry and a small but alarming al-Qaida presence against a background of resource depletion and fear of state

failure. Sectarian tensions were the key to the trouble in Bahrain, where a Sunni monarchy rules over a restive Shia majority.
Islamists, the bogeymen of the west and the enemies of all autocratic Arab regimes, have not - yet - played a significant role. Still, Ennahda in Tunisia and the Muslim Brotherhood in Egypt have new opportunities in multi-party systems that will in turn change them.
The killing of Osama bin Laden was a timely reminder of the defeat of jihadi ideology in an Arab world being transformed by people power.
Another variable has been the response: French support for Ben Ali was embarrassing; the US was praising Mubarak days before he departed. Muammar Gaddafi had no friends - and the Arab League was crucial in providing a figleaf for UN-sanctioned Nato intervention. Bashar al-Assad, by contrast, has yet to be condemned by the UN for a crackdown that has cost at least 1,300 lives. Bahrain is too strategically important to face more than a rebuke from the US.
Elsewhere in the region, Israel is nervous about the demise of Mubarak. Turkey fears instability in Syria. The Palestinians, eclipsed by drama elsewhere, are trying to learn lessons. Iran's support for the Arab uprisings is sheer hypocrisy given its crushing of democratic protests since 2009.
Now the EU and the US must stop being seen by Arabs as "partners for dictators" in the words of the Tunisian academic Ahmed Driss. Billions of dollars will be needed to support democracy and development.
Tunisia and Egypt fear instability as they face free elections. But the really hard transformational work, as the respected commentator Rami Khouri has observed, "will start in the years after the new parliaments are elected and the complete infrastructure of political governance is forged according to the will of the majority".

There are exceptions. The Saudis are investing to create jobs and defuse dissent. Jordan and Morocco have tried liberal gestures. Algeria's oil wealth and experience of civil war have helped maintain peace there. But it is striking how Arab unrest has become a permanent feature of the global landscape. It is unfinished business wherever it is happening. "The outcome of this tectonic realignment is not just unpredictable but unknowable," said Prince Hassan of Jordan.

Article 2.

Al-Ahram Weekly

Netanyahu and the Arab spring

Abdel-Moneim Said

9 - 15 June 2011 -- Two regionally and globally crucial spectacles have been unfolding in the Arab world this year. The first is the wave of "revolutions", or "uprisings", or whatever they might be called that have variously overthrown regimes, striven to overthrow others, and made yet others so uncomfortable that not a day goes by without them announcing various reforms.

The second spectacle originated in Washington, where US President Barack Obama has launched his latest initiative to kickstart a new Palestinian-Israeli peace process based on the two-state solution defined by the 1967 borders, albeit modifiable by land swaps in order to accommodate the concrete changes that have taken place over the past 44 years.

What happened next will be familiar to all: Israeli prime minister Binyamin Netanyahu went to Washington, furious at Obama's announcement. In spite of the fact that both leaders addressed the American Israeli Public Affairs Committee (AIPAC), Obama's speech being conciliatory while Netanyahu remained inflexible, the bridge between the two leaders remains fragile. However, to complete the picture, there is a need to refer as well to Netanyahu's speech to the joint houses of Congress, also made during his recent visit to Washington.

The standing ovation Netanyahu received there was a palpable reminder of how deeply Israel has worked its way under America's skin and that no differences between the two seem ever likely to ever spoil their intimacy.

The two spectacles combined are planting the seeds for new events in the ongoing Arab-Israeli conflict. Obama would not have uttered the magic words "1967 borders" if he had not wanted to woo the new Arab revolutionaries and taken some credit for steering their revolution towards the establishment of democracy, the spread of freedom and the advancement of American interests in the region. The approach is perfectly in keeping with Obama's sophisticated style, which contrasts so starkly with his predecessor's crass behaviour.

It is also an approach that is not far from the target. Obama's own appearance on the scene has been a special sort of revolution, and a rich and inspiring one at that. His address in Cairo delivered a revolutionary message, equating what America stands for with "humanitarian" traits. Certainly, no one will dispute the fact that Obama had previously displayed no great fondness for Arab leaders, unlike the Bush family with its various friendships and financial connections with a good number of them. However, it has nevertheless not taken long for Obama's courtship of the Arab revolutionaries to run up against the Israeli wall, one that invariably looms up to create a gulf between the US and the Arab world.

At the same time, it is important to bear in mind that in the modern history of the Middle East, revolution and Arab awakening have long been linked with the Palestinian cause. The recent reconciliation between Fatah and Hamas, for example, probably reflected a general desire to take advantage of a propitious historical moment, which then found its reaffirmation in a global willingness to recognise a Palestinian state within the 1967 borders and a US readiness to pronounce the magic words in spite of Israel's anger.

However, the problem may be more complicated still, since the Arab revolutionary movements of the second half of the 20th century, which often built their revolutionary credentials and impetus on their

championship of the Palestinian cause, themselves became the enemies of the people, being crowned during the current revolutionary period with infamy and dishonour. This applies to the former regime in Iraq, the regime in Syria and the Mubarak regime in Egypt.

The case of Hizbullah reflects this revolutionary predicament with respect to the Palestinian cause and the struggle against Israel. It suffices to recall which side this group came down upon when it had to chose between the Syrian people, who are presently fighting for their future and for the future of their children, and a regime that has thrived off a conflict in which it has never fired a single shot to liberate the Golan Heights from Israeli occupation, regardless of its political posturing.

All this leads to the question of whether Netanyahu's new position is based on some type of analysis of the ongoing Arab revolutions. Does he believe that they will turn out to be like their predecessors and feed off the Palestinian cause, for example, and has this led him to want to deal firmly with them from the outset? Egypt received a message to the effect that Al-Qaeda was in control of the Sinai and that Israel therefore felt itself free to act as it wishes.

Alternatively, could Netanyahu's thinking be headed in another direction, such that the current Arab revolutions are seeking to rectify the fatal habit of previous revolutions of focussing on external affairs at the expense of domestic needs and that they will therefore seek to avert wars, conflicts and attendant tribulations?

Surely it is no coincidence that a leading Nasserist Arab nationalist and presidential candidate, Hamdeen Sabahi, has stated several times that he has no intention of opening hostilities against Israel and every intention instead of waging war on poverty and fighting for educational and healthcare reforms and other such urgent domestic causes.

Of course, it is difficult to know what is going on in the minds of Israeli decision-makers. But the result seems clear: Netanyahu has decided to mix deterrence with opportunity. Undoubtedly, he believes that the Arab revolutions will not be prepared to move closer to peace on his terms and that they will most likely make the current peace colder than the polar icecaps. However, Israel can live with frigidity. Indeed, the Israeli right has never been keen to make the climate warmer, let alone to turn Israel into a normal country at home with others in the Middle East, a notion that seems to find few takers in Israel.

As is the case with epic narratives, the Arab spring and the Obama initiative are two threads of a story whose coming together does not herald an end, but rather forms one out of many chapters. The fate of this coming together is still difficult to determine. However, there are elements that seem to be propelling it forward, such as the recent French initiative offering to host a Palestinian-Israeli summit meeting, which must be seen against the backdrop of the looming September deadline when the Palestinians and Arabs plan to seek a UN General Assembly Resolution recognising a Palestinian state within the 1967 borders.

France is clearly striving to score points for its new more active approach to the Middle East. However, it is also working in the same direction as Obama, which is to dissuade the Palestinians and Arabs from going to the UN in September.

Curiously, all this is unfolding at a time when the Arabs' own collective body, the Arab League, is weaker than ever. No Arab summit has been convened, and the current secretary-general is preoccupied with his own political future in Egypt. Meanwhile, bilateral relations that have long rested on an Egyptian-Saudi footing are in some confusion. There seems to be considerable wavering between the principle that this basis should remain firm regardless of

changes in the political regime and the conviction that no basis can remain the same when its constituent components have changed. The components, whether in Cairo or Riyadh, are changing, but the two sides continue to reach out to the other in the midst of a raging storm.

It is impossible to predict the end of a story having so many different and intricately interwoven threads. Yet, it would be equally impossible to ignore the Palestinian factor at this moment of Arab ferment, as much as it has been impossible at times of Arab stagnation.

Article 3.

The New Yorker

Zawahiri at the Helm

Lawrence Wright

June 16, 2011 -- Dr. Ayman al-Zawahiri, an Egyptian surgeon, has come into his inheritance—Al Qaeda—at a time when the organization is at its nadir. Osama bin Laden, its charismatic founder, is dead, and after some internal debate his No. 2 man, Zawahiri, has taken control. For nearly a decade, bin Laden pushed his followers to come up with a second act to 9/11, but they were unable to match the appalling brilliance of that attack. Now it is up to Zawahiri to salvage an organization that many think (and hope) has drifted into irrelevance. Compared to bin Laden, Zawahiri lacks charisma, but it would be a mistake to underestimate his commitment and his willingness to spill blood. He was hardened by the torture he endured in the three years he spent in Egyptian prisons following the assassination of Anwar al-Sadat, in 1981, and by the savage underground war that he has fought with Egyptian intelligence agencies ever since. Zawahiri has shown a daring willingness to improvise. He inaugurated the use of suicide bombers with his failed attack on the Egyptian Interior Minister, Hasan al-Alfi, in 1993, although the tactic breaks a fundamental taboo in Islam against the taking of one's own life. He also introduced the propaganda ploy of the martyrdom video, which would become a signature of Al Qaeda. Bin Laden needed Zawahiri, not least because of his physical ailments. Although bin Laden did not have kidney disease, as was widely thought, he was often ill; Zawahiri served as his personal physician, and manipulated his position to cement their relationship. Bin Laden also depended on Zawahiri for his organizational skill and the talented men he brought with him. But Zawahiri also depended

on bin Laden, whose money, mystique, and connections to wealthy Gulf Arabs gave Al Qaeda an advantage few other terror groups have ever enjoyed. Zawahiri has experience in rebuilding broken terrorist groups; his own organization in Egypt, Al Jihad, was twice wiped out by operational errors, and Zawahiri had to rally the demoralized survivors, even pretending to step aside from power, although he was never really far from the controls. His ultimate solution was to merge Al Jihad with Al Qaeda, making it into an Egyptian body with a Saudi head. Now that bin Laden is gone, the challenge for Zawahiri will be to keep non-Egyptians in Al Qaeda. Members pledged their loyalty to bin Laden personally, not to the organization, so a new round of declarations will have to be made, providing Zawahiri an immediate test of his popularity. One big difference in Zawahiri's leadership from that of his predecessor is likely to be a renewed focus on Egypt. Zawahiri's terrorist career began when he was fifteen years old, when he started a cell to overthrow the Egyptian government. Now the government actually has been overthrown, no thanks to Zawahiri's efforts. The country is in a tumultuous and formative but also vulnerable moment in its history, which Zawahiri will seek to exploit. He knows that Egypt is the real game in the Islamist contest for power. The future of Egypt will determine much of what happens in the rest of the Arab world. No matter how it turns out, the Egyptian revolution will be seen historically as a bookend to the Iranian revolution in 1979, which added reality to the radical Islamist agenda and inspired so many young Muslims, like Zawahiri, to take up jihad. Iran showed them that they actually could take over a major Muslim country and turn it into a theocracy. Zawahiri was always frustrated that it was a Shiite country that became the first important Islamic theocracy in the modern world. He will devote himself to making Egypt a Sunni replica of the Iranian state, and not the end of

a trend that has led so many Muslim countries into fundamentalist dead ends.

Article 4.

NYT

Does Foreign Policy Matter?

Roger Cohen

June 16, 2011— Perhaps foreign policy doesn't matter in U.S. elections. President George H.W. Bush orchestrated a peaceful unwinding of the Cold War that united Germany within the West. A Europe divided became whole and free. Hundreds of millions of people benefited. They still do. This was one of the finest hours of American diplomacy. His reward for great achievements on the world stage was to be defeated in the 1992 election. After all, he'd raised taxes. He'd let the size of government grow. Confronted by a grocery store checkout scanner, he looked like a genteel space cadet. So he had his comeuppance from Bill Clinton, who'd got how groceries get bought.

Yes, Americans want money in their pockets that keeps food on the table: to heck with huge events across the oceans. They think foreign policy is for the birds. Or do they? Americans have an exalted sense of their nation and its liberating mission. That self-image stops making sense if America is not engaged. The authoritative 2010 survey of American public opinion by the Chicago Council on Global Affairs found that more than 8 out of 10 Americans think it's either "very desirable" or "somewhat desirable" for the United States to "exert strong leadership in world affairs."

In the real world that means doing foreign policy. I see Americans torn. There's a quasi-isolationist urge. They're tired of wars. They want jobs. They see problems piling up on the home front that they want fixed ahead of any foreign adventures. At the same time something rankles when they hear talk of American decline and the end of the American century and China rising. They want a president

to stand tall for American greatness if only to anaesthetize them against day-to-day hardship.

Republican wannabes sense all this. To judge by the early stages of the 2012 campaign, they think foreign policy might matter after all. They're trying to cast Barack Obama as a president who has sold America short, an impostor who has ditched the mystical belief in the unique calling of the United States that is American exceptionalism. So Mitt Romney says Obama takes his values not from the small towns of America but from "the capitals of Europe." Obama treats Israel the way European countries do — with "suspicion" and "distrust." He's offering "European answers to American problems." He's projecting a weak United States: "We're following the French into Libya." The president is a naïve idealist undermined by his "questioning as to whether America is an exceptional nation."

For Europe, in the above characterization, read land of feckless socialists on welfare bent on universal health care.

Not to be outdone, Newt Gingrich has decrypted in Obama a "Kenyan, anti-colonial" worldview.

Gingrich wants a "foreign policy that is clear about the evil that we face" — that would be Shariah law among other things — and rooted in this universalist message: "America is still the last, best hope of mankind on Earth." As for Sarah Palin, she attributes most of Obama's problems to what she's called his "lack of faith in American exceptionalism." I have several reactions to this that all fit under the rubric: baloney! First, we're not in 1990 any longer: America remains dominant but cannot resolve major problems alone and will in the next decade, by some estimates, see China overtake it as the world's largest economy. Second, it's precisely Republican factionalism in Washington that's stopping the United States from attaining again the greatness Republicans invoke. Remember James Madison's

admonition to “break and control the violence of faction” through a “well-constructed Union.”

Right now factionalism leaves critical budget challenges unmet, stops serious investment in education and research, and leaves America trailing China on the green technologies that will be big job-creators in coming decades. The road to the American future is not “Drill, Baby, Drill!”

Third, it’s just delusional to imagine that any president, Republican or Democrat, confronted by the meltdown of 2008, would not have seen as a core task a retrenchment of U.S. overseas commitments in an attempt to bring them in line with diminished resources.

But with an angry, anxious nation, Republicans are betting that invocations of greatness and dominance, however illusory, will resonate. Bruce Jentleson, a political scientist at Duke University, said, “After the killing of Osama bin Laden, they can’t attack Obama as a wimp, but they will attack him as not being a real American.” Obama, he added, must answer by demonstrating “what this generation of Americans is going to show the world, how it’s going to compete in a global era. Against the illusion of restoration, he must offer adaptation.”

With the U.S. economy wobbling, Obama runs the Bush Sr. risk. He got Bin Laden and has been on the right side of the Arab Spring — what Timothy Garton Ash has called “the most hopeful set of events in the 21st century so far, comparable in scale and potential to 1989.” Americans respond to that kind of hope. They care about foreign policy and see through foreign posturing. What they need now from Obama is a better sense of how their economy can thrive in this changed world.

Article 5.

Los Angeles Times

European Union: Everywhere you look, a crisis

Timothy Garton Ash

June 16, 2011 -- Like an overladen container lorry laboring up a steep hill, the European Union is close to stalling. Greece is the most urgent part of this crisis. Between the fury on the streets of Athens and the continued disunity of decision-makers in Brussels, Berlin, Frankfurt and Luxembourg, the crunch could come any day. But it's not just Greece. In Ireland, Portugal and Spain too, the anger is boiling over, as people feel that the young, the poor and the unemployed are being forced to pay for the selfish improvidence of their politicians — and of the French and German bankers, who loaned profusely where they should not have loaned at all.

Across the Continent, the legions of the indignados, as they are called in Spain, and the aganaktismenoi (the outraged), as they say in Greece, are growing. And it's not just the Eurozone. Every single major project of the European Union is faltering. France and Italy are suggesting that the achievement of the Schengen area, in which 25 European countries have removed border controls, should be chipped away, just because a few thousand people from convulsed North Africa have taken refuge on the Italian island of Lampedusa. Many European countries are already in a panic about the integration of immigrants and people of migrant origin, especially those who are Muslims. Solidarity and social justice, central values of the post-1945 European project, are in retreat almost everywhere as a result of growing inequality and spending cuts to tackle public debt.

In the Arab Spring, Europe faces the most hopeful set of events in the 21st century so far, comparable in scale and potential to 1989; but the Continent's collective and institutional response to this historic

opening has been feeble. Even in the most hopeful cases — Tunisia and Egypt — we may have only a few months in which to prevent the Arab Spring becoming an Arab fall. The disappointed hopes of that half of the population that is under 30 would then produce further, larger immigrant surges to Europe. In their own countries, Islamists would exploit the chances and the confusion of semi-freedom.

The European-led military intervention in Libya was always likely to be a slow, difficult grind, but it has painfully exposed Europe's chronic failure to concentrate its military capabilities. Already, some of the European powers involved are running short of munitions. You can understand why U.S. Defense Secretary Robert M. Gates was scathing about this in Brussels last week. Even enlargement, Europe's most successful project, is close to stalling. In his victory speech after the recent Turkish elections, Prime Minister Recep Tayyip Erdogan did not even mention the EU. Yes, Croatia will probably join the EU in 2013, and that's good news. But Croatians might be forgiven for wondering what exactly they will be joining. Retired prime ministers and foreign ministers never tire of attributing this faltering of the European project to the lack of leadership. (Subtext: It was all so much better when we were in charge.) This is true, but less than half the story. For although the quality of European leadership is somewhat poorer than it was a quarter-century ago, the need for it is greater. Why? Because all the great underlying motivators of the European project back in the days of Helmut Kohl, Francois Mitterrand and Jacques Delors, and even more so in the time of the founding fathers, have faded or disappeared. Those powerful driving forces included searing personal experiences of war, occupation, holocaust, fascist and communist dictatorships; the Soviet threat, catalyzing west European solidarity; generous, energetic American support for European unification; and a West Germany that was the mighty engine of European integration, with France on top as the

driver. All these are now gone, or very much diminished. While there are intellectually convincing new rationales for the project, including the rise of non-Western giants such as China, rationales are no match for emotional motivators. The key to so much of this, especially on the economic side, is Germany. For much of its history, what has become the European Union pursued political ends by economic means. For Kohl and Mitterrand, the euro was mainly a political project, not an economic one. Now the boot is on the other foot. To save a poorly designed and overextended monetary union, the political must ride to the rescue of the economic. That will require Angela Merkel's leadership. If we are talking about the European economy and currency, Germany is the indispensable power. Only the combination of Germany and the European Central Bank, working in unison, has a chance of calming the mighty markets.
For more than a year now, Merkel has attempted to find the narrow — perhaps nonexistent — line where the minimum that can be done to save the embattled Eurozone periphery meets the maximum she thinks German public opinion will bear. She has then tried to win her Eurozone partners to that course. So far, it has not worked. Now she needs to start from the other end: Work out, with the central bank and other Eurozone governments, what is the best, most credible deal available, and then put all her authority on the line to convince a reluctant German public that this is in the long-term, enlightened national self-interest of Germany. And it is. For no one has more to lose from the disintegration of the Eurozone than the Continent's central economic power. It may soon be too late.

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Article 6.

The American Interest

What Would War with Iran Look Like?

Jeffrey White

July - August 2011 -- The debate over what to do about an Iranian Islamist regime apparently bent on acquiring nuclear weapons has been on or near our front burner for at least six years, and is now almost a settled feature of the policy landscape. There is general agreement in the United States on two points. First, an Iranian nuclear weapons capability is "unacceptable", as both the Bush and Obama Administrations have put it; and second, we prefer getting to an acceptable outcome without using force. The debate gets testy when we consider that means short of force, such as sanctions and covert technical sabotage, might not work.

It may be too simple to reduce the argument to just two sides—those who fear the regime's acquisition of nuclear weapons more than the consequences of a war to prevent it, and those who fear the consequences of a war above all else—but in this case simplicity has the virtue of capturing the essence as observers ponder which set of unpalatable risks they would rather run. What is remarkable, though hardly surprising, is that the two sides usually put forth very different assessments of what using force would entail. Those who fear Iranian nukes above all else tend to minimize the risks of using force, while those who fear war tend to exaggerate them. Neither side, however, has persuasively spelled out the reasons for their assessment, leading one to suspect that much of the argument rests on less than rigorous analysis.

What would an honest assessment of the risks of military conflict with Iran look like? How should we think about it? These are difficult questions even for those who are not partisans of one side or the

other. Wars are notorious for yielding unintended and unexpected consequences; for reasons explained below, a war against Iran is even harder than usual to bound analytically.

Complexity, Uncertainty and War

Our first consideration in analyzing the likely course of war with Iran is that a U.S.-led attack would be merely the first phase of a war, the opening act of an extended drama whose scenes would unfold, not according to any script, but to an emergent logic of its own. Given the political context in which military engagement would rest, even a minor attack would likely become a major test of strength involving not only the United States and Iran but also a host of allies and associates. It is therefore disingenuous to try to frame military action against Iran as a simple "raid" or even a broader "operation." We are talking here about war, with attendant potential high costs to all combatants in terms of military casualties, civilian damage and economic disruption.

At least three concepts are key to any coherent discussion of a U.S.-Iranian military engagement: complexity, uncertainty and war itself. By complexity we mean the number of moving parts in a given situation: actors, processes and the connections among them. By uncertainty we mean structural uncertainty—that is, not just ignorance of the magnitudes of agreed casual factors, but the ignorance of the causal factors themselves, and their mutual relations. For example, not only may the U.S. government not know, say, the technical status of the Iranian nuclear program, or the actual state of readiness of Iranian forces. It may not know (or worse, have wrong) the decision-making and implementation protocols of the Iranian government, how the Iranian people and military would react to an attack, what Tehran would ask its allies and proxies to do, and what in fact they will do.

Enemy disinformation, as well as simple error, can also set us on the wrong track. The enemy acts not just on the battlefield but also through an ability to influence our understanding of the situation by means of denial and deception. In this and other ways complexity reinforces uncertainty.1 The large number of actors involved in the Iranian situation would make it very difficult to discern clearly what is happening once the shooting starts, and the scene would remain very fluid as long as the fight persisted, and very likely for a good while afterward.2

As to the meaning of war, it may hardly seem worthwhile to probe something so self-evident, except that it is not self-evident anymore, if it ever was. A simple definition of war is the waging of armed conflict against an enemy, but this is too limited a concept in the 21st century. War in our time involves simultaneous conflict in the military, diplomatic, economic and social domains on four levels: political, strategic, operational and tactical.3 While a war with Iran might begin in the military domain, it would likely expand to others, and while it might begin at the operational or tactical level it would soon encompass strategic and political levels as well.

How these twin expansions would take place has everything to do with context. All wars have one. Would a U.S.-Iran war break out during a protracted diplomatic process, or in the absence or abeyance of one? Would it happen during a period of increasing tension and military readiness, or out of the blue, after one party thinks that the dangers of war have subsided? Would the U.S. government assemble a broad “coalition of the willing”, just a few close allies-in-arms at the ready, or go it alone, even actively dissuading Israel from joining an attack? What would the domestic political situation be in the United States? Would there be an internal political consensus to act, or would there be an active, acrimonious debate? Would the American people be prepared for the aftermath of an initial attack,

including rising oil prices and falling stock values? What would the economic situation be like in the United States and beyond? The answers to these questions would have a substantial impact on the war's course, conduct and outcome.4

Whose War, for What Purpose?

Perhaps the most critical contextual element concerns how senior U.S. decision-makers, the presumed initiators of war in this case, would construe their war aims.5 These aims must somehow affirm that force can be employed to achieve reasonable political and strategic objectives, but those objectives could range from the limited to the expansive. Three sets of objectives come readily to mind. First, a war could aim to simply delay the Iranian nuclear weapons program through the physical destruction of key facilities and human assets: a Peenemünde option, so to speak.6 Second, war could aim to effectively end the Iranian nuclear program by inflicting broad damage on its components and other key regime assets, military, infrastructure and leadership, combined with the threat to re-strike as necessary: a submission option. Third, war could aim to topple the regime through a concerted campaign against its assets and supporting mechanisms, coupled with support to its presumably less WMD-desirous opponents: a regime change option.

The U.S. government has military options corresponding more or less to these aims. A Peenemünde option would presuppose a narrowly focused, short duration strike largely limited to nuclear facilities. It would aim to inflict serious damage, but also to restrict the scope of conflict. Such an attack would rely on U.S. stealth systems, electronic warfare, cruise missiles and air power. U.S. allies could play a supporting role, especially in dealing with an Iranian response, but American forces would carry the brunt of the action.

A submission option would call for a sustained air and naval campaign against nuclear associated facilities, air defense systems,

command centers, offensive missile forces, naval forces and the Army of the Guardians of the Islamic Republic (IRGC), the regime's praetorian guard and shock troops. This campaign would aim to severely damage the nuclear program, limit Iran's ability to defend against the attack (and subsequent restrikes, if necessary) and reduce its capabilities for post-attack retaliation.

A regime-change option would require a broad military offensive that could include nuclear facilities, air defenses, Iran's retaliatory capabilities, leadership targets, regime supporters, and national infrastructure and economic targets. This could include putting some forces on the ground to collect intelligence and neutralize specific targets that are difficult to strike effectively with air power. No large-scale ground operations are likely, but they cannot be ruled out at some levels of conflict and in some scenarios, such as those that posit a need to open and secure passage through the Strait of Hormuz and Persian Gulf.

In general, the more expansive a war's goals as a plan escalates from strike to campaign to broad offensive, the greater the force needed to achieve those goals, the greater the uncertainty in achieving them, and the greater the consequences of both success and failure. Moreover, a war's goals at the outset of conflict may not remain stable. Early sudden successes or unanticipated failures can lead to the escalation of initially limited goals, particularly if terminating hostilities proves difficult. Lateral expansion as well as escalation is also possible: Iranian leaders might surrender or agree to a truce but be unable to enforce a similar decision on Hizballah leaders or terror agents around the world. This leads to yet another layer of complexity and uncertainty: Whose war would this be?

A U.S.-Iranian war would probably not be fought by the United States and Iran alone. Each would have partners or allies, both willing and not-so-willing. Pre-conflict commitments, longstanding

relationships, the course of operations and other factors would place the United States and Iran at the center of more or less structured coalitions of the marginally willing.

A Western coalition could consist of the United States and most of its traditional allies (but very likely not Turkey, based on the evolution of Turkish politics) in addition to some Persian Gulf states, Jordan and perhaps Egypt, depending on where its revolution takes it. Much would depend on whether U.S. leaders could persuade others to go along, which would mean convincing them that U.S. forces could shield them from Iranian and Iranian-proxy retaliation, or at least substantially weaken its effects.

Coalition warfare would present a number of challenges to the U.S. government. Overall, it would lend legitimacy to the action, but it would also constrict U.S. freedom of action, perhaps by limiting the scope and intensity of military operations. There would thus be tension between the desire for a small coalition of the capable for operational and security purposes and a broader coalition that would include marginally useful allies to maximize legitimacy.

The U.S. administration would probably not welcome Israeli participation. But if Israel were directly attacked by Iran or its allies, Washington would find it difficult to keep Israel out—as it did during the 1991 Gulf War. That would complicate the U.S. ability to manage its coalition, although it would not necessarily break it apart. Iranian diplomacy and information operations would seek to exploit Israeli participation to the fullest.

Iran would have its own coalition. Hizballah in particular could act at Iran's behest both by attacking Israel directly and by using its asymmetric and irregular warfare capabilities to expand the conflict and complicate the maintenance of the U.S. coalition. The escalation of the Hizballah-Israel conflict could draw in Syria and Hamas; Hamas in particular could feel compelled to respond to an Iranian

request for assistance. Some or all of these satellite actors might choose to leave Iran to its fate, especially if initial U.S. strikes seemed devastating to the point of decisive. But their involvement would spread the conflict to the entire eastern Mediterranean and perhaps beyond, complicating both U.S. military operations and coalition diplomacy.

It seems fairly clear then that a conflict with Iran is unlikely to be an isolated event in which the U.S. strikes, Iran retaliates, and it's over—with Iran either left with a viable nuclear program or not. War is far more likely to be a series of actions played out over time at varying levels of intensity and with a strong potential for escalation. Nor can war with Iran be limited to military action; it will extend to the diplomatic, economic and social domains. U.S. decision-makers might prefer a limited war that would privilege U.S. military and technical advantages, but Iran can force a broader conflict, where it can employ its own political, economic and social means of waging war, including terrorist attacks on U.S. soil and against U.S. interests abroad. The challenge for the United States would be to conduct the conflict so that the longer and broader the war, the more Iran would lose. That objective should affect how the U.S. government would fight in all four domains.

This means that even if the shooting starts at the military tactical or operational levels, the United States or a U.S.-led coalition must plan for all four levels of war and organize itself to ensure unity of command and purpose across those levels. It will, for example, find itself involved in a "secret war" of terrorist attacks and special counterterror operations outside the main theater of conflict. It will find itself in a "political war" involving Iranian and allied diplomatic and information operations to weaken support from other states and actors for the U.S. coalition and mobilize support for Iran. It will find itself in an "economic war" featuring Iranian efforts to disrupt the oil

market.7 A “social war” would involve appeals to Islamic solidarity and attempts to weaken popular support for adversary governments through influence operations and attacks aimed at civilians. In such a broad and protracted contest, the United States might not enjoy a favorable balance of advantages. It is by no means clear, either, that the U.S. government is structured to effectively prosecute such a war, or that its intelligence capabilities are oriented properly toward supporting it.

Given these caveats and complexities, it seems to follow that if the United States chose to attack Iran, it would do so in ways that would prevent Iran from expanding the conflict into areas where it held an advantage. The reasoning might go something like this: Since the Iranian regime has many ways to widen a war into domains that do not favor the United States, the best option is to execute regime-change before the regime can open its bag of tricks. Or it might go like this: Start small, but if the Iranians escalate the war, shift immediately to a regime-change option before they can succeed. Almost needless to say, these are hard-to-control and high-risk approaches. A decapitation strategy, we know, did not fare so well in March 2003 against Iraq, and it would probably be harder to pull off against a more deeply institutionalized polity like Iran.

As for a “start small” approach, let’s suppose that the war begins with a limited air and naval operation. Iran could respond in a limited “tit-for-tat” way. But the regime might conclude that the operation is intended to remove it from power (or succeed in doing so unintentionally); if so, it might respond with a high level of violence along several axes of capability. There is simply no way to predict with confidence how radicals in Iran would respond to an initially limited U.S. attack. We must base our predictions largely on what the leadership says, the Iranian regime’s history and our limited intelligence on the regime’s internal dynamics.8 All this is subject to

interpretation by experts employing various explicit or implicit models, the most prominent of which casts the regime as a "rational actor" that calculates risks and rewards like any Western state. In this model the highest goal is regime survival, a notion that doesn't necessarily apply to the Iranian clerical regime. Clerics, even Christian ones from an earlier age, have been known to take their otherworldly prerogatives seriously.

All we can say, then, is that the regime would not try to martyr itself, nor would it be passive. Most likely, Iran would seek to prolong and expand the war, attrite U.S. forces and morale, and weaken the resolve of coalition members. Iran has the means, methods and allies with which to respond in this fashion, and it has made clear that it would use them.9

Important Iranian conventional war assets include short- and medium-range missiles; strike aircraft; missile-equipped naval combatants and small boats; naval mine-laying capabilities; regular army and IRGC special forces; and air defense and coastal defense missiles. These conventional capabilities provide Iran a substantial ability for a local fight in the Strait of Hormuz, the Persian Gulf and along its borders.10 Iran "leans" on the Persian Gulf states from a military and political perspective. Shi'a populations in Bahrain and Saudi Arabia could be a useful resource and environment for terrorist and irregular operations.

While the Iranian military is at its most dangerous close to its frontiers, we are not "safe" from it anywhere. Missile systems (principally the Shahab 3 variants and Sejjl types) allow Iran to strike targets throughout the Middle East, including population centers, military facilities, infrastructure and U.S. forces based in the region.11 Iranian missile numbers and launchers are limited, but Iran has other means of waging a global conflict, including its allies. For instance, Iran would likely attempt to induce Hizballah to attack

Israel. Likewise, Hizballah would expect Iran to assist it and any conflict with Israel. Either case could eventually involve Syria. Hizballah can now strike targets throughout Israel. Its missiles and rockets are also accurate enough to hit military installations and other important facilities, and it can fire as many as 500–600 per day. Hizballah also has the ability to conduct terrorist or special operations against civilian, military and infrastructure targets outside the immediate theater of war. Sheikh Nasrallah has plausibly threatened to attack shipping in the eastern Mediterranean in the event of a conflict with Israel.12 If Hizballah were to gain access to Syria's P-800 Yakhont supersonic cruise missile system—a distinct possibility—it could potentially strike targets as distant as 300 kilometers from the Lebanese coast.

Syrian military forces are optimized and deployed for war with Israel, so it would have only a limited ability to directly assist Iran in a conflict with the United States. Syria's missile systems could target military sites, logistics facilities and airfields in Israel. Syria's Yakhont coastal defense cruise missile system gives it an enhanced capability to threaten naval and merchant vessels in the eastern Mediterranean.

Hamas is also part of this threat environment, although its offensive and defensive capabilities are much more limited than Hizballah's. Hamas's offensive capabilities rest on mortars and rockets of gradually increasing range, bringing more of central and southern Israel under threat with every upgrade. Hamas can now reach central Tel Aviv and beyond Beersheba in southern Israel.

Iran will likely supplement this proxy war by exploiting "images of victory"—such as sinking a U.S. naval unit or displaying U.S. casualties and prisoners to undermine support for the U.S. action and bolster its own supporters.

U.S. conventional military capabilities, especially combined with those of its likely allies, are of course far superior to those of Iran. In many recent years the size of the U.S. defense supplemental alone exceeded the entire Iranian defense budget. But a fight with Iran would not be a fair or clean fight. Winning in any meaningful sense might prove costly.

Escalation

If Iran's advantage lies in broadening and widening a conflict once begun, how might we expect its leaders to go about it? At least three types of escalation are open to Tehran: horizontal, vertical and domain.

Horizontal escalation involves the spread of hostilities from beyond the immediate area of conflict to additional geographic areas and political actors.13 Iran's means and methods, as discussed above, give it the ability to escalate horizontally within the Middle East region and beyond to include Europe and the United States.

Vertical escalation involves the employment of new or increasingly potent weapons systems, attacking new types of targets, or introducing additional types of forces into the conflict.14 What begins as essentially a fight between U.S. and allied air and naval strike assets and Iranian air defense assets could be quickly expanded by Iran to the use of offensive missile systems and naval surface and sub-surface forces in retaliation. Iranian escalation to the employment of WMD (if a war occurred after an Iranian breakout) seems unlikely short of an imminent threat to the regime, but that threat would be hanging in the air as fighting escalated.

Domain escalation refers to the expansion of the conflict from the purely military domain to the diplomatic, economic and social domains, in which Iran has some advantages.

In summary, an attack on Iran could produce dynamics that would push either or both sides to escalate the conflict even if neither had an

interest or an initial intention to do so. Iranian civilian casualties, for example, could provoke Iran to step up its response. This becomes more likely as the scale of a U.S. attack increases. Downed U.S. aircrews could lead to search and rescue operations that could become significant military actions in their own right. The need to restrike targets that were missed or inadequately damaged could also prolong the conflict and involve additional forces. As the conflict developed, internal and external political pressures could press both antagonists to escalate the fighting.

On the other hand, there may also be countervailing pressures. A very successful operation could cause Iran to seek a rapid exit, at least from the military aspect of the war. So, too, could increased domestic unrest within Iran. International political pressure brought about by economic disruption of the oil market and fears of military escalation could work to restrain the United States. But we cannot rule out the possibility of escalation, and that knowledge should reinforce the need for clarity of purpose and a full understanding of the risks involved before we pull the trigger.

How It Ends

Just as we cannot rule out escalation, we cannot rule out the harmful protraction of a war. Every war has to end, but how it does so is no simple matter. Even if it were soundly defeated, Iran could complicate the endgame. It's not simply a matter of our declaring "mission accomplished" and bringing the troops home. As retired Brigadier General Huba Wass de Czege writes:

Although Sun Tzu warned statesmen and generals many centuries ago that long wars benefit no one, they continue to occur, and for some very fundamental human reasons. Statesmen and generals who start wars commit themselves to worthy war aims that are expressed far too specifically—and too soon—in order to get the polity on board. Then they conceive of a strategy based on what they think they

know about their capabilities and the situation. They begin taking concrete steps along the path that they think will get them to that end. They learn far too slowly that what they initially thought they knew was in fact wrong or no longer relevant. . . . Things can get much more convoluted by adding allies, different influential actors among the polity, and multiple adversaries. This is why wars are easier to get into than out of.15

Knowing when to end a war relates to war aims and measures of success. A war's aims should be definitive enough so that success can be measured in some clear way. This is easiest to do where the aims concern discrete things such as the destruction of material targets. Measuring success becomes harder as aims become more political and psychological, such as weakening or toppling a regime, encouraging opposition or deterring further action. Then, too, war aims can expand as fighting escalates or broadens. In a situation in which Iran has retaliated strongly and managed to inflict losses (especially civilian losses) on the United States or its coalition partners, we should expect to hear calls to inflict more damage, to punish the regime and its forces, to bring a "decisive" end to the conflict.

Short of inflicting a total defeat on Iran, an outcome that seems scarcely conceivable, exiting the war could be challenging if Iran chooses to fight on in some form of asymmetric conflict. We might then have to compel Iran to quit, and that could potentially require the application of force well beyond what was originally agreed upon within the United States or with coalition partners. Even then, if the Iranian regime survives at all, it is likely to declare victory, and many of its supporters would believe it. How or when a war with Iran would actually end is therefore no easy topic to nail down. Any attack on Iran of sufficient scale to significantly damage its nuclear program would have rolling consequences both in the short and long term.

After the last bomb falls there will be a new reality in the region and beyond.

In the short term, there would be consequences in the military, diplomatic, economic and social domains. The intensity and locus of these consequences would depend on the outcome of the attack and conflict, but there would be "battle damage" in all domains. Short-term consequences would likely include a tense and unstable military situation (unless the conflict ended cleanly) that would require the commitment of forces for monitoring and reacting to emergent threats; and also a potential political crisis in the region propelled by instability and uncertainty about the future, including residual Iranian capabilities to retaliate directly or indirectly.16 The oil market would remain in shock for some time after an attack. Naval mines, wartime damage to facilities and irregular attacks on facilities or tankers would see to that. Social turmoil would be likely as various population groups react to the attack and subsequent conflict. In short, there would be no bright line ending the war in the economic, diplomatic and social realms.

To turn to the long-term consequences, Iran would almost certainly remain a major player in its region. Its adjustment to the war and its outcome would have a major role in shaping regional realities. A beaten, humiliated but still defiant Iran with essentially the same political system and approach to the region and the world would be a long-term, growing danger similar to Iraq after the First Gulf War (or Germany after World War I). This would extend beyond the military to include dangers in the other domains.

The first conclusion we should draw from this exercise is that the U.S. government should be prepared for a long and difficult conflict if it ultimately decides it must attack Iran. An attack might end quickly with few complications if Iran acts "rationally." We may not like what that means, however: One "rational" ending for the Iranians

would be to accept their losses, declare "victory" because the regime survived, lick their wounds, prepare for indirect retaliation, and resume nuclear activities on a clandestine basis. But a war might not end cleanly, and the U.S. administration could find itself in a messy and protracted conflict. This suggests the need for both an expansive approach to net assessment and deep and broad preparation not just of the military but also of the "home front" and the economy, for Iran may choose to fight on these fronts as well as within its own borders and in the region.

How well prepared is the United States for this kind of fight? This is at least in part a question of national or societal resilience. If all options are on the table, as both Bush and Obama Administration spokesmen have insisted, are preparations for employing all options being made ready? If not, then Iran may decide that some of the options on the table lack credibility.

The second conclusion we should take from this discussion is that, in attacking Iran, we would be trading one set of risks for another. Any option we choose, even choosing not to choose, will have political as well as military-strategic consequences. As hard as it is to know the consequences of war, it is just as hard to know the consequences of a decision to "learn to live" with a nuclear-armed Iran. Both courses are fraught and logically open-ended. Thus the fear of potentially negative consequences from a war should not necessarily rule one out. Winston Churchill, reflecting on British policy before World War II, wrote:

If the circumstances are such as to warrant it, force may be used. And if this be so, it should be used under the conditions which are most favourable. There is no merit in putting off a war for a year if, when it comes, it is a far worse war or one much harder to win.17

In any case, if the United States decides to attack Iran it should certainly look before it leaps and prepare itself for a hard landing.

Above all, U.S. leaders should not underestimate the scope or misread the broad nature of war and should therefore organize the U.S. government in advance to prosecute it coherently. In light of how we have fared with whole-of-government approaches and unity-of-command issues in Iraq and Afghanistan, this is clearly a requirement we need to take seriously.

Jeffrey White is a defense fellow at the Washington Institute for Near East Policy and a former senior U.S. intelligence officer.

From: Jeffrey Epstein [jeevacation@gmail.com]
Sent: 9/22/2011 4:48:35 AM
To: Sultan Bin Sulayem [redacted]e]
Subject: Re: Gps GTX Smart Shoe

thanks , great idea , i really like your friend.

On Thu, Sep 22, 2011 at 12:46 AM, Sultan Bin Sulayem <[redacted]> wrote:

- About GTX
- Products & Services
- Platform
- News
- Contact Us
- Investors
- Press
- Blog

-
- Videos
-
  -
  Watch Video
  - GTX Corp on YouTube
  - Locimobile

NEWS

Patrick Bertagna Interviewed on Travel Talk Radio with Sandy Dhuyvetter

Patrick Bertagna, founder and co-inventor of the GTX Smart Shoe, joins Sandy to discuss this new invention and what it means to patients and families.

The Executive Producer and Host of TravelTalkMEDIA is Ms. Sandy Dhuyvetter, one of the world's leading travel industry media specialists. Following a successful career as a pioneer in the

internet industry and new media in the San Francisco area, Sandy established TravelTalkMEDIA in 2001 to provide radio and web-based, online information to the U.S. and global travel industry.

Listen to the radio interview (MP3)

GTX Corp's Tracking Apps Hit One Million Dowloads

GPS Wolrd - July 12, 2011 - GPS Tracking Apps, from GTX Corp subsidiary LOCiMOBILE, have been downloaded more than one million times by users in 116 countries, and continues to be on the top charts of iTunes and Android marketplace, the company said. "The GPS Tracking app is the simplest way to stay connected to a child, parent, friend or business associate, quickly and accurately from a Smartphone or Internet-ready device like the iPad, iPod or Android tablet, allowing users to locate people, instantly with one simple touch of a button," said Patrick Bertagna, CEO of GTX Corp. "We also offer it at a price everyone can afford without compromising privacy."

Read the full article

GTX Corp... More'n A Million Served (GPS)

This App has managed to stay quite popular in both iTunes and Android online sites...

SatNews Daily - July 1, 2011 - GTX Corp. (OTCBB: GTXO.OB), a provider of real-time two way GPS Tracking and personal location services (PLS) has announced its LOCiMOBILE subsidiary's GPS Tracking Apps has managed more than 1 Million downloads with users in 116 countries and continues to be on the top charts of iTunes and Android market place. "The GPS Tracking app is the simplest way to stay connected to a child, parent, friend or business associate, quickly and accurately from a Smartphone or internet ready device like the iPad, iPod or Android tablet, allowing users to locate people, instantly with one simple touch of a button," said Patrick Bertagna, CEO of GTX Corp. "We also offer it at a price everyone can afford without compromising privacy."

Read the full article

Professor Andy Carle talks about "Nana" technology and the GPS Smart Shoe™

Radio show called "Wriggling in the Middle", based out of Canton, Ohio and syndicated nationally through FOX radio network.
http://www.whbc.com/Wriggling-In-The-Middle/6636686

For anyone who would like to skip directly to the shoes, go to the link below, scroll down to the show listing (March 28) and fast forward to about the 26-minute mark. The conversation on the shoes lasts about 7 minutes.

Proximity marketing will push location based service revenues to nearly $13 billion over the next few years.

SatNews Daily - March 23, 2011 - GTX Corp (OTCBB: GTXO) and ADAM, Inc. have entered into an exclusive revenue share agreement allowing 123 Chambers of Commerce representing more than 100,000 businesses nationwide to push out proximity alert promotions, using the GTX Corp GPS/PLS Platform and leveraging its growing GPS Tracking Smartphone App user base. Gartner reports that 42 percent of consumers use their phone to check a store location, 31% use it for a mobile promotion, and 17 percent use their phone for the actual purchase.

Read the full article

GTX Corp. Joins with Chambers of Commerce on Location Advertising

GPS World - March 22, 2011 - GTX Corp., which provides two-way GPS Personal Location Services (PLS), and ADAM, Inc., a platform for Hyper Local Mobile Apps for Directories, entered into an exclusive revenue share agreement allowing 123 Chambers of Commerce representing more than 100,000 businesses nationwide to push out proximity alert promotions, using the GTX Corp GPS/PLS Platform and leveraging its growing GPS Tracking Smartphone App user base, GTX Corp. announced.

Read the full article

New Tech Is Helping Families With Special Needs

March 17, 2011 8:52 PM - MIAMI (CBS4) – New technology is making life a little easier for people with special needs and their families.

The GTX Corp. is introducing new shoes, loafers and sneakers, with GPS built into them. CBS technology expert Katie Linendoll said they can really come in handy for families who are taking care of relatives suffering from Alzheimer's disease. With a downloadable app, they can track them using the GPS or get an alert if the person wanders out of a pre-set safe zone.

Read the full story and view the video

Technology for seniors

Great Day Show - CBS KHou.com - Houston - March 23, 2011

Truly groundbreaking tech to change our lives

CBS News - Early Show - March 17, 2011 - The shoe uses GPS and cellular technologies. It gives a family member or a caregiver the option of monitoring real-time from the Internet or on your phone...

Watch the CBS Early Show video

GTX's GPS Tracking Apps For iPhone
Apps allow you to let family, friends know your location

Joel Mathis, Macworld.com - If the federal government tagged millions of iPhone users with GPS tracking devices, the American people—or, at least, Apple devotees—might protest very strongly. But iPhones these days come with GPS installed, and companies make good money furnishing apps that utilize that very feature. On this list: GTX, who offers a pair of $4 GPS apps—GPS Tracking and Tracking—that provide workmanlike solutions for users who want to keep an electronic eye on their loved ones.

Read the full article

Going Gray-Where Technology's Headed - Entering the Gray-Tech Revolution
World Market Media - Brittney Barrett - February 16, 2011

Over the next 20 years, 80 million baby boomers will enter their sixties and seventies in the U.S. alone. In the next 40, the number of senior citizens will double. For the government, this represents a huge financial burden resultant from rising Medicare and

Social Security costs. For industries focused on late-life care and creating products that cater to the aging demographic; however, this population shift represents a major opportunity.

Read the full article

Walk to Remember? A National Academy of Sciences Study Says Yes

February 13, 2011 - In healthy adults, the hippocampus — a part of the brain important to the formation of memories — begins to atrophy around 55 or 60 and even sooner to an even greater degree if one contracts Alzheimer's. Now psychologists are suggesting that the hippocampus can be modestly expanded, and memory improved, by nothing more than regular walking.

Read the full article

GTX's New Patent...Smart Shoe Has Heart In Its Sole (GPS)

Satnews Daily - February 09, 2011 - GTX Corp (OTCBB: GTXO) has a big heart that is manifested in their sole. GTX, known for customizable, 2-way GPS Personal Location Services (PLS) solutions, was granted its ninth patent for their innovative and potentially life saving GPS Smart Shoe technology.

By the year 2050, there will be 16 million adults with Alzheimer's in the U.S. alone. The multi patent GPS Smart Shoe™ will afford millions of caregivers the means to remotely monitor those afflicted with Alzheimer's that become lost due to wondering.

Read the full article

GPS Shoes – Footsteps to the Future…

World Market Media - Brittney Barrett - February 7, 2011

Every 70 seconds, someone in America develops Alzheimer's, according to the Alzheimer's Association 60% will wander away from their homes or care facilities at some point during their affliction with the disease. Worse, it's even more difficult to find a missing senior citizen than a missing child, as fewer people will take note of older person walking alone than they would a small child.

Read the full article

GPS Tracking Technology – How it works

GPS Tracking Apps are available for most smartphones.

Watch this video to learn how GPS Tracking Technology works and what it can do for you.

GPS Tracking Apps installed on over 850,000 smart phones

GPS Tracking Apps by LOCiMOBILE are installed on over 850,000 smart phones in over 106 countries.

LOCiMOBILE is a leader in 2-way GPS Tracking Solutions providing the ability to find your loved ones quickly and easily with one touch of a finger. But don't stop there, get creative with it; track your drivers in real-time, see when your relatives land at the airport… with turn by turn directions, you will never get lost again!

Read the full article

Locimobile GPS Tracker App Now for the iPad

Well it looks like the iPad's next leap is to become a GPS tracker. Locimobile, which makes GPS Tracking Apps for iPhones, iPods and smartphones is now taking on the iPad. From the comfort of your own home and on a much bigger screen, you can keep tabs on your spouse or kids and see in greater detail than before, where they are off too or hanging out. Will the iPad be the cause for the next big celebrity break-up?! Who knows but in the mean time you can use it to keep tabs on your own family for only $4.99

Proximity marketing will push Location Based Services revenues to nearly $13 Billion

Knowing where you are will give you the answer to the "where is" question.

Recent developments in GPS positioning technologies could drive revenues from mobile location-based services to more than $12.7 billion by 2014, according to a new report published by Juniper Research.

Revenues will come from sales of apps through application stores and other channels, but also from mobile advertising tied to those apps. In fact, the Juniper report notes that advertising will likely form an increasing share of Mobile Location Based Services-related revenues over the next five years.

Read the full article

GPS Technology Mentioned In State of the Union Address as Growth Driver

World Market Media - Brittney Barrett - January 26, 2011

"The rules have changed. In a single generation, revolutions in technology have transformed the way we live, work and do business" said President Barack Obama last night, during his second State Of The Union address to the 112th Congress of the United States and 1.3 million Americans watching the speech from their homes.

Read the full article

Patrick Bertagna interview with Bob McCormick from CBS Los Angeles, Money 101

January 17, 2011 - Being an apps developer can pay off handsomely when you fill a need.

Click here to listen to the interview

LBSN – What It Is And Why You Should Care

Marsha Ahrenkiel - January 13, 2011 - Shades of The Island of Dr. Moreau! (hint: Google H.G. Wells) Modern-day mad scientists (let's call them "software developers") have been merging social networking concepts with a range of other technologies and rolling out new hybrid beasts that could eventually change your marketing and public relations strategies.

One that we're keeping a close eye on here is a species known as "location based social networking" (LBSN) – combining short message service (SMS), aspects of gaming, smartphone technologies and GPS capabilities.

Read the full article

GTX Corp - Year in Review 2010

SatMagazine - December 2010 - GTX Corp is in the business of keeping you connected — the Company continues to be at the forefront of the personal location industry and debuting new technologies that impact how you ask the "where is" question.

Read the full article

Future Family: Life In the Digital Age preview.

The Discovery Channel - Nov. 13, 2010 - This patient education program explores how baby boomers the 78 million Americans born in the wake of World War II are embracing technology to better manage increased work and home responsibilities. Future Family discusses the GPS footwear by GTX Corp.

View the show - Part 1

View the show - Part 2

Wireless Technology on Black Friday: Smart Phones Good, PNDs Bad According to WedBush

World Market Media - Tom Copeland - December 1, 2010 -

The biggest holiday shopping days of the year has passed and many investors want to know: How did wireless technology do? According to Scott Sutherland, CFA with Wedbush Securities, the answer is pretty good – depending on which companies you're invested in.

Read the full article

Andrew Carle on Elder Tech Trends

Eldergadget.com - November 5, 2010 - ElderGadget's Michael Goldman starts the series with a conversation with Andrew Carle, an Assistant Professor at George Mason University. Andrew is also an expert on technology development for seniors, and is a consultant for the Nintendo Corp., GTX Corp., and several other companies about how to make their newest gadgets more elder friendly.

Listen to Podcast interview with Andrew Carle

How does a GPS tracking system work?

Patrick Bertagna, GTX Corp. - 10/26/2010 - Global Positioning System (GPS) is a worldwide radio-navigation system formed from the constellation of 24 satellites and their ground stations. The Global Positioning System is mainly funded and controlled by the U.S Department of Defense (DOD). The system was initially designed for the operation of U. S. military. But today, there are also many civil users of GPS across the whole world. The civil users are allowed to use the Standard Positioning Service without any kind of charge or restrictions.

Read the full article

GPS Elder Applications

Eldergadget.com - October 21, 2010 - The rapid evolution of Global Positioning Satellite (GPS) tracking technology is producing new applications of particular interest to seniors, their families, and caregivers. One of the most active companies in this space is GTX Corp. GTX is the company behind the patented GPS Smart Shoe™ , in partnership with footwear manufacturer Aetrex Worldwide. The shoe was developed to provide peace of mind for families with senior-age loved ones suffering from Alzheimer's and other forms of dementia. Available on the Internet at the GPS Shoe, Aetrex, and Foot.com sites, the shoe should also be available in retail stores some time in 2011, according to GTX Corp. chairman/president Patrick Bertagna.

Read the full story

The "Where" or Your Social Media Network - iCheck-In

World Market Media - Tom Copeland - November 15, 2010 - Checking in is a movement that's really starting to catch on, and companies are scrambling to develop and release check-in apps and services. GTX Corp committed to being the "better people finder", owns and operates LOCiMOBILE, Inc. which developsGPS Tracking location based social networking (LBSN) mobile applications, today released its 17th App - iCheck-In, the fastest and easiest way to "check-in" and stay connected to everyone in your mobile contact list and your Facebook and Twitter friends.

Read the full story

App News

On Saturday, CBS News broadcasted a segment on The Early Show called "Unique Ways on Keeping Kids Safe on Halloween" in which CNET technology contributor Katie Linendoll showcased a few charming gadgets to help track children while they're out and about. Naturally, GTX Corp's iPhone, iPad, Android and Samsung GPS Tracking Apps iLoci2 and GPS Tracking Pro were highlighted for their easy-to-use yet powerful features.

View the show

Patrick Bertagna GTX Corp CEO on the Peggy Smedley Show

Oct. 26, 2010 - wsRadio

Listen to an interview with

Patrick Bertagna, GTX Corp CEO,

on The Peggy Smedley Show

Click here to listen

GPS Smart Shoe ™ Wins 2010 People's Choice Award

LOS ANGELES, Oct. 12, 2010 (GLOBE NEWSWIRE) -

GTX Corp (OTCBB:GTXO - News) has won the prestigious 2010 People's Choice Award for Most Innovative Connected Location Device at the 4th Annual Locations & Beyond Summit this past week.

"We are honored to have won this prestigious award and look forward to continue to bring innovative and game changing technologies that transform how we utilize GPS tracking and stay connected to one another," says Patrick Bertagna, CEO and founder of GTX Corp.

Read the full story

Wall Street Reporter Interview

Audio interview with Patrick Bertanga, CEO, GTX Corp

Click here and then on Audio MP3 button to listen to the interview.

Safety afoot, via GPS, for Alzheimer's patients

USA Weekend - PEGGY J. NOONAN - October 17, 2010

A tiny GPS chip embedded in the sole of the shoe provides continuous tracking ... The GPS Shoe by Aetrex is available from Foot.com and GPSShoe.com now for ...

Read the full story

GTX Corp. (OTCBB: GTXO) Wins 2010 Peoples Choice Award

Tom Copeland - October 11, 2010 - World Market Media

The GPS Smart Shoe™ was nominated for Most Innovative Location Connected Device at the Locations and Beyond Summit that was held last week during the CTIA show and CEO Patrick Bertagna confirmed with us - GTXO had won!

Read the full story

With 675,000 Downloads in 91 Countries GPS Tracking Apps Leader GTX Corp Launches 3 New GPS and LBS Apps

GPS Tracking Apps Keep You Connected to Everyone, Everywhere

LOS ANGELES,CA - Tuesday, September, 28th 2010 - GTX Corp business unit LOCiMOBILE, Inc. is launching a series of GPS and personal location - based "apps" and web services solidifying its leadership position in the mobile LBS market, which mobile carriers are calling "Pure Gold".

Read the full story

Not All Who Wander Are Lost

Donna Fannin - Gather News Technology - October 17, 2010

GPS shoes are coming to a retailer near you. Why in the world would anyone want a GPS tracker in their shoes, you ask? Generally, they don't, if they know about it.

Read the full story

People Choice Tries on GPS Smart Shoe

By Peter Suciu - Kinetic Shift - October 13, 2010

While there are many tracking programs out there for children and even teens, GTX Corp introduced an innovative product aimed at adults suffering from Alzheimer's disease and other dementias. Many sufferers are actually in good physical condition and thus aren't confined to a room or even a house. To keep track of loved ones, the company came up with a novel idea – namely putting a tracking device in the footwear.

Read the full story

GTX Corp... Phone Finder (GPS)

Satnews Daily - September 28, 2010

GTX Corp (OTCBB: GTXO.OB) business unit LOCiMOBILE, Inc. is launching a series of GPS and personal location-based "apps" and web services.

The new apps all have a GPS component and are designed to add the "where is" factor to functionality. The Company launched on the Android market place Phone Tracking™ in case you lose or misplace your phone. More than 70 million phones are reported lost or stolen in the US each year, but while the loss of a phone may be annoying, the loss of personal and business data could be devastating.

Read the full story

Gadgets -These Shoes Were Made for Tracking

By Erin Monda - TMCnet Contributor - September 22, 2010

There is no end to the wonderments that shoes can achieve (a certain pair of ruby Mary Janes comes to mind) – and one company is pushing the envelope even further (although not quite as far as Oz).

I'm referring to GTX, a company integrating two-way GPS people-finding technologies into consumer products and applications. The company utilizes the latest in miniaturized global positioning system (GPS) tracking and cellular location technology, enabling subscribers to track in real time the whereabouts of people, pets, or high valued assets through its customizable

transceiver module, wireless connectivity gateway, middleware, and viewing portals.

Read the full story

Costs of Alzheimer's will touch 1% of Global GDP in 2010

By World Market Media

The rising need for GTX Corp's technology continues to be influenced by the increasing numbers of elderly and those that are memory impaired, and so the epic battle of technology and illness wages on. ...

Read the full story

Do you know what the Most Innovative Location Device is?

No it's not a compass or an astrolabe. It's not semaphore or a smoke signal. Not an RFID tag or a neon sign or phosphorous flare either.

Give up?

It's the GPS Smart Shoe™ recently mentioned in Forbes Magazine, developed by GTX Corp (OTCBB: GTXO.OB) and licensed to Aetrex Worldwide. Yes, a shoe…well a very smart shoe as it can tell a caregiver the precise location, bearing, history, speed and altitude of an Alzheimer's victim that has eloped or wandered. No small feat – pun intended – to reduce the overwhelming stress on the millions of victim caregivers while potentially saving thousands from injuries and death owing to exposure, accidents and criminal activity. The GPS Shoe also reduces the manpower drain on municipal services; fire, police and welfare agencies often enlisted to locate the mentally ill.

While a Finalist in the Most Innovative Location Device category of the Locations & Beyond Summit and the People's Choice Awards is a wonderful acknowledgment for the years GTXO invested in developing the solution and the promise that Aetrex has made in bringing the Shoe to market… the real winners are those touched by this devastating disease for which there is no cure, but now have a new measure of hope.

'Nanatech': Seniors Stay Independent With Tech Gadgets

Senior Tech - Ashlea Ebeling, 09.15.10

The GPS shoes from GTX (GTXO - news - people) tackle another senior problem--folks who have Alzheimer's who wander and are at risk of getting lost or injured. A GPS device in one of the shoes will alert a caregiver if the wearer leaves a specified area. Don't expect the latest styles from Nike (NKE - news - people) or Steve Madden (shoo - news - people) . The manufacturer is Aetrex Worldwide, an orthodic and medical specialty shoe maker. Roll-out is expected by year's end.

Read the full story

Keeping an eye on Mom and Dad

Remote monitoring technology aims to keep seniors in their houses and out of nursing homes

Over the coming months a raft of new-and-improved remote monitoring devices will hit the market, from GPS shoes that can track the whereabouts of wandering seniors to MedCottages, portable RV-like units equipped with motion and monitoring systems that allow seniors to maintain some independence from the backyard of their adult childrens' homes.

"As we age, this is going to be a growing trend," says Laurie Orlov, a Florida-based expert on so-called "aging-in-place technology" aimed at keeping seniors in their houses and out of nursing homes as long as possible.

"We have to get past the fear and antagonism among the older people who need it the most. I don't think they're that technology-ready, but the boomers, who are their adult children, certainly are."

Motion sensors strategically placed in the three-bedroom home where Howe has lived for 53 years feed information right to her daughter's laptop, detailing when she got out of bed (the Friday we chatted it was 9 a.m.), walked into the bathroom (9:15 a.m.) or hovered at the kitchen table where she keeps her pills (9:30 a.m.)

Even her blood-pressure reading (165/76) is fed to her daughter's computer, along with her daily weigh-in tally, providing a detailed graph which she often takes to her doctor appointments.

The only thing GrandCare can't tell Pierce, because her system doesn't include cameras, is if her mother actually swallowed her pills.

Monitoring and in-home help technologies will be a $20 billion U.S. business in North America by 2020, predicts Orlov, founder of Aging In Place Technology Watch.

Already some baby boomers are able to remotely lock their parents' doors, track calls coming into their homes and even see who is ringing the doorbell, in many cases right from their smart phones. Systems such as QuietCare, WellAWARE, FineThanx and SimplyHome are already fixtures in some U.S. homes and seniors' communities, although Orlov estimates fewer than 10,000 units are in active use because the systems can be so costly.

Next month, Paul Whyte, a Markham dealer of smart-home technology that allows ordinary electronics and appliances to communicate with each other, will unveil the GrandCare system at the Zoomer show in Toronto.

"I call it the invisible caregiver," says Whyte of Cybernetics Systems Inc. "The minute I saw this system I thought, 'There's something that actually makes sense.'

The key, of course, with all these technologies is that the senior be relatively able-bodied and sound of mind — most are of limited value if the senior is suffering from dementia, which is expected to become a major public health issue in the next few decades.

But developers are also working hard on that challenging front.

Sometime later this fall or next spring the first GPS-equipped shoe, the Aetrex Ambulator, will go on sale through www.gpsshoe.com orwww.foot.com.

Originally designed for children by Los Angeles-based GTX Corp., the new shoes are expected to retail for about $250 U.S. They enable caregivers to track those afflicted with dementia or Alzheimer's thanks to GPS and cellular technology that will relay their whereabouts back to a monitoring centre.

"Privacy may be a talking point, but it's not really an issue," says Patrick Bertagna, chairman and CEO of GTX Corp.

MEDCottage creator Dupin expects concerns around privacy will fade quickly as families and health-care systems here and in the U.S. become overwhelmed by aging baby boomers — more than 76 million in the U.S., 10 million in Canada — who start hitting 65 next year.

"I see remote monitoring becoming an integral part of health care as we all age," says Dupin. "One of the issues around aging in place is going to be making trade-offs. Privacy may be something we have to give up."

Susan Pigg focuses on issues about aging and baby boomers. spigg@thestar.ca

Tracking Deal

A downtown L.A. company that creates GPS tracking applications for cell phones has announced a deal to provide its friend-finding apps on Samsung smart phones.

The deal could mean more than 40 million more downloads, which would translate to increased revenue, for GTX Corp.'s application, which is currently available for the iPhone, BlackBerry and Android phones, said GTX Chief Executive Patrick Bertagna.

The LociMobile tracking applications send a GPS signal out to all of a person's cell phone contacts who use the app. Bertagna said the app can be used to meet up with friends or keep tabs on kids.

GTX has also developed a GPS shoe for tracking Alzheimer's patients.

Staff reporter Natalie Jarvey can be reached atnjarvey@labusinessjournal.com or at (323) 549-5225, ext. 230.

Read the full story

Senior Gadgets: GPS Shoe May Offer Peace of Mind to Alzheimer's Caregivers

By Teresa Steinfatt - July 1, 2010 - Safety of loved ones is a top concern for caregivers, especially those caring for persons with Alzheimer's disease.

Memory loss and confusion can set in without warning. For example, a loved one might set out on a walk or errand alone, wander off and not be able to return home safely.

Currently scheduled for retail sale this summer, the Aetrex Ambulator® GPS Shoe by GTX Corp will provide millions of caregivers the means to help easily find those afflicted with Alzheimer's and other forms of dementia who wander and become lost.

Read the full story

Style and Safety Come Together with GPS Shoes For Alzheimer's Care

GTX Corp (OTCBB: GTXO), a provide of customizable, embedded 2-way GPS Personal Location Services (PLS) solutions, is bringing personal GPS tracking solutions to the 5.3 million seniors afflicted with dementia by signing a

four year, license agreement with Aetrex Worldwide, Inc. GTX Corp's eight patents for the GPS Shoe cover a GPS transceiver module that is placed within the footwear and transmission of location coordinates to a central monitoring station which disseminates the location data through the use of proprietary software, cellular connectivity, the GTX Corp middleware platform and the secure viewing portal.

Read the full story - World Market Media

Wandering Soles

Aetrex Worldwide Inc. has teamed with GTX Corp. to create the Aetrex Ambulator GPS Shoe, a therapeutic sneaker designed for people with Alzheimer's disease. The shoe comes with a tiny GPS tracker that alerts a caregiver when the wearer has strayed more than a set distance. It then sends the caregiver a Google map link that plots the wearer's location.

Read the full story

GTX And MNX — STAT Trax Critical Medical and Bio-Pharmas

SatNews - June 9, 2010 - GTX Corp (OTCBB: GTXO.OB), a provider in embedded GPS tracking location based services and MNX (Midnite Express), a worldwide specialty courier, have entered into an exclusive three-year contract for GTX to deliver thousands of highly customized, industry-first GPS tracking devices. Additionally, the GTX Corp tracking platform to the shipping company is included in the contract.

Read the full story

Find Friends and Family Mobile Apps

LOCiMOBILE [iPhone & Android]

LOCiMOBILE has a few great GPS tracking apps out at the moment. The two that I would like to feature are the free/lite versions of the software. This app supports up to 6 users (paid version is unlimited) and integrates with Twitter and Facebook. GPS Tracking populates your phone's built-in Google Maps with the locations of people in your private opt-in buddy list. You can let users

know where you are or request their location, and you can post your information to your social profiles.

Read the full story

GPS Tracking Apps Website to Track iPad, iPhone, Android, Blackberry Smart Phones

Want to locate all your friends with smart phones (ipad, ipod, iphone, android, blackberry) but you don't have one? The latest technology from GTX Corp allows you to do just that – www.gpstrackingapps.com high-tech website enables you to locate your family, friends and coworkers (who have downloaded the GPS Tracking App) instantly, in real time, even if you don't have a smart phone. http andwww.locimobile.com are proud members of the http GTX Corp (OTCBB: GTXO.OB) family of products and services. people locator, people finder, gps tracking, gps tracking app, location based social networking, iphone Friend finder, android, top downloads, gps apps, iPad, blackberry, gps shoe, GTXO, gtxcorp, top apple downloads

Read the full story

Style and Safety Come Together with GPS Shoes For Alzheimer's

Senior Housing News - GTX Corp (OTCBB: GTXO), a provide of customizable, embedded 2-way GPS Personal Location Services (PLS) solutions, is bringing personal GPS tracking solutions to the 5.3 million seniors afflicted with dementia by signing a four year, ...

Read the full story

Keeping track of seniors with Alzheimer's

Rosemary McClure, Special to the Los Angeles Times - May 29, 2010 - The email alert shouted its message: "Missing Person with Alzheimer's. PLEASE HELP." It was sent to Alzheimer's Assn. chapters and to law enforcement officials within hours after an Orange County woman disappeared while on a short trip to visit a friend.

The woman had set out in her car, made a wrong turn and became confused, says her family, who asked that her name not be used to protect her privacy.

Read the full story

Resources and Technology to Help Caregivers Cope

Kirk Johnson - NYTimes.com - May 4, 2010 - One Alzheimer's wanderer in Arizona had lost much of his memory, but not, apparently, his interest in fashion: he never left the house without a beloved baseball cap on his head. So a trick the family used to keep the man around was to hide his caps.

Search-and-rescue experts who deal with dementia patients also recommend alarms on doors that sound when opened if a proper code is not entered, along with posters or wallpaper images that disguise or conceal doors. Sometimes a simple large, emphatic sign on every door saying "Stop!" will deter a wanderer.

Read the full story

New App craze brings back the 1990's

World Market Media - April 9, 2010 - Every Portfolio manager I've ever known loves to find a sector with wind at it's back..the early users of the "CrackBerry" knew (Nasdaq: RIMM) was the stock he/she needed to invest in because every person on Wall Street had one. This phenomena doesn't occur often and RIMM"s are as rare as Australopithecus. I observe the current app craze as the new cycle for lightning quick revenues based on the size of the market itself. Certainly anyone with an iPhone or Android phone has imagined that they could build an app when they got home that night…I know I did.

I can tell you from experience that when Kleiner Perkins doubles the size of its venture fund specific to app's you know your watching the ship turning in the harbor. This is a unique space with wind at it's back and certainly the app's market is a niche to watch, we found this company and had a chance to speak with Patrick Bertagna at GTX Corp (OTCBB:GTXO) its Founder/ Chairman and CEO. He had some interesting comments about how the company has evolved and found some traction with its wholly owned subsidiary LOCiMOBILE Inc. Bertagna commented "With 500 million smart phones entering the market place, I believe we are at the tip of the next

disruptive wave. Apps will become as ubiquitous as the device they live on and that makes this new frontier a game changer" Certainly being on the iTunes top ten highest grossing list puts us at the forefront of this coming wave."

Read the full story

World Market Media Announces the Launch of the WMM NanoCap and MicroCap Indices

WEST PALM BEACH, April 19, 2010 (GLOBE NEWSWIRE) – World Market Media, Inc. ("WMM"), a high traffic stock market, news data website providing cutting edge new media products and services to publicly traded companies worldwide, announced today the launch of the WMM NanoCap Index and the WMM MicroCap Index.

Read the full story

GTX Corp. Inks Global Licensing Deal with Aetrex Worldwide

SGI - March 24, 2010 - The four-year, exclusive contract brings Los Angeles-based GTX a step closer to bringing its personal GPS tracking solutions to 5.3 million seniors afflicted with dementia. Aetrex is slated to begin selling the Aetrex Ambulator GPS shoe this summer through its website, www.foot.com, at www.gpsshoe.com and at a select group of assisted living facilities in the U.S.

Read the full story

New Running Shoes Could Include Embedded GPS

GPS-powered trail running shoes may be on the horizon

Michael Barkoviak - March 17, 2010 - GTX Corporation may be one step closer to trail running shoes that have integrated GPS directly into the shoes. GPS use has increased in the cycling and running worlds, as it is used to accurately track time, distance, and speed. There has been discussion of GPS-enabled running shoes in the past, but nothing significant ever materialized.

Read the full story

GPS in your shoe?

Yes GTX Corp. has a GPS shoe that can be worn while a family member is walking or jogging that reports your location to other family members ...

Read the full story

GTX Corporation - Year In Review

GPS "People Tracking" continues to garner both increased opportunity and adoption worldwide — PLS technology has been the focus of our business for the past seven years. GTX Corp., a leader in Personal Location Services, develops and license's 2-way GPS people finding technologies which seamlessly integrate with consumer products and enterprise applications. GTX Corp uses the latest miniaturized, low power consumption hardware technology in its GPS and cellular location devices and provides a fully customizable back-end portal enabling subscribers to use real time tracking to obtain the whereabouts of people, pets, or valued assets. Through its miniaturized transceiver module, wireless connectivity gateway, smart phone Apps, customizable middleware, and viewing portal, GTX Corp offers a complete end to end solution.

Read the full story

BEAM: Game Plays...

SatMagazine.com : November 2009 - With this issue's focus on the Latin American and MENA markets, one of the most interesting news items deals with Rio de Janeiro's win of the 2016 Winter Olympics. Companies who bid for, and win, the broadcasting rights to the 2016 Summer Olympics in Rio de Janeiro are certain to enjoy substantial profits, and Latin American countries and communities are already celebrating this award by the Olympic Committee.

According to GTX Corp., a firm whose base is in the Personal Location Services businesses, Latin America has increased its adoption of Location Based Services by a factor of 10 from 2008 to 2009. Carlos Briceno, the firm's Vice President of Business Development, states that the category with the highest total spending in South and Central America is in "People Tracking," which has been the exact focal point of GTX Corp for the past seven years.

Read the full story

GTX Corp Annual Update - Vista Partners
Download the full document

We Know Where You Are

Phoenix, AZ --(www.USEquityNews.com)-- 03/12/2009 - If the above headline sounds a bit spooky, be prepared for things to get a lot spookier in the coming years - but also a lot more useful, valuable and fun. That's because electronic technology has once again taken a turn that could, like the cell phone, affect much of your waking life, either directly or indirectly.

Read the fill story

GTX Corp brings personal location-based services to the masses with Google Maps API Premier Business

Wherever you go, there you are, goes the saying – but others might have a tough time finding you, at least until now. With GTX Corp's Personal Location Services, people can go online and, via an intuitive interface, track the exact location of loved ones, or even their high-value assets. GTX offers miniaturized assisted Global Positioning Satellite (GPS) tracking and cellular location-transmitting technology for consumer products and applications. The company's business model is to deliver solutions to consumers in a wide variety of wearable location devices, from shoes to tiny clip-on devices no larger than a small matchbox, by licensing its core technology to branded consumer product partners.

Read the full story

GPS-Equipped Shoes Keep Track of Wanderers

Tuesday, August 11, 2009 - Caring for a loved one with dementia is worrisome, especially if that person is prone to taking flight. Statistics suggest that 60 percent of people with Alzheimer's

disease will get lost at least once, said Andrew Carle, director of George Mason University's senior housing administration program.

Read the full story

Keep Track of Your Kids This Summer

>From GPS to Temporary Tattoos With Contact Info, Keep Your Kid Safe This Summer

ABC News - Good Morning America - July 31, 2009 - Those of you with iPhone know that there are many GPS applications. One of the latest is the Locimobile. Ideal for the 3.0 family (you and your teen need to have the phone). You download the app to your phones, and then your teen lets you check on his or her whereabouts, perhaps in exchange for getting an iPhone in the first place. The Locimobile app allows you to see exactly where your child or children are on a map. You can monitor several kids at one time.

Read the full story

Understanding Dementia And 'Wandering'

NPR - USA - July 14, 2009 - A shoe company, Aetrex Worldwide, and a firm that makes global positioning devices, GTX Corp., have created shoes containing GPS technology for wanderers to ...

GTX in Sports Illustrated

June 29, 2009 - GTX, a technology company, and Aetrex Worldwide have announced plans for shoes containing a GPS chip that will allow family members or saftey personnel to locate anyone wearing the shoes through online tracking software.

Download the article

GPS Tech Review:

Interviews with Leading GPS Innovators

GPS Tech Review is a forum for current news stories and interviews with the leading innovators of GPS-enabled personal location services.

Abductors of Children May Run, But Today Code Amber and SA-Announce Make it Much More Difficult for Them to Hide

Timely missing person's alerts and rich graphics delivered to your phone.

Mandeville, LA (PRWEB) June 25, 2009 --www.CodeAmber.com News Service the nation's leading internet and digital display missing persons alert service, a wholly owned subsidiary of www.GTXCorp.com (GTXO.OB), has expanded its multimillion viewer reach with an additional 2 million www.syn-apps.comsubscribers. SA-Announce, Syn-Apps' notification system, is a feature-rich communication application that works with Cisco Unified Communications Manager to distribute alerts across enterprises such as; NASA, Tiffany & Co and Martha Stewart Living, as well as numerous schools and government offices. The Code Amber alerts will be available to the SA-Announce subscribers and accessible in real-time appearing on their VOIP enabled phones.

Read the full story

GPS shoe to track Alzheimer's patients

A new shoe outfitted with a GPS chip aims to offer peace of mind to Alzheimer's patients and their caregivers.

London, England (CNN) -- June 10, 2009 -- The embedded GPS tracking system will allow the wearer of the shoe to be located instantly online and for their whereabouts to be monitored in real time.

Read the full story

GTX Corp in Sports Intelligence Magazine

May 2009 - GTX Corp., which markets patented two-way GPS Personal Location Services (PLS) solutions, will launch two new applications this summer - expanding its LOCi brand with iLOCi2 and Code Mobile.

Download the Article Here

GTX Corp in Lextech May Newsletter

Download the Full Newsletter Here

GTX Corp on RedChip Real Radio

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GTX in Bottom Line Health

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GTX Corp on RedChip Real Radio

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GTX Corp on CNBC

Watch the video clip

GTX Corp on RedChip Real Radio

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GTX Corp on The Early Show

Watch the video clip

GTX Corp on the Discovery Channel

Watch the video clip

GTX Corp in the Philidelphia Inquirer

Read the article

GTX Corp on KCBS Radio, San Francisco

Listen to the audio clip

GTX Corp on KFWB Radio, Los Angeles

Audio clip 1, Audio clip 2, Audio clip 3

GTX Corp on the KGW News, Portland, OR

Watch the video clip

GTX Corp on the Boston 10 o'clock News

Watch the video clip

GTX Corp in Los Angeles Business Journal

Download the full article

GTX Corp in Pervasive Computing Magazine, April/June 2007

Download the full article

GTX Corp in Budget Travel Magazine, May 2007

Read the full article

GTX Corp in Footwear News Magazine, April 2007

Read the full article

Kids Sneakers That Know Where They Are

Castro Valley Forum - CA, USA - By : Michael Singer : 10/16/07

There is a trend in high-tech that recommends adding location-based services to anything and everything. But it has me pulled between wanting to see really cool gadgets and avoiding a Big Brother-like society.

The latest is a new high-tech tennis shoe coming to the market that lets parents and guardians track the movements of their family using Global Positioning Systems or GPS technology.

Called the "Smart Shoe," the miniature device is inserted in the sole of the low-top sneaker. An antenna that runs up the back of the footwear communicates with satellites and relays a location back to a subscription Web site service for easy viewing. Los Angeles-based GTXC, which makes the devices and the service, said it is hoping to put Smart Shoes in stores by the end of the year. Shoes with the technology could cost between $100 and $200. The tracking service is expected to cost about $20 a month.

Follow That Kid

Today's technology makes it easier for parents to know where their kids are and what they're doing.

By Joe Burris | Baltimore Sun | July 1, 2007

Michelle Smith had been reluctant to buy a cell phone for her 7-year-old daughter, Daysha. Then one day in April, a substitute teacher placed the Radford, Va., girl on the wrong school bus. Instead of being dropped off at her older sister's after-school program as planned, Daysha was sent home - only to find the doors locked.

As she sat on her front porch crying, her mother drove around town, searching frantically for the girl. No one at the school could tell her which bus the girl had been put on.

"Then my next-door neighbor called," said Smith, "and said, 'I have your baby.' "

The scary moment had a happy ending, but Smith didn't want to take a chance on losing her daughter again. So she did what many other parents are doing - she bought her child a cell phone equipped with an electronic device that could keep track of her whereabouts.

Download the full article

Tracking technology hits the ground running.

Wherever you go, there you are. And we know where you are.

By Nancy Francis

GPS technology will soon be at your feet, offering peace of mind to loved ones of Alzheimer's sufferers, people with autism, active preschoolers and others who might wander into harm's way or get lost.

A Los Angeles-based company that sees opportunity in the merging of GPS tracking technology and footwear, has developed several prototypes of GPS tennis shoes.

GTX Corporation is having discussions with various footwear manufactures (including some in Oregon) about licensing its technological designs and connectivity system.

During a recent visit to Portland, GTX Corp CEO Patrick Bertagna showed KGW a prototype of the company's GPS shoe.

Download the full article

Mobile Ways to Keep Track of Your Kids

By Lori Tucker, (WATE) Knoxville, TN -- June 7, 2007

As technology makes our society more mobile, there are more mobile ways to keep track of your loved ones including cell phones, car trackers and even shoes. GPS shoes That's right, an LA company has patented a GPS system in a shoe.

Xplorer Smart Shoes, made by GTX Corp., are able to track the person wearing them in real time or by remote surveillance.

GTX says the shoes work particularly well for: children, people with Alzheimer's disease, outdoor adventures, military, police, fire and public safety workers.

IN THE PIPELINE: Tracking All The Uses For Positioning Chips

By Donna Fuscaldo - DowJones Newswire - May 1, 2007

For Patrick Bertagna, the eureka moment came a few years ago when watching the coverage of the Elizabeth Smart abduction. After spending years helping companies track their products via software, Bertagna decided it was time to do something that mattered.

So the serial entrepreneur, armed with a couple of checks from friends, launched Global Trek Xploration Corp., a Los Angeles-based company that's developing shoes embedded with a global positioning chip. The shoes will enable parents to monitor their children's every movement and caregivers to keep real time tabs on elderly or sick people.

Download the full article

Top-Notch Security

M2M - Specialty Publications - April 6, 2007

M2M technology providers and system integrators often cite efficiency improvements and new revenue opportunities as common indicators of return-on-investment. However, as more and more customers use machine-to-machine applications to collect data, security has not only become a top-notch priority for end users and OEMs (original equipment manufacturers) but also a highly valued part of fostering a positive ROI.

According to IDC Corp., www.idc.com, Framingham, Mass., as devices enabling a mobile workforce continue to shrink in size, the increased likelihood of losing devices, such as laptops, mobile phones, BlackBerrys, has caused growing concern over the sensitive corporate information they contain.

Smart Shoes Get Smarter

M2M - Specialty Publications - April 2, 2007

Smart shoes just got a little smarter. The newest models of GPS-enabled (global positioning system) shoes from Global Trek Xploration Corp. (GTXC), www.gtxcorp.com, Los Angeles, Calif., will now be equipped with wireless and location modules from Enfora Inc.,www.enfora.com, Plano, Texas.

GTXC chose Enfora's Enabler IIG-A-GPS modules for its robust and accurate platform, company executive say. Eric Stalnaker vice president of business development at GTXC explains, "Enfora and the Enabler II provide us with an integrated approach to software, Internet connectivity, and customization that lets us focus on our product and service offering."

Wireless Briefs

by Andrew D. Smith | Dallas Morning News | Thursday, March 29, 2007

Few at conference get to soul of GPS shoe

Satellite tracking services were expected to be one of the big attractions at this year's big wireless conference in Orlando, but the satellite shoe seemed to surprise most of the people walking around the convention floor.

Many passers-by Wednesday furrowed their brows or shook their heads at what appeared to be a silly toy for spoiled yuppie joggers. Only a few investigated long enough to realize that the GPS

shoe may well be one of the least frivolous prototypes on display among the 1,100 exhibitors. Developers plan to sell the device as a way to track mentally disabled people or seniors who have Alzheimer's disease.

Where would you be without GPS?

Perhaps carrying fewer gadgets: The technology is being added to shoes, MP3 players, dogs

By Carolyn Y. Johnson | Boston Globe | February 19, 2007

This month, GTX Corp. launched a line of Xplorer Smart GPS shoes that transform sneakers into a wearable LoJack system.

ABI Research found that the number of people in North America who subscribe to GPS-enabled location-based services more than doubled between 2005 and 2006, from 1.6 to 3.9 million. The number of subscribers is projected to rocket to 52 million in 2011.

That means companies working in what used to be a niche market have been enjoying explosive growth. Revenues at TomTom NV, a Concord-based maker of personal navigation products, have increased more than 500-fold since 2001, from $2.5 million to an estimated $1.7 billion last year. Garmin's business has exploded into the mainstream, too, and the company ran its first Super Bowl ad this year. Boston-based start-up Skyhook Wireless brings location awareness to any device with WiFi, and announced a major partnership this month with GPS platform maker SiRF.

Xplorer shoes offer advanced personal location services

from Wearable Electronics

January 29, 2007 - We've written several times about the concept of electronically fencing dogs and cats for their safety, or the safety of others. Similarly, as GPS technologies have become commercially viable, of tracking assets and loved ones to ensure their safety. Now personal location services company GTXC Corporation, is set to unveil a line of Xplorer Smart GPS shoes at the World Shoe Association (WSA) in Las Vegas on February 1 which offer a range of new opportunities. Xplorer shoes incorporate a small and robust GPS tracking device which hooks up with GTXC's internet user portal to offer a very compelling array of personal location services.

Integrated GPS Shoes by GTXC

Getoutdoors.com Outdoor Blog - Friday, February 2. 2007

Integrated GPS Shoes by GTXC Though originally made to track patients and kids, we're sure the shoes will be integrated soon with the Nike + Ipod so you can track your run in your personal Google mashup. Or hide it in your wife's purse to see whether she's banging San Francisco's mayor, Gavin Newsom. Or something like that. The system from GTXC has a sophisticated GPS integrated into the shoe, which communicates directly with a satellite, which then relays locations in real-time to their monitoring center and made available via internet or phone. Predetermined geographic areas can also be defined and alerts sent when the person being tracked leaves or enters the area. And don't worry, they already have a product for outdoor activities called the Wearable Caddy.

New Smart GPS Shoes

Manisha Kanetkar - Thursday, 1 February 2007

Keeping track of your loved ones has never been so easy (or so spy-like) with the new Xplorer smart GPS shoes designed by GTXC.

The company boasts the shoes incorporate the smallest, most powerful and robust GPS tracking device currently available. GTXC says they are ideal for caretakers of children or the elderly to easily monitor the location of their charges.

So, for example, they can preset perimeters of safe zones or unsafe zones, and then receive mobile phone alerts if a perimeter is breached by the wearer. This is handled by what the company calls its 'set-it-and-forget-it' Dual GeoFencing feature.

Shoes with GPS locator Coolest Gadgets

Jan 29, 2007 - GTX Corporation will be unveiling its new line of Xplorer Smart GPS footwear at the beginning of next month in Las Vegas. The Xplorer aims to usher in the next generation of GPS smart shoes by incorporating smaller and yet more powerful GPS chipsets inside the shoe itself to provide a more accurate reading....

GTX Corporation unveils GPS-equipped Xplorer shoes Engadget

Jan 26, 2007 - It seems like Sayo Isaac Daniel has some serious competition coming at him in the GPS shoe market, as GTX Corporation is unveiling its latest geo-tracking footwear at next week's World Shoe Association trade show. The questionably styled Xplorer kicks pack an internal GPS transceiver,...

GPS Shoes keep track of kids

January 25, 2007 - GPS-integrated shoes - now why didn't I think of that? The Xplorer line of Smart GPS shoes from GTX Corp. come with an integrated GPS tracking device which helps parents keep tabs on their children. In addition, parents are able to set up a virtual boundary, where they will be duly noted via SMS should the shoes leave beyond the designated area.

GPS Shoes Let Mommy Know Where You Are

January 25, 2007 - Good news for worried parents. These GTX GPS Xplorer Smart Shoes will let you keep track of your kids no matter where you are. Here's how it works.

Define a "safe" area around your house or school that it's safe for your kids to wander around. When the GPS signal goes outside of the area, an SMS will be sent to your phone alerting you of the situation. Then you're free to call your wife, the police, or Chloe from 24.

The GTX GPS shoes have a small GPS tracking device inside the shoe actually communicates the location to a central location tracking service

ESATO NEWS - Jan 26, 2007 - Xplorer, the next generation of smart GPS shoes, incorporates the smallest, most powerful and robust GPS tracking device on the market today. Drawing on a long history of patented embedded GPS technology for footwear and other consumer products, GTXC has been in development on the Xplorer line for the past three years. The new line advances the state of GPS tracking technology considerably, utilizing several groundbreaking innovations currently in the patent process.

GTX Corp. announces the Xplorer line of Smart GPS shoes

Thu, 25 Jan 2007 - The GTX GPS shoes have a small GPS tracking device inside the shoe actually communicates the location to a central location tracking service. So you could get your kids these GPS sneakers and define an area where it is safe for the kid to wander around. When leaving the defined area an SMS would be sent to your mobile phone notifying you of the situation. GTX calls this feature GeoFencing. The batteries powering the GPS unit inside the shoes last several days.

"With Liberty and Surveillance for All: Person-to-person Surveillance Gets Green Light from Public

Survey research from Boston University graduate students shows that Americans are more willing to engage in surveillance of loved ones than one might expect given our love for independence. Half of Americans are comfortable with being electronically monitored by a loved one for safety

or health reasons. Nearly a third 32% say it is likely they will use a tracking device to monitor a loved one in the future."

"The greatest endorsement of P2P surveillance is that 66% of Americans are comfortable being monitored by concerned loved ones in case of emergency. That's an awfully large market waiting to be tapped by companies like GTX Corporation who debuts its first GPS-based tracking shoe for children this week."

Excerpts from recent Boston University Research indicating that two-thirds of Americans are comfortable being electronically monitored by loved ones in case of an emergency

Download the full article

Brave New GPS World

By James Klein, Larta VOX Editor - November 3, 2003

In the future, we won't lose anything. Advances in global positioning system technology allow users to easily pinpoint the location of any object on earth. GPS boards have been reduced to the size of a postage stamp. Soon, we could attach GPS locators to everything we own - cell phones, briefcases, wallets - and even our children.

GPS Shoe to Track Alzheimer's Patients

London, England - June 10, 2009 - A new show outfitted with a GPS chip aims to offer peace of mind to Alzheimer's patients and their caregivers.

Download the full article

GTX Signs Deal With Aertrex Worldwide

June 1, 2009 - GTX signs its first footwear deal for its Personal Location Services product with Aertrex Worldwide, which specializes in orthotic footwear.

Download the full article

Enfora and GTXC Advance Personal Tracking and Location with GPS-enabled Shoe

Plano, Texas - March 27, 2007 - Enfora, Inc., today announced GTX Corporation's (GTXC) adoption of the Enabler® IIG-A-GPS embedded wireless and location module into their latest model of the GTXC Xplorer® GPS Smart Shoe designed to monitor the whereabouts of loved ones.

"Enfora and the Enabler II provide us with an integrated approach to software, Internet connectivity and customization that lets us focus on our product and service offering," said Eric Stalnaker, VP of Business Development at GTXC. "By working with Enfora, we know the Xplorer® A-GPS Smart Shoe is built on a robust and highly accurate platform."
Download the full article

GTXC Wins Praise, Reduces Chip Size

Los Angeles, California, March 5, 2007 - GTXC received a strong, positive reception as a third time exhibitor at the recent World Shoe Association show in Las Vegas, NV. It also won praise from the technology community at the latest 3GSM World Congress in Barcelona, Spain. GTXC continues to build momentum, enhance its intellectual property and provide leadership throughout the embedded GPS footwear space.
Download the full article

New era of "Wearable GPS" capabilities enabled by technological breakthrough.

February 21, 2007, Los Angeles, CA - GTXC, founder of the Personal Location Services category and leader in Miniaturized GPS Technologies, has created a proprietary, "single click" software application used to activate the GPS-2-SMS Dual-GeoFence features that form an integral part of its embedded GPS technology. The recent Multi Dual GeoFence patent application filled in February 2007 is the most current of seven applications filed since the company's founding five years ago, and promises to bring new capabilities and efficiencies to the Wearable GPS industry. The company's first, US Patent 6.788.200 titled GPS Footwear was issued in September 2004.
Download the full article

GTXC unveils new generation of Smart GPS Shoes

Los Angeles, CA, January 25, 2007 - GTX Corp., a dominant world leader in personal location services, will unveil their new Xplorer line of Smart GPS shoes on February 1st, at the World Shoe Association (WSA) in Las Vegas.
Xplorer, the next generation of smart GPS shoes, incorporates the smallest, most powerful and robust GPS tracking device on the market today. Drawing on a long history of patented embedded GPS technology for footwear and other consumer products, GTXC has been in development on

the Xplorer line for the past three years. The new line advances the state of GPS tracking technology considerably, utilizing several ground-breaking innovations currently in the patent process.
Download the full article

GTXC to provide maritime version of personal GPS tracking devices to governmental security agencies and consumers

Los Angeles, California, October 4, 2006 - GTXC (GTX Corporation), the Personal Location Services (PLS) company known worldwide for developing and commercializing miniaturized personal GPS tracking technologies - including ground-breaking shoe-based satellite tracking products - announced today that they have signed a licensing agreement aimed at providing miniaturized, waterproof personal tracking devices to governmental security agencies and consumer maritime enthusiasts.
Download the full article

An Open Letter To GTX Corporation's Investors, Customers And Friends

January 5, 2007 - GTX Corp has received many inquiries this week regarding recent reports that another manufacturer has entered the GPS footwear sector claiming, among other things, that they have patented GPS footwear technology, and that there is a technology called "Quantum Satellite Technology."
GTXC believes that the convergence of high technology with consumer products should be represented to the public in an ethical and honest fashion. GTXC takes issue with the claims made in those recent reports, and believes that they do not paint an accurate and truthful picture. As such, GTXC is taking immediate, strong and active steps to respond to those claims in a responsible way to inform the public and the relevant media about GTXC, its products and technology, and the true status of the following facts.
Download the full article

CEO & President of GTXC - to Address Cornell MBA Class

Los Angeles, California, November 6, 2006 - Patrick Bertagna, CEO and President of GTXC (GTX Corporation), the Personal Location Services (PLS) company known worldwide for developing and commercializing miniaturized personal GPS tracking technologies - including

shoe-based and hand held satellite tracking products - will address the Cornell Business students that are analyzing a case study that was developed over the past year at the university.
Download the full article

GTXC announces newest addition to PERSONAL GPS suite of miniaturized location-finding solutions

Los Angeles, California, June 1, 2006 - GTXC (GTX Corporation), known worldwide for developing and commercializing innovative shoe-based GPS tracking technologies, today announced a downloadable location-finding application for hand held PDAs.
Beginning with PaqTrax™ for the HP iPaq 6515, the newest GTXC application integrates a PDA's embedded GPS abilities with the internet-based GTXC TrackPack™, creating a complete Personal GPS™ tracking and location-finding solution.
Download the full article

Boston University study validates Americans' acceptance of Person-to-Person (P2P) surveillance

Los Angeles, California, March 14, 2006 - GTXC, Inc., maker of miniaturized tracking technologies - including a patented shoe-based GPS location-finding platform - shared in the release of a recent Boston University study which offers proof of strong consumer demand for Person-To-Person (P2P) tracking and surveillance products. Despite increased media attention to governmental eavesdropping and surveillance issues, the study's conclusions contradict privacy advocates and redress recent media sentiments by finding that up to 81% of those surveyed approve the use of P2P surveillance under specific situations, and nearly a third (32%) say they are likely to use a tracking device to monitor a loved one in the future.
Download the full article

GTXC announces world's first GPS location-reporting technology built into footwear

Los Angeles, California, February 10, 2006 - After several years of intensive research and development, GTXC (GTX Corporation) today announced the world's first GPS location-reporting platform built into footwear. Unveiled at the World Shoe Association trade show in Las Vegas, Nevada, the company's patented solution links advanced GPS and cellular miniaturization technology with internet-based monitoring capabilities to provide accurate, real-time location and movement history to a wide range of users. Their shoe-based technology also introduces an

innovative platform for delivering a new category of portable, personal consumer-based applications, from exercise monitoring and live real-time gaming to interaction with appliances and other household items.
Download the full article

With Liberty and Surveillance for All: Person-to-person Surveillance Gets Green Light from Public

February 2006 - Excerpts from recent Boston University Research indicating that two-thirds of Americans are comfortable being electronically monitored by loved ones in case of an emergency. Survey research from Boston University graduate students shows that Americans are more willing to engage in surveillance of loved ones than one might expect given our love for independence. Half of Americans are comfortable with being electronically monitored by a loved one for safety or health reasons. Nearly a third 32% say it is likely they will use a tracking device to monitor a loved one in the future."
Download the full article

DailyTech, LLC - Michael Barkoviak - March 17, 2010 - GTX Corporation may be one step closer to trail running shoes that have integrated GPS directly into the shoes. GPS use has increased in the cycling and running worlds, as it is used to accurately track time, distance, and speed. There has been discussion of GPS-enabled running shoes in the past, but nothing significant ever materialized.

Oct 26, 2010
Listen to an interview with GTX Corp CEO, Patrick Bertagna on wsRadio - The Peggy Smiley Show.

Top Grossing iTunes list

GPS Tracking Apps for your smart phone.

Featured Products

Shoes to monitor seniors suffering from dementia.

While GPS tracking can answer the "where" question, the Code Amber Alertag knows the answers to the "who, what and when" questions that first responders to emergencies need to know to provide informed treatment.

2 Way GPS has helped the lives of thousands by guiding emergency services to the precise location of people and pets in need of immediate attention. Getting there quickly however is only the first step. That's why everyone needs a Code Amber Alertag

Code Amber is a wholly owned subsidiary and a member of the family of products and services of GTX Corp

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From: Jeffrey Epstein [jeevacation@gmail.com]
Sent: 9/22/2011 10:19:51 AM
To: Sultan Bin Sulayem [redacted]
Subject: Re: Gps GTX Smart Shoe

we will have dinnner at 8 ,, you can bring your maldives friend or anyone else. (no women). we should spend an hour together just the two of us. today tomorrow:? It is always fun to see you

On Thu, Sep 22, 2011 at 12:46 AM, Sultan Bin Sulayem <[redacted]> wrote:

- About GTX
- Products & Services
- Platform
- News
- Contact Us
- Investors
- Press
- Blog

- Videos
- Watch Video
- GTX Corp on YouTube
- Locimobile

NEWS

Patrick Bertagna Interviewed on Travel Talk Radio with Sandy Dhuyvetter

Patrick Bertagna, founder and co-inventor of the GTX Smart Shoe, joins Sandy to discuss this new invention and what it means to patients and families.

The Executive Producer and Host of TravelTalkMEDIA is Ms. Sandy Dhuyvetter, one of the world's leading travel industry media specialists. Following a successful career as a pioneer in the

internet industry and new media in the San Francisco area, Sandy established TravelTalkMEDIA in 2001 to provide radio and web-based, online information to the U.S. and global travel industry.

Listen to the radio interview (MP3)

GTX Corp's Tracking Apps Hit One Million Dowloads

GPS Wolrd - July 12, 2011 - GPS Tracking Apps, from GTX Corp subsidiary LOCiMOBILE, have been downloaded more than one million times by users in 116 countries, and continues to be on the top charts of iTunes and Android marketplace, the company said. "The GPS Tracking app is the simplest way to stay connected to a child, parent, friend or business associate, quickly and accurately from a Smartphone or Internet-ready device like the iPad, iPod or Android tablet, allowing users to locate people, instantly with one simple touch of a button," said Patrick Bertagna, CEO of GTX Corp. "We also offer it at a price everyone can afford without compromising privacy."

Read the full article

GTX Corp... More'n A Million Served (GPS)

This App has managed to stay quite popular in both iTunes and Android online sites...

SatNews Daily - July 1, 2011 - GTX Corp. (OTCBB: GTXO.OB), a provider of real-time two way GPS Tracking and personal location services (PLS) has announced its LOCiMOBILE subsidiary's GPS Tracking Apps has managed more than 1 Million downloads with users in 116 countries and continues to be on the top charts of iTunes and Android market place. "The GPS Tracking app is the simplest way to stay connected to a child, parent, friend or business associate, quickly and accurately from a Smartphone or internet ready device like the iPad, iPod or Android tablet, allowing users to locate people, instantly with one simple touch of a button," said Patrick Bertagna, CEO of GTX Corp. "We also offer it at a price everyone can afford without compromising privacy."

Read the full article

Professor Andy Carle talks about "Nana" technology and the GPS Smart Shoe™

Radio show called "Wriggling in the Middle", based out of Canton, Ohio and syndicated nationally through FOX radio network.
http://www.whbc.com/Wriggling-In-The-Middle/6636686

For anyone who would like to skip directly to the shoes, go to the link below, scroll down to the show listing (March 28) and fast forward to about the 26-minute mark. The conversation on the shoes lasts about 7 minutes.

Proximity marketing will push location based service revenues to nearly $13 billion over the next few years.

SatNews Daily - March 23, 2011 - GTX Corp (OTCBB: GTXO) and ADAM, Inc. have entered into an exclusive revenue share agreement allowing 123 Chambers of Commerce representing more than 100,000 businesses nationwide to push out proximity alert promotions, using the GTX Corp GPS/PLS Platform and leveraging its growing GPS Tracking Smartphone App user base. Gartner reports that 42 percent of consumers use their phone to check a store location, 31% use it for a mobile promotion, and 17 percent use their phone for the actual purchase.

Read the full article

GTX Corp. Joins with Chambers of Commerce on Location Advertising

GPS World - March 22, 2011 - GTX Corp., which provides two-way GPS Personal Location Services (PLS), and ADAM, Inc., a platform for Hyper Local Mobile Apps for Directories, entered into an exclusive revenue share agreement allowing 123 Chambers of Commerce representing more than 100,000 businesses nationwide to push out proximity alert promotions, using the GTX Corp GPS/PLS Platform and leveraging its growing GPS Tracking Smartphone App user base, GTX Corp. announced.

Read the full article

New Tech Is Helping Families With Special Needs

March 17, 2011 8:52 PM - MIAMI (CBS4) – New technology is making life a little easier for people with special needs and their families.

The GTX Corp. is introducing new shoes, loafers and sneakers, with GPS built into them. CBS technology expert Katie Linendoll said they can really come in handy for families who are taking care of relatives suffering from Alzheimer's disease. With a downloadable app, they can track them using the GPS or get an alert if the person wanders out of a pre-set safe zone.

Read the full story and view the video

Technology for seniors

Great Day Show - CBS KHou.com - Houston - March 23, 2011

Truly groundbreaking tech to change our lives

CBS News - Early Show - March 17, 2011 - The shoe uses GPS and cellular technologies. It gives a family member or a caregiver the option of monitoring real-time from the Internet or on your phone...

Watch the CBS Early Show video

GTX's GPS Tracking Apps For iPhone
Apps allow you to let family, friends know your location

Joel Mathis, Macworld.com - If the federal government tagged millions of iPhone users with GPS tracking devices, the American people—or, at least, Apple devotees—might protest very strongly. But iPhones these days come with GPS installed, and companies make good money furnishing apps that utilize that very feature. On this list: GTX, who offers a pair of $4 GPS apps—GPS Tracking and Tracking—that provide workmanlike solutions for users who want to keep an electronic eye on their loved ones.

Read the full article

Going Gray-Where Technology's Headed - Entering the Gray-Tech Revolution
World Market Media - Brittney Barrett - February 16, 2011

Over the next 20 years, 80 million baby boomers will enter their sixties and seventies in the U.S. alone. In the next 40, the number of senior citizens will double. For the government, this represents a huge financial burden resultant from rising Medicare and

Social Security costs. For industries focused on late-life care and creating products that cater to the aging demographic; however, this population shift represents a major opportunity.

Read the full article

Walk to Remember? A National Academy of Sciences Study Says Yes

February 13, 2011 - In healthy adults, the hippocampus — a part of the brain important to the formation of memories — begins to atrophy around 55 or 60 and even sooner to an even greater degree if one contracts Alzheimer's. Now psychologists are suggesting that the hippocampus can be modestly expanded, and memory improved, by nothing more than regular walking.

Read the full article

GTX's New Patent...Smart Shoe Has Heart In Its Sole (GPS)

Satnews Daily - February 09, 2011 - GTX Corp (OTCBB: GTXO) has a big heart that is manifested in their sole. GTX, known for customizable, 2-way GPS Personal Location Services (PLS) solutions, was granted its ninth patent for their innovative and potentially life saving GPS Smart Shoe technology.

By the year 2050, there will be 16 million adults with Alzheimer's in the U.S. alone. The multi patent GPS Smart Shoe™ will afford millions of caregivers the means to remotely monitor those afflicted with Alzheimer's that become lost due to wondering.

Read the full article

GPS Shoes – Footsteps to the Future…

World Market Media - Brittney Barrett - February 7, 2011

Every 70 seconds, someone in America develops Alzheimer's, according to the Alzheimer's Association 60% will wander away from their homes or care facilities at some point during their affliction with the disease. Worse, it's even more difficult to find a missing senior citizen than a missing child, as fewer people will take note of older person walking alone than they would a small child.

Read the full article

GPS Tracking Technology – How it works

GPS Tracking Apps are available for most smartphones.

Watch this video to learn how GPS Tracking Technology works and what it can do for you.

GPS Tracking Apps installed on over 850,000 smart phones

GPS Tracking Apps by LOCiMOBILE are installed on over 850,000 smart phones in over 106 countries.

LOCiMOBILE is a leader in 2-way GPS Tracking Solutions providing the ability to find your loved ones quickly and easily with one touch of a finger. But don't stop there, get creative with it; track your drivers in real-time, see when your relatives land at the airport… with turn by turn directions, you will never get lost again!

Read the full article

Locimobile GPS Tracker App Now for the iPad

Well it looks like the iPad's next leap is to become a GPS tracker. Locimobile, which makes GPS Tracking Apps for iPhones, iPods and smartphones is now taking on the iPad. From the comfort of your own home and on a much bigger screen, you can keep tabs on your spouse or kids and see in greater detail than before, where they are off too or hanging out. Will the iPad be the cause for the next big celebrity break-up?! Who knows but in the mean time you can use it to keep tabs on your own family for only $4.99

Proximity marketing will push Location Based Services revenues to nearly $13 Billion

Knowing where you are will give you the answer to the "where is" question.

Recent developments in GPS positioning technologies could drive revenues from mobile location-based services to more than $12.7 billion by 2014, according to a new report published by Juniper Research.

Revenues will come from sales of apps through application stores and other channels, but also from mobile advertising tied to those apps. In fact, the Juniper report notes that advertising will likely form an increasing share of Mobile Location Based Services-related revenues over the next five years.

Read the full article

GPS Technology Mentioned In State of the Union Address as Growth Driver

World Market Media - Brittney Barrett - January 26, 2011

"The rules have changed. In a single generation, revolutions in technology have transformed the way we live, work and do business" said President Barack Obama last night, during his second State Of The Union address to the 112th Congress of the United States and 1.3 million Americans watching the speech from their homes.

Read the full article

Patrick Bertagna interview with Bob McCormick from CBS Los Angeles, Money 101

January 17, 2011 - Being an apps developer can pay off handsomely when you fill a need.

Click here to listen to the interview

LBSN – What It Is And Why You Should Care

Marsha Ahrenkiel - January 13, 2011 - Shades of The Island of Dr. Moreau! (hint: Google H.G. Wells) Modern-day mad scientists (let's call them "software developers") have been merging social networking concepts with a range of other technologies and rolling out new hybrid beasts that could eventually change your marketing and public relations strategies.

One that we're keeping a close eye on here is a species known as "location based social networking" (LBSN) – combining short message service (SMS), aspects of gaming, smartphone technologies and GPS capabilities.

Read the full article

GTX Corp - Year in Review 2010

SatMagazine - December 2010 - GTX Corp is in the business of keeping you connected — the Company continues to be at the forefront of the personal location industry and debuting new technologies that impact how you ask the "where is" question.

Read the full article

Future Family: Life In the Digital Age preview.

The Discovery Channel - Nov. 13, 2010 - This patient education program explores how baby boomers the 78 million Americans born in the wake of World War II are embracing technology to better manage increased work and home responsibilities. Future Family discusses the GPS footwear by GTX Corp.

View the show - Part 1

View the show - Part 2

Wireless Technology on Black Friday: Smart Phones Good, PNDs Bad According to WedBush

World Market Media - Tom Copeland - December 1, 2010 -

The biggest holiday shopping days of the year has passed and many investors want to know: How did wireless technology do? According to Scott Sutherland, CFA with Wedbush Securities, the answer is pretty good – depending on which companies you're invested in.

Read the full article

Andrew Carle on Elder Tech Trends

Eldergadget.com - November 5, 2010 - ElderGadget's Michael Goldman starts the series with a conversation with Andrew Carle, an Assistant Professor at George Mason University. Andrew is also an expert on technology development for seniors, and is a consultant for the Nintendo Corp., GTX Corp., and several other companies about how to make their newest gadgets more elder friendly.

Listen to Podcast interview with Andrew Carle

How does a GPS tracking system work?

Patrick Bertagna, GTX Corp. - 10/26/2010 - Global Positioning System (GPS) is a worldwide radio-navigation system formed from the constellation of 24 satellites and their ground stations. The Global Positioning System is mainly funded and controlled by the U.S Department of Defense (DOD). The system was initially designed for the operation of U. S. military. But today, there are also many civil users of GPS across the whole world. The civil users are allowed to use the Standard Positioning Service without any kind of charge or restrictions.

Read the full article

GPS Elder Applications

Eldergadget.com - October 21, 2010 - The rapid evolution of Global Positioning Satellite (GPS) tracking technology is producing new applications of particular interest to seniors, their families, and caregivers. One of the most active companies in this space is GTX Corp. GTX is the company behind the patented GPS Smart Shoe™ , in partnership with footwear manufacturer Aetrex Worldwide. The shoe was developed to provide peace of mind for families with senior-age loved ones suffering from Alzheimer's and other forms of dementia. Available on the Internet at the GPS Shoe, Aetrex, and Foot.com sites, the shoe should also be available in retail stores some time in 2011, according to GTX Corp. chairman/president Patrick Bertagna.

Read the full story

The "Where" or Your Social Media Network - iCheck-In

World Market Media - Tom Copeland - November 15, 2010 - Checking in is a movement that's really starting to catch on, and companies are scrambling to develop and release check-in apps and services. GTX Corp committed to being the "better people finder", owns and operates LOCiMOBILE, Inc. which developsGPS Tracking location based social networking (LBSN) mobile applications, today released its 17th App - iCheck-In, the fastest and easiest way to "check-in" and stay connected to everyone in your mobile contact list and your Facebook and Twitter friends.

Read the full story

App News

On Saturday, CBS News broadcasted a segment on The Early Show called "Unique Ways on Keeping Kids Safe on Halloween" in which CNET technology contributor Katie Linendoll showcased a few charming gadgets to help track children while they're out and about. Naturally, GTX Corp's iPhone, iPad, Android and Samsung GPS Tracking Apps iLoci2 and GPS Tracking Pro were highlighted for their easy-to-use yet powerful features.

View the show

Patrick Bertagna GTX Corp CEO on the Peggy Smedley Show

Oct. 26, 2010 - wsRadio

Listen to an interview with

Patrick Bertagna, GTX Corp CEO,

on The Peggy Smedley Show

Click here to listen

GPS Smart Shoe ™ Wins 2010 People's Choice Award

LOS ANGELES, Oct. 12, 2010 (GLOBE NEWSWIRE) -

GTX Corp (OTCBB:GTXO - News) has won the prestigious 2010 People's Choice Award for Most Innovative Connected Location Device at the 4th Annual Locations & Beyond Summit this past week.

"We are honored to have won this prestigious award and look forward to continue to bring innovative and game changing technologies that transform how we utilize GPS tracking and stay connected to one another," says Patrick Bertagna, CEO and founder of GTX Corp.

Read the full story

Wall Street Reporter Interview

Audio interview with Patrick Bertanga, CEO, GTX Corp

Click here and then on Audio MP3 button to listen to the interview.

Safety afoot, via GPS, for Alzheimer's patients

USA Weekend - PEGGY J. NOONAN - October 17, 2010

A tiny GPS chip embedded in the sole of the shoe provides continuous tracking ... The GPS Shoe by Aetrex is available from Foot.com and GPSShoe.com now for ...

Read the full story

GTX Corp. (OTCBB: GTXO) Wins 2010 Peoples Choice Award

Tom Copeland - October 11, 2010 - World Market Media

The GPS Smart Shoe™ was nominated for Most Innovative Location Connected Device at the Locations and Beyond Summit that was held last week during the CTIA show and CEO Patrick Bertagna confirmed with us - GTXO had won!

Read the full story

With 675,000 Downloads in 91 Countries GPS Tracking Apps Leader GTX Corp Launches 3 New GPS and LBS Apps

GPS Tracking Apps Keep You Connected to Everyone, Everywhere

LOS ANGELES,CA - Tuesday, September, 28th 2010 - GTX Corp business unit LOCiMOBILE, Inc. is launching a series of GPS and personal location - based "apps" and web services solidifying its leadership position in the mobile LBS market, which mobile carriers are calling "Pure Gold".

Read the full story

Not All Who Wander Are Lost

Donna Fannin - Gather News Technology - October 17, 2010

GPS shoes are coming to a retailer near you. Why in the world would anyone want a GPS tracker in their shoes, you ask? Generally, they don't, if they know about it.

Read the full story

People Choice Tries on GPS Smart Shoe

By Peter Suciu - Kinetic Shift - October 13, 2010

While there are many tracking programs out there for children and even teens, GTX Corp introduced an innovative product aimed at adults suffering from Alzheimer's disease and other dementias. Many sufferers are actually in good physical condition and thus aren't confined to a room or even a house. To keep track of loved ones, the company came up with a novel idea – namely putting a tracking device in the footwear.

Read the full story

GTX Corp... Phone Finder (GPS)

Satnews Daily - September 28, 2010

GTX Corp (OTCBB: GTXO.OB) business unit LOCiMOBILE, Inc. is launching a series of GPS and personal location-based "apps" and web services.

The new apps all have a GPS component and are designed to add the "where is" factor to functionality. The Company launched on the Android market place Phone Tracking™ in case you lose or misplace your phone. More than 70 million phones are reported lost or stolen in the US each year, but while the loss of a phone may be annoying, the loss of personal and business data could be devastating.

Read the full story

Gadgets -These Shoes Were Made for Tracking

By Erin Monda - TMCnet Contributor - September 22, 2010

There is no end to the wonderments that shoes can achieve (a certain pair of ruby Mary Janes comes to mind) – and one company is pushing the envelope even further (although not quite as far as Oz).

I'm referring to GTX, a company integrating two-way GPS people-finding technologies into consumer products and applications. The company utilizes the latest in miniaturized global positioning system (GPS) tracking and cellular location technology, enabling subscribers to track in real time the whereabouts of people, pets, or high valued assets through its customizable

transceiver module, wireless connectivity gateway, middleware, and viewing portals.

Read the full story

Costs of Alzheimer's will touch 1% of Global GDP in 2010

By World Market Media

The rising need for GTX Corp's technology continues to be influenced by the increasing numbers of elderly and those that are memory impaired, and so the epic battle of technology and illness wages on. ...

Read the full story

Do you know what the Most Innovative Location Device is?

No it's not a compass or an astrolabe. It's not semaphore or a smoke signal. Not an RFID tag or a neon sign or phosphorous flare either.

Give up?

It's the GPS Smart Shoe™ recently mentioned in Forbes Magazine, developed by GTX Corp (OTCBB: GTXO.OB) and licensed to Aetrex Worldwide. Yes, a shoe…well a very smart shoe as it can tell a caregiver the precise location, bearing, history, speed and altitude of an Alzheimer's victim that has eloped or wandered. No small feat – pun intended – to reduce the overwhelming stress on the millions of victim caregivers while potentially saving thousands from injuries and death owing to exposure, accidents and criminal activity. The GPS Shoe also reduces the manpower drain on municipal services; fire, police and welfare agencies often enlisted to locate the mentally ill.

While a Finalist in the Most Innovative Location Device category of the Locations & Beyond Summit and the People's Choice Awards is a wonderful acknowledgment for the years GTXO invested in developing the solution and the promise that Aetrex has made in bringing the Shoe to market… the real winners are those touched by this devastating disease for which there is no cure, but now have a new measure of hope.

'Nanatech': Seniors Stay Independent With Tech Gadgets

Senior Tech - Ashlea Ebeling, 09.15.10

The GPS shoes from GTX (GTXO - news - people) tackle another senior problem--folks who have Alzheimer's who wander and are at risk of getting lost or injured. A GPS device in one of the shoes will alert a caregiver if the wearer leaves a specified area. Don't expect the latest styles from Nike (NKE - news - people) or Steve Madden (shoo - news - people) . The manufacturer is Aetrex Worldwide, an orthodic and medical specialty shoe maker. Roll-out is expected by year's end.

Read the full story

Keeping an eye on Mom and Dad

Remote monitoring technology aims to keep seniors in their houses and out of nursing homes

Over the coming months a raft of new-and-improved remote monitoring devices will hit the market, from GPS shoes that can track the whereabouts of wandering seniors to MedCottages, portable RV-like units equipped with motion and monitoring systems that allow seniors to maintain some independence from the backyard of their adult childrens' homes.

"As we age, this is going to be a growing trend," says Laurie Orlov, a Florida-based expert on so-called "aging-in-place technology" aimed at keeping seniors in their houses and out of nursing homes as long as possible.

"We have to get past the fear and antagonism among the older people who need it the most. I don't think they're that technology-ready, but the boomers, who are their adult children, certainly are."

Motion sensors strategically placed in the three-bedroom home where Howe has lived for 53 years feed information right to her daughter's laptop, detailing when she got out of bed (the Friday we chatted it was 9 a.m.), walked into the bathroom (9:15 a.m.) or hovered at the kitchen table where she keeps her pills (9:30 a.m.)

Even her blood-pressure reading (165/76) is fed to her daughter's computer, along with her daily weigh-in tally, providing a detailed graph which she often takes to her doctor appointments.

The only thing GrandCare can't tell Pierce, because her system doesn't include cameras, is if her mother actually swallowed her pills.

Monitoring and in-home help technologies will be a $20 billion U.S. business in North America by 2020, predicts Orlov, founder of Aging In Place Technology Watch.

Already some baby boomers are able to remotely lock their parents' doors, track calls coming into their homes and even see who is ringing the doorbell, in many cases right from their smart phones. Systems such as QuietCare, WellAWARE, FineThanx and SimplyHome are already fixtures in some U.S. homes and seniors' communities, although Orlov estimates fewer than 10,000 units are in active use because the systems can be so costly.

Next month, Paul Whyte, a Markham dealer of smart-home technology that allows ordinary electronics and appliances to communicate with each other, will unveil the GrandCare system at the Zoomer show in Toronto.

"I call it the invisible caregiver," says Whyte of Cybernetics Systems Inc. "The minute I saw this system I thought, 'There's something that actually makes sense.'

The key, of course, with all these technologies is that the senior be relatively able-bodied and sound of mind — most are of limited value if the senior is suffering from dementia, which is expected to become a major public health issue in the next few decades.

But developers are also working hard on that challenging front.

Sometime later this fall or next spring the first GPS-equipped shoe, the Aetrex Ambulator, will go on sale through www.gpsshoe.com orwww.foot.com.

Originally designed for children by Los Angeles-based GTX Corp., the new shoes are expected to retail for about $250 U.S. They enable caregivers to track those afflicted with dementia or Alzheimer's thanks to GPS and cellular technology that will relay their whereabouts back to a monitoring centre.

"Privacy may be a talking point, but it's not really an issue," says Patrick Bertagna, chairman and CEO of GTX Corp.

MEDCottage creator Dupin expects concerns around privacy will fade quickly as families and health-care systems here and in the U.S. become overwhelmed by aging baby boomers — more than 76 million in the U.S., 10 million in Canada — who start hitting 65 next year.

"I see remote monitoring becoming an integral part of health care as we all age," says Dupin. "One of the issues around aging in place is going to be making trade-offs. Privacy may be something we have to give up."

Susan Pigg focuses on issues about aging and baby boomers. spigg@thestar.ca

Tracking Deal

A downtown L.A. company that creates GPS tracking applications for cell phones has announced a deal to provide its friend-finding apps on Samsung smart phones.

The deal could mean more than 40 million more downloads, which would translate to increased revenue, for GTX Corp.'s application, which is currently available for the iPhone, BlackBerry and Android phones, said GTX Chief Executive Patrick Bertagna.

The LociMobile tracking applications send a GPS signal out to all of a person's cell phone contacts who use the app. Bertagna said the app can be used to meet up with friends or keep tabs on kids.

GTX has also developed a GPS shoe for tracking Alzheimer's patients.

Staff reporter Natalie Jarvey can be reached atnjarvey@labusinessjournal.com or at (323) 549-5225, ext. 230.

Read the full story

Senior Gadgets: GPS Shoe May Offer Peace of Mind to Alzheimer's Caregivers

By Teresa Steinfatt - July 1, 2010 - Safety of loved ones is a top concern for caregivers, especially those caring for persons with Alzheimer's disease.

Memory loss and confusion can set in without warning. For example, a loved one might set out on a walk or errand alone, wander off and not be able to return home safely.

Currently scheduled for retail sale this summer, the Aetrex Ambulator® GPS Shoe by GTX Corp will provide millions of caregivers the means to help easily find those afflicted with Alzheimer's and other forms of dementia who wander and become lost.

Read the full story

Style and Safety Come Together with GPS Shoes For Alzheimer's Care

GTX Corp (OTCBB: GTXO), a provide of customizable, embedded 2-way GPS Personal Location Services (PLS) solutions, is bringing personal GPS tracking solutions to the 5.3 million seniors afflicted with dementia by signing a

four year, license agreement with Aetrex Worldwide, Inc. GTX Corp's eight patents for the GPS Shoe cover a GPS transceiver module that is placed within the footwear and transmission of location coordinates to a central monitoring station which disseminates the location data through the use of proprietary software, cellular connectivity, the GTX Corp middleware platform and the secure viewing portal.

Read the full story - World Market Media

Wandering Soles

Aetrex Worldwide Inc. has teamed with GTX Corp. to create the Aetrex Ambulator GPS Shoe, a therapeutic sneaker designed for people with Alzheimer's disease. The shoe comes with a tiny GPS tracker that alerts a caregiver when the wearer has strayed more than a set distance. It then sends the caregiver a Google map link that plots the wearer's location.

Read the full story

GTX And MNX — STAT Trax Critical Medical and Bio-Pharmas

SatNews - June 9, 2010 - GTX Corp (OTCBB: GTXO.OB), a provider in embedded GPS tracking location based services and MNX (Midnite Express), a worldwide specialty courier, have entered into an exclusive three-year contract for GTX to deliver thousands of highly customized, industry-first GPS tracking devices. Additionally, the GTX Corp tracking platform to the shipping company is included in the contract.

Read the full story

Find Friends and Family Mobile Apps

LOCiMOBILE [iPhone & Android]

LOCiMOBILE has a few great GPS tracking apps out at the moment. The two that I would like to feature are the free/lite versions of the software. This app supports up to 6 users (paid version is unlimited) and integrates with Twitter and Facebook. GPS Tracking populates your phone's built-in Google Maps with the locations of people in your private opt-in buddy list. You can let users

know where you are or request their location, and you can post your information to your social profiles.

Read the full story

GPS Tracking Apps Website to Track iPad, iPhone, Android, Blackberry Smart Phones

Want to locate all your friends with smart phones (ipad, ipod, iphone, android, blackberry) but you don't have one? The latest technology from GTX Corp allows you to do just that – www.gpstrackingapps.com high-tech website enables you to locate your family, friends and coworkers (who have downloaded the GPS Tracking App) instantly, in real time, even if you don't have a smart phone. http andwww.locimobile.com are proud members of the http GTX Corp (OTCBB: GTXO.OB) family of products and services. people locator, people finder, gps tracking, gps tracking app, location based social networking, iphone Friend finder, android, top downloads, gps apps, iPad, blackberry, gps shoe, GTXO, gtxcorp, top apple downloads

Read the full story

Style and Safety Come Together with GPS Shoes For Alzheimer's

Senior Housing News - GTX Corp (OTCBB: GTXO), a provide of customizable, embedded 2-way GPS Personal Location Services (PLS) solutions, is bringing personal GPS tracking solutions to the 5.3 million seniors afflicted with dementia by signing a four year, ...

Read the full story

Keeping track of seniors with Alzheimer's

Rosemary McClure, Special to the Los Angeles Times - May 29, 2010 - The email alert shouted its message: "Missing Person with Alzheimer's. PLEASE HELP." It was sent to Alzheimer's Assn. chapters and to law enforcement officials within hours after an Orange County woman disappeared while on a short trip to visit a friend.

The woman had set out in her car, made a wrong turn and became confused, says her family, who asked that her name not be used to protect her privacy.

Read the full story

Resources and Technology to Help Caregivers Cope

Kirk Johnson - NYTimes.com - May 4, 2010 - One Alzheimer's wanderer in Arizona had lost much of his memory, but not, apparently, his interest in fashion: he never left the house without a beloved baseball cap on his head. So a trick the family used to keep the man around was to hide his caps.

Search-and-rescue experts who deal with dementia patients also recommend alarms on doors that sound when opened if a proper code is not entered, along with posters or wallpaper images that disguise or conceal doors. Sometimes a simple large, emphatic sign on every door saying "Stop!" will deter a wanderer.

Read the full story

New App craze brings back the 1990's

World Market Media - April 9, 2010 - Every Portfolio manager I've ever known loves to find a sector with wind at it's back..the early users of the "CrackBerry" knew (Nasdaq: RIMM) was the stock he/she needed to invest in because every person on Wall Street had one. This phenomena doesn't occur often and RIMM"s are as rare as Australopithecus. I observe the current app craze as the new cycle for lightning quick revenues based on the size of the market itself. Certainly anyone with an iPhone or Android phone has imagined that they could build an app when they got home that night…I know I did.

I can tell you from experience that when Kleiner Perkins doubles the size of its venture fund specific to app's you know your watching the ship turning in the harbor. This is a unique space with wind at it's back and certainly the app's market is a niche to watch, we found this company and had a chance to speak with Patrick Bertagna at GTX Corp (OTCBB:GTXO) its Founder/ Chairman and CEO. He had some interesting comments about how the company has evolved and found some traction with its wholly owned subsidiary LOCiMOBILE Inc. Bertagna commented "With 500 million smart phones entering the market place, I believe we are at the tip of the next

disruptive wave. Apps will become as ubiquitous as the device they live on and that makes this new frontier a game changer" Certainly being on the iTunes top ten highest grossing list puts us at the forefront of this coming wave."

Read the full story

World Market Media Announces the Launch of the WMM NanoCap and MicroCap Indices

WEST PALM BEACH, April 19, 2010 (GLOBE NEWSWIRE) – World Market Media, Inc. ("WMM"), a high traffic stock market, news data website providing cutting edge new media products and services to publicly traded companies worldwide, announced today the launch of the WMM NanoCap Index and the WMM MicroCap Index.

Read the full story

GTX Corp. Inks Global Licensing Deal with Aetrex Worldwide

SGI - March 24, 2010 - The four-year, exclusive contract brings Los Angeles-based GTX a step closer to bringing its personal GPS tracking solutions to 5.3 million seniors afflicted with dementia. Aetrex is slated to begin selling the Aetrex Ambulator GPS shoe this summer through its website, www.foot.com, at www.gpsshoe.com and at a select group of assisted living facilities in the U.S.

Read the full story

New Running Shoes Could Include Embedded GPS

GPS-powered trail running shoes may be on the horizon

Michael Barkoviak - March 17, 2010 - GTX Corporation may be one step closer to trail running shoes that have integrated GPS directly into the shoes. GPS use has increased in the cycling and running worlds, as it is used to accurately track time, distance, and speed. There has been discussion of GPS-enabled running shoes in the past, but nothing significant ever materialized.

Read the full story

GPS in your shoe?

Yes GTX Corp. has a GPS shoe that can be worn while a family member is walking or jogging that reports your location to other family members ...

Read the full story

GTX Corporation - Year In Review

GPS "People Tracking" continues to garner both increased opportunity and adoption worldwide — PLS technology has been the focus of our business for the past seven years. GTX Corp., a leader in Personal Location Services, develops and license's 2-way GPS people finding technologies which seamlessly integrate with consumer products and enterprise applications. GTX Corp uses the latest miniaturized, low power consumption hardware technology in its GPS and cellular location devices and provides a fully customizable back-end portal enabling subscribers to use real time tracking to obtain the whereabouts of people, pets, or valued assets. Through its miniaturized transceiver module, wireless connectivity gateway, smart phone Apps, customizable middleware, and viewing portal, GTX Corp offers a complete end to end solution.

Read the full story

BEAM: Game Plays...

SatMagazine.com : November 2009 - With this issue's focus on the Latin American and MENA markets, one of the most interesting news items deals with Rio de Janeiro's win of the 2016 Winter Olympics. Companies who bid for, and win, the broadcasting rights to the 2016 Summer Olympics in Rio de Janeiro are certain to enjoy substantial profits, and Latin American countries and communities are already celebrating this award by the Olympic Committee.

According to GTX Corp., a firm whose base is in the Personal Location Services businesses, Latin America has increased its adoption of Location Based Services by a factor of 10 from 2008 to 2009. Carlos Briceno, the firm's Vice President of Business Development, states that the category with the highest total spending in South and Central America is in "People Tracking," which has been the exact focal point of GTX Corp for the past seven years.

Read the full story

GTX Corp Annual Update - Vista Partners
Download the full document

We Know Where You Are

Phoenix, AZ --(www.USEquityNews.com)-- 03/12/2009 - If the above headline sounds a bit spooky, be prepared for things to get a lot spookier in the coming years - but also a lot more useful, valuable and fun. That's because electronic technology has once again taken a turn that could, like the cell phone, affect much of your waking life, either directly or indirectly.

Read the fill story

GTX Corp brings personal location-based services to the masses with Google Maps API Premier Business

Wherever you go, there you are, goes the saying – but others might have a tough time finding you, at least until now. With GTX Corp's Personal Location Services, people can go online and, via an intuitive interface, track the exact location of loved ones, or even their high-value assets. GTX offers miniaturized assisted Global Positioning Satellite (GPS) tracking and cellular location-transmitting technology for consumer products and applications. The company's business model is to deliver solutions to consumers in a wide variety of wearable location devices, from shoes to tiny clip-on devices no larger than a small matchbox, by licensing its core technology to branded consumer product partners.

Read the full story

GPS-Equipped Shoes Keep Track of Wanderers

Tuesday, August 11, 2009 - Caring for a loved one with dementia is worrisome, especially if that person is prone to taking flight. Statistics suggest that 60 percent of people with Alzheimer's

disease will get lost at least once, said Andrew Carle, director of George Mason University's senior housing administration program.

Read the full story

Keep Track of Your Kids This Summer

>From GPS to Temporary Tattoos With Contact Info, Keep Your Kid Safe This Summer

ABC News - Good Morning America - July 31, 2009 - Those of you with iPhone know that there are many GPS applications. One of the latest is the Locimobile. Ideal for the 3.0 family (you and your teen need to have the phone). You download the app to your phones, and then your teen lets you check on his or her whereabouts, perhaps in exchange for getting an iPhone in the first place. The Locimobile app allows you to see exactly where your child or children are on a map. You can monitor several kids at one time.

Read the full story

Understanding Dementia And 'Wandering'

NPR - USA - July 14, 2009 - A shoe company, Aetrex Worldwide, and a firm that makes global positioning devices, GTX Corp., have created shoes containing GPS technology for wanderers to ...

GTX in Sports Illustrated

June 29, 2009 - GTX, a technology company, and Aetrex Worldwide have announced plans for shoes containing a GPS chip that will allow family members or saftey personnel to locate anyone wearing the shoes through online tracking software.

Download the article

GPS Tech Review:

Interviews with Leading GPS Innovators

GPS Tech Review is a forum for current news stories and interviews with the leading innovators of GPS-enabled personal location services.

Abductors of Children May Run, But Today Code Amber and SA-Announce Make it Much More Difficult for Them to Hide

Timely missing person's alerts and rich graphics delivered to your phone.

Mandeville, LA (PRWEB) June 25, 2009 --www.CodeAmber.com News Service the nation's leading internet and digital display missing persons alert service, a wholly owned subsidiary of www.GTXCorp.com (GTXO.OB), has expanded its multimillion viewer reach with an additional 2 million www.syn-apps.comsubscribers. SA-Announce, Syn-Apps' notification system, is a feature-rich communication application that works with Cisco Unified Communications Manager to distribute alerts across enterprises such as; NASA, Tiffany & Co and Martha Stewart Living, as well as numerous schools and government offices. The Code Amber alerts will be available to the SA-Announce subscribers and accessible in real-time appearing on their VOIP enabled phones.

Read the full story

GPS shoe to track Alzheimer's patients

A new shoe outfitted with a GPS chip aims to offer peace of mind to Alzheimer's patients and their caregivers.

London, England (CNN) -- June 10, 2009 -- The embedded GPS tracking system will allow the wearer of the shoe to be located instantly online and for their whereabouts to be monitored in real time.

Read the full story

GTX Corp in Sports Intelligence Magazine

May 2009 - GTX Corp., which markets patented two-way GPS Personal Location Services (PLS) solutions, will launch two new applications this summer - expanding its LOCi brand with iLOCi2 and Code Mobile.

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GTX Corp in Lextech May Newsletter

Download the Full Newsletter Here

GTX Corp on RedChip Real Radio

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GTX in Bottom Line Health

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GTX Corp on CNBC

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GTX Corp on The Early Show

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GTX Corp on the Discovery Channel

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GTX Corp in the Philidelphia Inquirer

Read the article

GTX Corp on KCBS Radio, San Francisco

Listen to the audio clip

GTX Corp on KFWB Radio, Los Angeles

Audio clip 1, Audio clip 2, Audio clip 3

GTX Corp on the KGW News, Portland, OR

Watch the video clip

GTX Corp on the Boston 10 o'clock News

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GTX Corp in Los Angeles Business Journal

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GTX Corp in Pervasive Computing Magazine, April/June 2007

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GTX Corp in Budget Travel Magazine, May 2007

Read the full article

GTX Corp in Footwear News Magazine, April 2007

Read the full article

Kids Sneakers That Know Where They Are

Castro Valley Forum - CA, USA - By : Michael Singer : 10/16/07

There is a trend in high-tech that recommends adding location-based services to anything and everything. But it has me pulled between wanting to see really cool gadgets and avoiding a Big Brother-like society.

The latest is a new high-tech tennis shoe coming to the market that lets parents and guardians track the movements of their family using Global Positioning Systems or GPS technology.

Called the "Smart Shoe," the miniature device is inserted in the sole of the low-top sneaker. An antenna that runs up the back of the footwear communicates with satellites and relays a location back to a subscription Web site service for easy viewing. Los Angeles-based GTXC, which makes the devices and the service, said it is hoping to put Smart Shoes in stores by the end of the year. Shoes with the technology could cost between $100 and $200. The tracking service is expected to cost about $20 a month.

Follow That Kid

Today's technology makes it easier for parents to know where their kids are and what they're doing.

By Joe Burris | Baltimore Sun | July 1, 2007

Michelle Smith had been reluctant to buy a cell phone for her 7-year-old daughter, Daysha. Then one day in April, a substitute teacher placed the Radford, Va., girl on the wrong school bus. Instead of being dropped off at her older sister's after-school program as planned, Daysha was sent home - only to find the doors locked.

As she sat on her front porch crying, her mother drove around town, searching frantically for the girl. No one at the school could tell her which bus the girl had been put on.

"Then my next-door neighbor called," said Smith, "and said, 'I have your baby.' "

The scary moment had a happy ending, but Smith didn't want to take a chance on losing her daughter again. So she did what many other parents are doing - she bought her child a cell phone equipped with an electronic device that could keep track of her whereabouts.

Download the full article

Tracking technology hits the ground running.

Wherever you go, there you are. And we know where you are.

By Nancy Francis

GPS technology will soon be at your feet, offering peace of mind to loved ones of Alzheimer's sufferers, people with autism, active preschoolers and others who might wander into harm's way or get lost.

A Los Angeles-based company that sees opportunity in the merging of GPS tracking technology and footwear, has developed several prototypes of GPS tennis shoes.

GTX Corporation is having discussions with various footwear manufactures (including some in Oregon) about licensing its technological designs and connectivity system.

During a recent visit to Portland, GTX Corp CEO Patrick Bertagna showed KGW a prototype of the company's GPS shoe.

Download the full article

Mobile Ways to Keep Track of Your Kids

By Lori Tucker, (WATE) Knoxville, TN -- June 7, 2007

As technology makes our society more mobile, there are more mobile ways to keep track of your loved ones including cell phones, car trackers and even shoes. GPS shoes That's right, an LA company has patented a GPS system in a shoe.

Xplorer Smart Shoes, made by GTX Corp., are able to track the person wearing them in real time or by remote surveillance.

GTX says the shoes work particularly well for: children, people with Alzheimer's disease, outdoor adventures, military, police, fire and public safety workers.

IN THE PIPELINE: Tracking All The Uses For Positioning Chips

By Donna Fuscaldo - DowJones Newswire - May 1, 2007

For Patrick Bertagna, the eureka moment came a few years ago when watching the coverage of the Elizabeth Smart abduction. After spending years helping companies track their products via software, Bertagna decided it was time to do something that mattered.

So the serial entrepreneur, armed with a couple of checks from friends, launched Global Trek Xploration Corp., a Los Angeles-based company that's developing shoes embedded with a global positioning chip. The shoes will enable parents to monitor their children's every movement and caregivers to keep real time tabs on elderly or sick people.

Download the full article

Top-Notch Security

M2M - Specialty Publications - April 6, 2007

M2M technology providers and system integrators often cite efficiency improvements and new revenue opportunities as common indicators of return-on-investment. However, as more and more customers use machine-to-machine applications to collect data, security has not only become a top-notch priority for end users and OEMs (original equipment manufacturers) but also a highly valued part of fostering a positive ROI.

According to IDC Corp., www.idc.com, Framingham, Mass., as devices enabling a mobile workforce continue to shrink in size, the increased likelihood of losing devices, such as laptops, mobile phones, BlackBerrys, has caused growing concern over the sensitive corporate information they contain.

Smart Shoes Get Smarter

M2M - Specialty Publications - April 2, 2007

Smart shoes just got a little smarter. The newest models of GPS-enabled (global positioning system) shoes from Global Trek Xploration Corp. (GTXC), www.gtxcorp.com, Los Angeles, Calif., will now be equipped with wireless and location modules from Enfora Inc.,www.enfora.com, Plano, Texas.

GTXC chose Enfora's Enabler IIG-A-GPS modules for its robust and accurate platform, company executive say. Eric Stalnaker vice president of business development at GTXC explains, "Enfora and the Enabler II provide us with an integrated approach to software, Internet connectivity, and customization that lets us focus on our product and service offering."

Wireless Briefs

by Andrew D. Smith | Dallas Morning News | Thursday, March 29, 2007

Few at conference get to soul of GPS shoe

Satellite tracking services were expected to be one of the big attractions at this year's big wireless conference in Orlando, but the satellite shoe seemed to surprise most of the people walking around the convention floor.

Many passers-by Wednesday furrowed their brows or shook their heads at what appeared to be a silly toy for spoiled yuppie joggers. Only a few investigated long enough to realize that the GPS

shoe may well be one of the least frivolous prototypes on display among the 1,100 exhibitors. Developers plan to sell the device as a way to track mentally disabled people or seniors who have Alzheimer's disease.

Where would you be without GPS?

Perhaps carrying fewer gadgets: The technology is being added to shoes, MP3 players, dogs

By Carolyn Y. Johnson | Boston Globe | February 19, 2007

This month, GTX Corp. launched a line of Xplorer Smart GPS shoes that transform sneakers into a wearable LoJack system.

ABI Research found that the number of people in North America who subscribe to GPS-enabled location-based services more than doubled between 2005 and 2006, from 1.6 to 3.9 million. The number of subscribers is projected to rocket to 52 million in 2011.

That means companies working in what used to be a niche market have been enjoying explosive growth. Revenues at TomTom NV, a Concord-based maker of personal navigation products, have increased more than 500-fold since 2001, from $2.5 million to an estimated $1.7 billion last year. Garmin's business has exploded into the mainstream, too, and the company ran its first Super Bowl ad this year. Boston-based start-up Skyhook Wireless brings location awareness to any device with WiFi, and announced a major partnership this month with GPS platform maker SiRF.

Xplorer shoes offer advanced personal location services

from Wearable Electronics

January 29, 2007 - We've written several times about the concept of electronically fencing dogs and cats for their safety, or the safety of others. Similarly, as GPS technologies have become commercially viable, of tracking assets and loved ones to ensure their safety. Now personal location services company GTXC Corporation, is set to unveil a line of Xplorer Smart GPS shoes at the World Shoe Association (WSA) in Las Vegas on February 1 which offer a range of new opportunities. Xplorer shoes incorporate a small and robust GPS tracking device which hooks up with GTXC's internet user portal to offer a very compelling array of personal location services.

Integrated GPS Shoes by GTXC

Getoutdoors.com Outdoor Blog - Friday, February 2. 2007

Integrated GPS Shoes by GTXC Though originally made to track patients and kids, we're sure the shoes will be integrated soon with the Nike + Ipod so you can track your run in your personal Google mashup. Or hide it in your wife's purse to see whether she's banging San Francisco's mayor, Gavin Newsom. Or something like that. The system from GTXC has a sophisticated GPS integrated into the shoe, which communicates directly with a satellite, which then relays locations in real-time to their monitoring center and made available via internet or phone. Predetermined geographic areas can also be defined and alerts sent when the person being tracked leaves or enters the area. And don't worry, they already have a product for outdoor activities called the Wearable Caddy.

New Smart GPS Shoes

Manisha Kanetkar - Thursday, 1 February 2007

Keeping track of your loved ones has never been so easy (or so spy-like) with the new Xplorer smart GPS shoes designed by GTXC.

The company boasts the shoes incorporate the smallest, most powerful and robust GPS tracking device currently available. GTXC says they are ideal for caretakers of children or the elderly to easily monitor the location of their charges.

So, for example, they can preset perimeters of safe zones or unsafe zones, and then receive mobile phone alerts if a perimeter is breached by the wearer. This is handled by what the company calls its 'set-it-and-forget-it' Dual GeoFencing feature.

Shoes with GPS locator Coolest Gadgets

Jan 29, 2007 - GTX Corporation will be unveiling its new line of Xplorer Smart GPS footwear at the beginning of next month in Las Vegas. The Xplorer aims to usher in the next generation of GPS smart shoes by incorporating smaller and yet more powerful GPS chipsets inside the shoe itself to provide a more accurate reading....

GTX Corporation unveils GPS-equipped Xplorer shoes Engadget

Jan 26, 2007 - It seems like Sayo Isaac Daniel has some serious competition coming at him in the GPS shoe market, as GTX Corporation is unveiling its latest geo-tracking footwear at next week's World Shoe Association trade show. The questionably styled Xplorer kicks pack an internal GPS transceiver,...

GPS Shoes keep track of kids

January 25, 2007 - GPS-integrated shoes - now why didn't I think of that? The Xplorer line of Smart GPS shoes from GTX Corp. come with an integrated GPS tracking device which helps parents keep tabs on their children. In addition, parents are able to set up a virtual boundary, where they will be duly noted via SMS should the shoes leave beyond the designated area.

GPS Shoes Let Mommy Know Where You Are

January 25, 2007 - Good news for worried parents. These GTX GPS Xplorer Smart Shoes will let you keep track of your kids no matter where you are. Here's how it works.

Define a "safe" area around your house or school that it's safe for your kids to wander around. When the GPS signal goes outside of the area, an SMS will be sent to your phone alerting you of the situation. Then you're free to call your wife, the police, or Chloe from 24.

The GTX GPS shoes have a small GPS tracking device inside the shoe actually communicates the location to a central location tracking service

ESATO NEWS - Jan 26, 2007 - Xplorer, the next generation of smart GPS shoes, incorporates the smallest, most powerful and robust GPS tracking device on the market today. Drawing on a long history of patented embedded GPS technology for footwear and other consumer products, GTXC has been in development on the Xplorer line for the past three years. The new line advances the state of GPS tracking technology considerably, utilizing several groundbreaking innovations currently in the patent process.

GTX Corp. announces the Xplorer line of Smart GPS shoes

Thu, 25 Jan 2007 - The GTX GPS shoes have a small GPS tracking device inside the shoe actually communicates the location to a central location tracking service. So you could get your kids these GPS sneakers and define an area where it is safe for the kid to wander around. When leaving the defined area an SMS would be sent to your mobile phone notifying you of the situation. GTX calls this feature GeoFencing. The batteries powering the GPS unit inside the shoes last several days.

"With Liberty and Surveillance for All: Person-to-person Surveillance Gets Green Light from Public

Survey research from Boston University graduate students shows that Americans are more willing to engage in surveillance of loved ones than one might expect given our love for independence. Half of Americans are comfortable with being electronically monitored by a loved one for safety

or health reasons. Nearly a third 32% say it is likely they will use a tracking device to monitor a loved one in the future."

"The greatest endorsement of P2P surveillance is that 66% of Americans are comfortable being monitored by concerned loved ones in case of emergency. That's an awfully large market waiting to be tapped by companies like GTX Corporation who debuts its first GPS-based tracking shoe for children this week."

Excerpts from recent Boston University Research indicating that two-thirds of Americans are comfortable being electronically monitored by loved ones in case of an emergency

Download the full article

Brave New GPS World

By James Klein, Larta VOX Editor - November 3, 2003

In the future, we won't lose anything. Advances in global positioning system technology allow users to easily pinpoint the location of any object on earth. GPS boards have been reduced to the size of a postage stamp. Soon, we could attach GPS locators to everything we own - cell phones, briefcases, wallets - and even our children.

GPS Shoe to Track Alzheimer's Patients

London, England - June 10, 2009 - A new show outfitted with a GPS chip aims to offer peace of mind to Alzheimer's patients and their caregivers.

Download the full article

GTX Signs Deal With Aertrex Worldwide

June 1, 2009 - GTX signs its first footwear deal for its Personal Location Services product with Aertrex Worldwide, which specializes in orthotic footwear.

Download the full article

Enfora and GTXC Advance Personal Tracking and Location with GPS-enabled Shoe

Plano, Texas - March 27, 2007 - Enfora, Inc., today announced GTX Corporation's (GTXC) adoption of the Enabler® IIG-A-GPS embedded wireless and location module into their latest model of the GTXC Xplorer® GPS Smart Shoe designed to monitor the whereabouts of loved ones.

"Enfora and the Enabler II provide us with an integrated approach to software, Internet connectivity and customization that lets us focus on our product and service offering," said Eric Stalnaker, VP of Business Development at GTXC. "By working with Enfora, we know the Xplorer® A-GPS Smart Shoe is built on a robust and highly accurate platform."
Download the full article

GTXC Wins Praise, Reduces Chip Size

Los Angeles, California, March 5, 2007 - GTXC received a strong, positive reception as a third time exhibitor at the recent World Shoe Association show in Las Vegas, NV. It also won praise from the technology community at the latest 3GSM World Congress in Barcelona, Spain. GTXC continues to build momentum, enhance its intellectual property and provide leadership throughout the embedded GPS footwear space.
Download the full article

New era of "Wearable GPS" capabilities enabled by technological breakthrough.

February 21, 2007, Los Angeles, CA - GTXC, founder of the Personal Location Services category and leader in Miniaturized GPS Technologies, has created a proprietary, "single click" software application used to activate the GPS-2-SMS Dual-GeoFence features that form an integral part of its embedded GPS technology. The recent Multi Dual GeoFence patent application filled in February 2007 is the most current of seven applications filed since the company's founding five years ago, and promises to bring new capabilities and efficiencies to the Wearable GPS industry. The company's first, US Patent 6.788.200 titled GPS Footwear was issued in September 2004.
Download the full article

GTXC unveils new generation of Smart GPS Shoes

Los Angeles, CA, January 25, 2007 - GTX Corp., a dominant world leader in personal location services, will unveil their new Xplorer line of Smart GPS shoes on February 1st, at the World Shoe Association (WSA) in Las Vegas.
Xplorer, the next generation of smart GPS shoes, incorporates the smallest, most powerful and robust GPS tracking device on the market today. Drawing on a long history of patented embedded GPS technology for footwear and other consumer products, GTXC has been in development on

the Xplorer line for the past three years. The new line advances the state of GPS tracking technology considerably, utilizing several ground-breaking innovations currently in the patent process.
Download the full article

GTXC to provide maritime version of personal GPS tracking devices to governmental security agencies and consumers

Los Angeles, California, October 4, 2006 - GTXC (GTX Corporation), the Personal Location Services (PLS) company known worldwide for developing and commercializing miniaturized personal GPS tracking technologies - including ground-breaking shoe-based satellite tracking products - announced today that they have signed a licensing agreement aimed at providing miniaturized, waterproof personal tracking devices to governmental security agencies and consumer maritime enthusiasts.
Download the full article

An Open Letter To GTX Corporation's Investors, Customers And Friends

January 5, 2007 - GTX Corp has received many inquiries this week regarding recent reports that another manufacturer has entered the GPS footwear sector claiming, among other things, that they have patented GPS footwear technology, and that there is a technology called "Quantum Satellite Technology."
GTXC believes that the convergence of high technology with consumer products should be represented to the public in an ethical and honest fashion. GTXC takes issue with the claims made in those recent reports, and believes that they do not paint an accurate and truthful picture. As such, GTXC is taking immediate, strong and active steps to respond to those claims in a responsible way to inform the public and the relevant media about GTXC, its products and technology, and the true status of the following facts.
Download the full article

CEO & President of GTXC - to Address Cornell MBA Class

Los Angeles, California, November 6, 2006 - Patrick Bertagna, CEO and President of GTXC (GTX Corporation), the Personal Location Services (PLS) company known worldwide for developing and commercializing miniaturized personal GPS tracking technologies - including

shoe-based and hand held satellite tracking products - will address the Cornell Business students that are analyzing a case study that was developed over the past year at the university.
Download the full article

GTXC announces newest addition to PERSONAL GPS suite of miniaturized location-finding solutions

Los Angeles, California, June 1, 2006 - GTXC (GTX Corporation), known worldwide for developing and commercializing innovative shoe-based GPS tracking technologies, today announced a downloadable location-finding application for hand held PDAs.
Beginning with PaqTrax™ for the HP iPaq 6515, the newest GTXC application integrates a PDA's embedded GPS abilities with the internet-based GTXC TrackPack™, creating a complete Personal GPS™ tracking and location-finding solution.
Download the full article

Boston University study validates Americans' acceptance of Person-to-Person (P2P) surveillance

Los Angeles, California, March 14, 2006 - GTXC, Inc., maker of miniaturized tracking technologies - including a patented shoe-based GPS location-finding platform - shared in the release of a recent Boston University study which offers proof of strong consumer demand for Person-To-Person (P2P) tracking and surveillance products. Despite increased media attention to governmental eavesdropping and surveillance issues, the study's conclusions contradict privacy advocates and redress recent media sentiments by finding that up to 81% of those surveyed approve the use of P2P surveillance under specific situations, and nearly a third (32%) say they are likely to use a tracking device to monitor a loved one in the future.
Download the full article

GTXC announces world's first GPS location-reporting technology built into footwear

Los Angeles, California, February 10, 2006 - After several years of intensive research and development, GTXC (GTX Corporation) today announced the world's first GPS location-reporting platform built into footwear. Unveiled at the World Shoe Association trade show in Las Vegas, Nevada, the company's patented solution links advanced GPS and cellular miniaturization technology with internet-based monitoring capabilities to provide accurate, real-time location and movement history to a wide range of users. Their shoe-based technology also introduces an

innovative platform for delivering a new category of portable, personal consumer-based applications, from exercise monitoring and live real-time gaming to interaction with appliances and other household items.
Download the full article

With Liberty and Surveillance for All: Person-to-person Surveillance Gets Green Light from Public

February 2006 - Excerpts from recent Boston University Research indicating that two-thirds of Americans are comfortable being electronically monitored by loved ones in case of an emergency. Survey research from Boston University graduate students shows that Americans are more willing to engage in surveillance of loved ones than one might expect given our love for independence. Half of Americans are comfortable with being electronically monitored by a loved one for safety or health reasons. Nearly a third 32% say it is likely they will use a tracking device to monitor a loved one in the future."
Download the full article

DailyTech, LLC - Michael Barkoviak - March 17, 2010 - GTX Corporation may be one step closer to trail running shoes that have integrated GPS directly into the shoes. GPS use has increased in the cycling and running worlds, as it is used to accurately track time, distance, and speed. There has been discussion of GPS-enabled running shoes in the past, but nothing significant ever materialized.

Oct 26, 2010
Listen to an interview with GTX Corp CEO, Patrick Bertagna on wsRadio - The Peggy Smiley Show.

Top Grossing iTunes list

GPS Tracking Apps for your smart phone.

Featured Products

Shoes to monitor seniors suffering from dementia.

While GPS tracking can answer the "where" question, the Code Amber Alertag knows the answers to the "who, what and when" questions that first responders to emergencies need to know to provide informed treatment.

2 Way GPS has helped the lives of thousands by guiding emergency services to the precise location of people and pets in need of immediate attention. Getting there quickly however is only the first step. That's why everyone needs a Code Amber Alertag

Code Amber is a wholly owned subsidiary and a member of the family of products and services of GTX Corp

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Sent: 2/15/2013 4:52:58 PM
To: Larry Summers [redacted]

take-it-or-leave-it deal by the U.S. on the nuclear issue is the wrong strategy

Ray Takeyh

February 14, 2013 -- On Feb. 26, the United States and Iran will once more resume their diplomatic ritual, in the so-called six-party talks, over Iran's disputed nuclear program. As the two perennial adversaries eye one another, there are competing paradigms about how to deal with Tehran.

An emerging school of thought suggests that the best means of "testing" Iran is to offer it a final nuclear agreement that presumably promises measurable relief from sanctions for significant Iranian concessions. Iran's failure to grasp such an offer would then conclusively demonstrate to both domestic and international audiences that the cause of the impasse is not American belligerence but Iranian truculence.

But this approach fails to recognize that an arms-control process is necessarily an incremental one, nor does it offer a practical substitute to the existing step-by-step diplomacy.

Iran's nuclear program encompasses a vast complex of enrichment facilities, centrifuge construction plants, uranium extraction companies and thousands of scientists working in university and government laboratories. Iran is enriching uranium at both 5% and 20% levels, experimenting with high-velocity centrifuges and seemingly in the process of constructing additional enrichment facilities.

Such a multilayered, multifaceted program can be dealt with only on a piecemeal basis, as the technical details and rules for inspections are too complex to be addressed in a single agreement.

Moreover, should the United States offer Iran a final deal, Tehran still has a right to contest and negotiate its provisions and offer counterproposals.

The international community is unlikely to concede to either more sanctions or the use of force until Iran's objections are taken into full consideration. As such, a grand deal that is supposed to provoke a moment of clarity is likely to be enmeshed in the existing, protracted arms-control process.

Another complication is the advent of public opinion and critical constituencies in Iran devoted to the perpetuation of the program. The growing public sentiment is that Iran has a right to acquire a nuclear capability. As the program matures, it is becoming a source of pride for a citizenry accustomed to the revolution's setbacks and failures.

Also emerging is a bureaucratic and scientific establishment with its own parochial considerations for sustaining the nuclear investment. A clerical leadership that is dealing with a restive population and empowered security services cannot easily dispense with its nuclear trump card.

All this suggests that the best means of addressing Iran's nuclear challenge is to mitigate its most dangerous dimensions. The focus should remain on Iran's high-grade enrichment and its underground nuclear facility nestled in mountains outside Qom. Tehran seems to have conceived an ingenious path to nuclear advancement, one that involves increasing the size and sophistication of its civilian atomic apparatus to the point where it can quickly surge into a bomb. While staying within the rules of the International Atomic Energy Agency's inspection process, Iran is essentially expanding its capabilities while shielding them under the veneer of legality. Given the fact that much of civilian nuclear technology can easily be misappropriated for military purposes, Iran can construct an elaborate nuclear infrastructure while remaining within IAEA guidelines.

The diplomatic challenge is to derail this path to a nuclear weapon by imposing significant restraints on its program. And this can still be done through a process that proceeds incrementally and sequentially.

U.S. officials would be wise to get out of the crisis mode and put some time back on the clock. The Iran issue always seems urgent, and yet somehow there is always time to deal with it. Washington should acknowledge the obvious, namely, that given Iran's gradualist approach, it

is still years from completing an efficient enrichment infrastructure, constructing a nuclear arsenal and developing a reliable means of delivery. By agreeing to a compressed timeline, the U.S. only narrows its options and makes a solution even more elusive.

As the United States again contemplates its Iran conundrum, it should eschew calls for a take-it-or-leave-it deal. The history of Iran's confrontation with the international community suggests that keeping it a crisis situation benefits the Islamic Republic. Ironically, it is the Western powers that have generated alarmist conditions. And then to escape the predicament of their own making, they offer Iran more concessions and further incentives.

To avoid a repeat of that outcome, it would be prudent to have a sense of proportionality and appreciate that, in the end, time works best for the United States and not the economically beleaguered theocracy.

Ray Takeyh is a senior fellow at the Council on Foreign Relations.

Article 2.

The Guardian

Whether it's North Korea or Iran, sanctions won't work

Simon Jenkins

13 February 2013 -- Iranian president Mahmoud Ahmadinejad. 'Threats and sanctions have not weakened the regime's determination to proceed [with nuclear weapons], but rather weakened opposition to it'. Photograph: Sven Hoppe/EPA

North Korea has set off a third nuclear test explosion. It has done so in defiance of the UN, America, Japan and even, reportedly, its sponsor, China. It has said to hell with everyone, in a brutal comment on western economic sanctions.

The UN security council met yesterday and Washington threatened "significant consequences" – code nowadays for "tighter sanctions". Every shred of evidence suggests that these will not achieve the declared goal. They will merely add to the impoverishment of North Korea's people by its own government. Sanctions are the most counter-productive tool known to diplomacy. Yet we keep imposing them. Why?

Sanctions assume that all countries react to external pressure as might a capitalist democracy. They assume a misguided regime will change its mind and put financial advantage above its definition of national interest. "Smart sanctions" (really dumb sanctions) further assume the rich can be punished without punishing the poor, and that all dictators' wives want to fly abroad and shop at Harrods. They assume that trade guides political action and political action trumps dictatorship.

Economic sanctions are hugely popular to western politicians, not because of their effect but because of their cause: the desire to stand on an international stage and being seen to "do something". They are the least-cost first resort of the laptop bombardiers of global intervention. They sound punitive and aggressive without inflicting any hardship on the imposer.

After North Korea the other target in the sanctions frame is Iran. Everything at present suggests that ever-tighter sanctions have done nothing to curb Iran's nuclear programme. Indeed, by inducing paranoia, probably the reverse. Sanctions have certainly "bitten", to the glee of their advocates. They have brought inflation and a collapse in the currency, the rial. They have harmed ordinary people and solidified sentiment against the west and the "great Satan" of the US. Assassination and cyber-weapons have wiped out a few scientists and scrambled a few computers.

What sanctions have not done is weakened the power of the ayatollahs or their private army, the Revolutionary Guards. Both seem as secure as ever,

while (relatively) moderate civilian politicians are reduced to feuding and arresting each others' children. Iran's nuclear programme appears to proceed independent even of the organs of its own state.

A spoof article in the Economist last year portrayed Iran's supreme leader, Ayatollah Khamenei, ruminating on western nations' obsessive posturing towards his country. He mused that these were unstable, unreliable places, dangerous though probably not all mad. But since it was hard to be sure, "I would feel a lot safer if we already had that bomb". Similar insecurity drove sanctioned Cuba to accept Russian missiles in the 1960s, and sanctioned Iraq and Libya to pretend to build weapons of mass destruction in the 1990s.

Sanctions never stop bad things happening. Rather they entrench dictators, build up siege economies and debilitate the urban middle class from which opposition to dictatorship grows. As Khamenei said in a speech a year ago, sanctions were "painful … but make us more self-reliant". Indeed, for a regime to be sanctioned is to receive an elixir: witness Castro, Gaddafi, the ayatollahs and the ruling cliques of Burma, Afghanistan and North Korea. That sanctioned regimes sometimes come to an end is not proof that sanctions work, rather that they take a long time and usually require war to "work".

This is a rarely researched topic because sanctions are diplomatic ideology rather than science. A debate in 1998 in International Security magazine saw the Chicago academic, Robert Pape, barely challenged in his view that only around five of the 115 cases of sanctions imposed since the war could claim any plausible efficacy. Most merely inflicted "significant human costs on the populations of target states, including on innocent civilians who have little influence on their government's behaviour". They are a ready invitation to war.

When I was reporting on South Africa in the 1980s I became convinced that sanctions were aiding import substitution and benefiting the Afrikaner economy, probably giving apartheid an extra decade of life. They likewise prolonged Ian Smith's regime in Rhodesia. Sanctions made Libya's Gaddafi so rich he could spoon money into the London School of

Economics. They made Saddam Hussein one of the 10 wealthiest people in the world. Besides, sanctions create sanctions-busting which, like drugs, is a global criminal industry born entirely of the idiocy of western diplomacy.

A year ago the Foreign Office defended yet another round of sanctions against Tehran on the grounds they would "hasten Iran's economic collapse and deepen rifts within the regime, in the hope that saner voices will deem the price of pursuing nuclear weapons too high". Economies don't collapse, any more than poverty changes governments. Even Greece, now the most "sanctioned" nation in Europe, has not collapsed. Places just get poorer. As for "saner voices", they go into exile, hiding or prison. That's where sanctions send them.

Iran is a proud nation of 80 million mostly Muslim people, one of many Asian and African states struggling between theocracy and democracy, tradition and modernity. These are agonising struggles among and within peoples, to which the west has contributed nothing but hostility and belligerence. Under the cloak of "counter-terror", it has been as crass as it was during the Crusades. Of course no one wants to see nuclear weapons spread. Russia tried to stop China getting them. China tried to stop North Korea. The west tried to stop India and Pakistan, while hypocritically tolerating Israel and the replenished arsenals of France and Britain. No pressure made the slightest difference to anyone.

If Iran really wants a nuclear weapon, it will get one – the more so when it is threatened with dire retribution if it does. That is how such states react to pressure. Ever since the dodgy election of 2009, threats and sanctions have not weakened the regime's determination to proceed, but rather weakened opposition to it. If ever there was a country unlikely to respond to diplomatic bullying, it is Iran. If ever there was a country that might respond to constructive engagement, to commercial, governmental and cultural intercourse, it is also Iran. Why the west should want to make it another North Korea passes comprehension.

Article 3.

The Washington Institute

Year of Decision: U.S. Policy toward Iran in 2013

James F. Jeffrey and Thomas Pickering

February 12, 2013 -- *On February 7, 2013, James F. Jeffrey and Thomas Pickering addressed a Policy Forum at The Washington Institute. Ambassador Jeffrey, a former assistant to the president and deputy national security advisor, is author of the new Institute study Moving to Decision: U.S. Policy toward Iran. Ambassador Pickering served in numerous key posts at home and abroad over a five-decade career, including undersecretary of state for political affairs. The following is a rapporteur's summary of their remarks.*

JAMES F. JEFFREY

The move to decision on Iran is the most pressing and dangerous issue on the U.S. and international agenda in 2013. The year ahead will largely define the longstanding struggle between Washington and Tehran, and the considerable stakes involved make it absolutely crucial that a swift and decisive resolution be achieved. Regardless of the outcome of the nuclear issue, however, Iran will continue to present a long-term challenge to the United States because of clashing ideologies, conflicting foreign policy goals, and Iran's claim to regional hegemony.

There are four likely outcomes to the nuclear issue: a unilateral Iranian decision to halt or dramatically slow its progress toward a nuclear weapon; a negotiated outcome, whether through the P5+1 (i.e., the five permanent members of the UN Security Council plus Germany) or bilateral negotiations; a military strike, as threatened by President Obama and Israeli prime minister Binyamin Netanyahu; and an explicit or implicit shift to containment, indicating that Washington would be prepared to coexist with a nuclear-armed Iran.

The most effective resolution would be a negotiated outcome -- to achieve it, Washington will need to take preliminary steps on several fronts. A serious compromise needs to be put on the table, including an offer to suspend crippling oil sanctions in return for specific, verifiable Iranian steps to eliminate any nuclear breakout capabilities. Equally significant is establishing a credible military threat, given that Tehran has been willing to endure increasing economic pressure in order to continue its nuclear program. The regime is unlikely to concede anything during negotiations if it does not believe that Washington will actually follow through on such threats. Although specific public redlines are often unpalatable, the Obama administration must clarify internally when it would take military steps, and these intentions must be made clear to the Iranians.

In the same vein, the military option requires a credible negotiating complement, as seen in the early 1990s with Iraq. To legitimize military action against Saddam Hussein's regime, Washington had to prove that all other options had been exhausted. Similarly, the only way to set the predicate for military action against Iran is to show the regime and the international community that everything has been tried, and that Washington has left Tehran with a way out. Failure to do so would undermine the legitimacy of any strikes.

It is also important to understand that curtailing Iran's nuclear progress will not by itself alter the regime's regional agenda -- nuclear ambitions are but an extension of Tehran's wider aspirations toward hegemony in the Middle East. Unfortunately, none of the longer-term proposals for addressing that issue seem feasible at the moment (e.g., regime change by internal or external means; a shift in Tehran's views on the Supreme Leader and succession; a "grand deal" between Washington, Iran, and the international community).

One lesson to be learned from past interactions with Tehran (or lack thereof) is that when the United States proactively opposes Iranian aggression in the Middle East, the regime relents, but when Washington offers a more passive response, Iranian aggression increases. With respect to Syria, for example, it cannot be assumed that Bashar al-Assad will fall at all, let alone quickly, without active U.S. engagement. If the Assad

regime does in fact survive, Iran would become increasingly emboldened, with potentially disastrous consequences for the United States and its allies and interests in the Middle East.

Denuding U.S. forces in the region to enable a pivot to Asia is also risky. Nowhere else in the world is America more likely to deploy forces than in the Persian Gulf in opposition to Iran, and nowhere else is it of utmost importance that any potential confrontation be won decisively in the next five to ten years than with the Islamic Republic.

Going forward, Washington must discriminate between Iranian behaviors it considers unacceptable -- such as support for terrorism, hegemonic ambitions, and progress toward nuclear weapons -- and those it can tolerate. U.S. officials could open the door for negotiations by making clear to Tehran that they do not seek regime change; the first step in that regard would be to let Iran know that Washington respects it as a nation-state and not a transnational revolutionary movement.

Finally, disorganization within the U.S. government and a "go it alone" mentality have accounted for many of Washington's internal difficulties in responding to the Iranian challenge. To alleviate this problem, all cabinet-level officials must be in constant and complete coordination, devoid of routine bureaucratic obstacles. In addition, the appointment of a senior subcabinet official whose sole responsibility is Iran (or, alternatively, a small group of officials in constant coordination) could allow the administration to reorganize bureaucratically in preparation for this year of decision.

THOMAS PICKERING

Discussions of containment policy typically imply accepting the Islamic Republic as an inevitable nuclear power and using deterrence to deal with a nuclear-armed Iran. Yet such an outcome would be disastrous for U.S. nonproliferation policy, which is based on the notion that fewer nuclear states means less chance of miscalculated use. If Iran attains a nuclear weapon, other regional powers would likely follow suit -- clearly an undesirable outcome for the international community.

At the other end of the spectrum, using military means in the short term to guarantee prevention would entail a vast use of force -- essentially an unofficial, semipermanent occupation of Iran. This is not a viable path, particularly since other diplomatic possibilities have not yet been exhausted.

Similarly, sanctions, while effective, are not sufficient by themselves. They must be intertwined with negotiations -- as Washington and its allies increase the pressure, cohesive and meaningful talks with equivalent concessions should follow suit. Some have argued that negotiations should expand to a "big for big" format, but decades of mistrust between the United States and Iran make smaller deals more practical. Such an approach would have to focus on ending Iran's most problematic enrichment activity: processing uranium to the 20 percent threshold, which makes the leap to weapons-grade material much easier. Instead, the regime could limit itself to 5 percent enrichment, and under strict supervision by the International Atomic Energy Agency.

The intelligence community widely believes that although Iran has not yet decided to make a nuclear weapon, it is still moving to acquire all the necessary capabilities in case it chooses that path. Accordingly, Washington will need to obtain a concrete Iranian commitment to convert its stocks of readily upgradeable gaseous uranium into metallic fuel elements, which pose significantly less of a threat. A serious inspection system would need to be implemented in order to monitor these requirements. In return, the Iranians would expect the lifting of nuclear-related sanctions. They would also likely ask for acknowledgement that they have the right to continue their civil enrichment program, whether for supposed use in cancer treatment or to safeguard against a potential Russian decision to cease fueling the Bushehr reactor.

Thus far, President Obama has been frustrated at the lack of progress in response to his openness toward the Iranian regime, and his new cabinet has an obligation to help him solidify a negotiating position that improves the situation. If the Iranians continue to reject U.S. positions that seemingly respond to some of their demands, then the administration should begin applying other pressures. These steps should be taken sooner

rather than later so that the parties can move toward a mutually acceptable conclusion.

Washington must also keep in mind that Supreme Leader Ali Khamenei has the last word on all matters in Iran, and that negotiations will go only as far as he allows them to go. In years past, he issued a fatwa condemning nuclear weapons -- Washington could take advantage of this fact by drafting a UN Security Council resolution endorsing the fatwa. This could be a small step toward boosting Khamenei's international profile while simultaneously pressuring Iran to follow its own religious decree.

To be sure, regime change remains an attractive alternative on paper, and some in Washington view it as an insurance policy. Historically, however, regime change has not been a successful option for the United States, and internal attempts at toppling Iran's leadership have thus far been crushed by Stalinesque suppression, including the 2009 uprising. Despite such failures and Washington's limited influence in Iranian domestic affairs, U.S. policy should be to demonstratively support popular democratic movements.

Article 4.

TIME

Spy Fail: Why Iran Is Losing Its Covert War with Israel

Karl Vick

Feb. 13, 2013 -- Slumped in a Nairobi courtroom, suit coats rumpled and reading glasses dangling from librarian chains, the defendants made a poor showing for the notorious Quds Force of the elite Iranian Revolutionary Guard Corps. Ahmad Abolafathi Mohammed and Sayed Mansour Mousa had been caught red-handed and middle-aged. And if the latter did them a certain credit — blandly forgettable always having been a good look for a

secret agent — the prisoners still had to explain why they had hidden 15 kg of the military explosive RDX under bushes on a Mombasa golf course.

Created to advance Iran's interests clandestinely overseas, the Quds Force has lately provided mostly embarrassment, stumbling in Azerbaijan, Georgia, India, Kenya and most spectacularly in Thailand, where before accidentally blowing up their Bangkok safe house, Iran's secret agents were photographed in the sex-tourism mecca of Pattaya, one arm around a hookah, the other around a hooker. In its ongoing shadow war with Israel, the Iranian side's lone "success" was the July 18 bombing of a Bulgarian bus carrying Israeli tourists — though European investigators last week officially attributed that attack to Iran's Lebanese proxy, Hizballah. That leaves the Islamic Republic itself with a failure rate hovering near 100% abroad and an operational tempo — nine overseas plots uncovered in nine months — that carries a whiff of desperation. A Tehran government long branded by U.S. officials as the globe's leading exporter of terrorism may be cornering the market on haplessness.

Within Iran's own borders, however, the story is different. Twice in the past two years Iranian intelligence has cracked espionage rings working with Israel's Mossad, Western intelligence officials tell TIME. In both cases, the arrests were the furthest thing from secret: announced at a news conference, each was later followed up by televised confessions broadcast on Iranian state television in prime time. Given Iran's history of trumped-up confessions, skepticism is more than justified. But the arrests appear to be solid. One intelligence official said the captured Iranians provided "support and logistics" to the Mossad operatives who carried out the assassinations of Iranian nuclear scientists.

At least four scientists were killed on Tehran's streets from 2010 to 2012, when, as TIME has reported, Israel ratcheted back on covert operations inside Iran. Officially, Israel has remained silent on the killings, though government officials will coyly say they welcome the deaths. The Jewish state maintains the same ambiguous posture on other "setbacks" to Iran's nuclear program widely — and correctly, Western intelligence officials say — attributed to Mossad, from the Stuxnet computer virus, to

mysterious explosions like the massive blast at a missile base, which destroyed ballistic missiles that could reach Israel.

The covert onslaught dovetails with Israel's history of reaching "over the horizon" to disarm perceived threats at a distance. To keep advanced arms from reaching Hamas and Hizballah, Israel in the past year sent warplanes to bomb convoys and arms depots in Sudan and Syria, respectively, without apparent retribution. In the case of Iran, however, experts say the audacity of Israel's covert campaign stirred Tehran to revive an espionage effort that lay largely fallow since 9/11. The Spy vs. Spy contest that ensued would prove woefully one-sided, even in the third-world countries where Iran chose to strike, hoping to avoid heightened security awareness in the developed world. In the end, its only success came inside Iran, where the secret police operate without inhibition.

The shadow war may have started on Jan. 15, 2007, the day Ardeshir Hosseinpour passed away. Hosseinpour was a specialist in electromagnetics at the Nuclear Technology Center in the city of Isfahan, Iran, but his death might have escaped notice had Iran's government not kept it under wraps for almost a week, finally attributing it to fumes from a faulty heater. An online report by the American private intelligence firm Stratfor suggested another cause — radioactive poisoning — and hinted that Mossad's Caesarea section was back in business. Caesarea, named for an Israeli beach town that dates back to Roman times, is the operations branch of Israel's secret service, most notoriously responsible for the assassinations of some two dozen Palestinians (and an innocent waiter) after the 1972 Munich Olympics. Assassinations are carried out by a very small unit dubbed Kidon, the Hebrew word for "tip of the spear." Kidon operates at a remove from the legions of Mossad employees working in less lethal fields.

It would have been a unit called Hatzomet, or "The Junction," that recruited Majid Fashi, a handsome young Iranian who dropped out of high school to pursue a career in kickboxing. By the account he gave on Iranian state television early in 2011, Fashi presented himself at the Israeli consulate in Istanbul in 2007 and was vetted for a solid year before being shown any trust. Two years later, on Jan. 12, 2010, he would place a bomb

on a motorbike parked on the sidewalk outside the Tehran home of Masoud Alimohammadi; the nuclear physicist was killed when it was detonated by remote control.

In the broadcast, Fashi accurately described the Mossad campus north of Tel Aviv. He said he had been given a laptop equipped with a second operating system and used it to communicate through online drop boxes. He was impressed by his handlers' thoroughness. At one point Fashi described studying a scale model of Alimohammadi's street. "It was an exact copy of the real one," Fashi said. "The tree next it, the street curb, the bridge." In a later broadcast, he was seated across from Alimohammadi's widow, who glared at him as he bowed his head and wept. Mossad officials were "pissed off and shocked" seeing their agent on television, the intelligence official said.

Fashi was executed in May 2012. About the same time, Iran's intelligence minister announced the arrest of 14 more Iranians, eight men and six women dubbed members of the "Terror Club" in the subsequent prime-time broadcast of that name. Filmed in shadow, and rich in atmospherics, the Aug. 5 program recreated Alimohammadi's death and four subsequent attacks: they started with the Nov. 29, 2010 nearly simultaneous attempts on Majid Shariari and Fereydoun Abbasi, nuclear scientists driving to work when magnetic "sticky bombs" were attached to the side of their cars from passing motorcycles. Abbasi managed to escape before it detonated, saving his wife as well. Shariari was killed — a significant setback for the Iranian nuclear program where he was the top scientist, according to a Western intelligence official.

The confessed agents offered absorbing detail — they were aboard a Bajaj Pulsar, wearing helmets, when the magnet bomb stuck on the right front panel of Shariari's car exploded. The riders scrambled into the "trail car" assigned to follow the target and disappeared into the traffic of the Imam Ali Autobahn. Already gone was the car assigned to cut off and slow the car carrying the scientist. They claimed to have rehearsed on a practice track inside Israel. None of the details could be confirmed, but an intelligence official acknowledged: "Another network was taken."

The third scientist, Dariush Rezaeinejad was shot on July 23, 2011 after picking up his child at a day care; his wife described hearing shots whiz by as she chased the assailants. The most recent assassination was the Jan. 11, 2012 death of Mustafa Ahmadi-Roshan, an expert on uranium enrichment, also by a magnet bomb slapped on his car during his morning commute.

By then, Iran was trying to strike back. The task of avenging the scientists fell to the sprawling Quds Force's own covert-operations division, known as Unit 400. It took a shotgun approach, targeting Israeli diplomatic missions in a variety of countries, mostly in the developing world where the global antiterrorism mesh is not so fine. Exposed in Baku, Tbilisi, Johannesburg, Mombasa and Bangkok, the failures mounted at a pace that was itself one of the problems. In the world of espionage, a quality covert operation can take years to pull together. Yet in the 15 months from May 2011 to July 2012, the Quds Force and Hizballah attempted 20 attacks, by the count of Matthew Levitt, a former State Department counterterrorism official. "Hizballah and the Quds Force traded speed for tradecraft and reaped what they sowed," Levitt writes in a January report for the Washington Institute for Near East Policy. "Quds Force planners were stretched thin by the rapid tempo of their new attack plan, and were forced to throw together random teams of operatives who had not trained together."

The decline in quality was so striking it initially inspired disbelief. Recall the preposterous-sounding plot weaving together a former used-car salesman, Mexico's Zetas drug gang and a bank transfer from a Revolutionary Guard account to assassinate Saudi Arabia's ambassador — by bombing a Washington restaurant? A year on it looks like the new normal. In Bangkok last month, an Iranian agent entered a courtroom in a wheelchair, having accidentally blown his legs off while fleeing police. A January alert issued by Turkish intelligence was light on specifics but quite certain the Quds operatives would be staying in five-star hotels.

"There's a number of reasons that Iranian intelligence has suffered," says Meir Javedanfar, an Iranian-born analyst who lectures at the Interdisciplinary Center in Herzliya, Israel. "No. 1," he says, "is the 2009 uprisings in Iran." The street protests over a fraudulent election

undermined the perceived legitimacy of the state among people who once would work for it, including in its secret services. “People less and less see it as a nationalist endeavor and more as a Khamenei-related project to strengthen himself,” Javedanfar says, referring to Iran’s Supreme Leader Ayatullah Ali Khamenei, who by some published accounts personally authorizes all overseas attacks.

Hard-liners further aggravated the situation by purging competent reformists from both the secret services and from Iran’s embassies — crucial to a force expected to work undetected abroad. “Basically the Quds Force doesn’t cooperate with the Foreign Ministry, and the Foreign Ministry isn’t what it used to be either,” says Javedanfar. Under President Mahmoud Ahmadinejad, 42% of ministry employees have only high school degrees. “The regime is a bigger threat to itself than Israel,” he says.

Karl Vick has been TIME's Jerusalem bureau chief since 2010, covering Israel,the Palestine territories and nearby sovereignties. He worked 16 years at the Washington Post in Nairobi, Istanbul, Baghdad, Los Angeles and Rockville, MD.

Article 5.

YaleGlobal

Is the US Ready To Be Number Two?

Kishore Mahbubani

11 February 2013 -- SINGAPORE: Long before anyone did, former US president Bill Clinton saw that America would have to prepare for the time

when it would no longer be the number one power in the world. In his 2003 Yale University address on "Global Challenges," he said:

If you believe that maintaining power and control and absolute freedom of movement and sovereignty is important to your country's future, there's nothing inconsistent in that [the US continuing to behaving unilaterally]. [The US is] the biggest, most powerful country in the world now. . . . But if you believe that we should be trying to create a world with rules and partnerships and habits of behavior that we would like to live in when we're no longer the military political economic superpower in the world, then you wouldn't do that. It just depends on what you believe.

Long before 2003, Clinton wanted to begin preparing Americans for this new world. "Clinton believed […] what we had in the wake of the cold war was a multilateral moment – an opportunity to shape the world through our active leadership of the institutions Clinton admired and [Charles] Krauthammer disdained," writes Strobe Talbott, former deputy secretary of state in his book The Great Experiment: The Story of Ancient Empires, Modern States, and the Quest for a Global Nation. "But Clinton kept that belief largely to himself while he was in office…. political instincts told him it would be inviting trouble to suggest that the sun would someday set on American preeminence." Sadly, few Americans have heeded Clinton's wisdom. Few dare to mention that America could well be number two. I discovered this when I chaired a panel on "the future of American power" at the 2012 World Economic Forum in Davos. After citing projections that America would have the second largest economy in just a few years, I asked the American panelists – two senators, a congresswoman and a former deputy national security advisor – whether Americans are ready to become number two. To my shock, none could acknowledge publically this possibility.

America may well become number two faster than anyone has anticipated. According to the most recent International Monetary Fund (IMF) projections, China will have larger share of global GDP than the United States by 2017. In 1980, in PPP terms, the US share of the global economy was 25 percent, while China's was 2.2 percent. By 2017, the US share will decline to 17.9 percent, and China's will rise to 18.3 percent. Even if

America becomes number two, we will still have a better world. In many ways, the world is "converging" to American values and standards, as I explain in The Great Convergence. The global middle class is booming, interstate war is waning, and never before have people traveled and communicated across the world so easily. These changes are creating common values and norms across the world. Education and scientific reasoning, for example, are enabling people the world over to speak with a common language. However, while humanity is well on its way to combating absolute poverty and interstate warfare, other problems are surfacing. Preventing and curtailing transnational issues like climate change, human and drug trafficking, and financial crises require cooperation among nation states, yet this is not happening. A simple analogy illustrates this. Before the era of modern globalization, humankind was like a flotilla of more than 100 separate boats in their separate countries. The world needed a set of rules then to ensure that the many boats did not collide and facilitate their cooperation on the high seas if they chose to do so. The 1945 rules-based order strived to do this, and despite some obvious failures, it succeeded in producing a relatively stable global order for more than 50 years. Today, the 7 billion people who inhabit planet earth no longer live in more than 100 separate boats. Instead, they live in 193 separate cabins on the same boat. But this boat has a problem. It has 193 captains and crews, each claiming exclusive responsibility for one cabin. No captain or crew cares for the boat as a whole. The world is now sailing into increasingly turbulent waters with no captain or crew at the helm. The Great Convergence echoes the themes of Clinton's 2003 Yale speech. It's in the interest of all – particularly great powers – to strengthen institutions of global governance so that we're not sailing blindly into choppy waters without a captain. The National Intelligence Council recently projected that in 2030 Asia would overtake the Western world economically, technologically and militarily. When China becomes a world superpower in a matter of decades, the United States and Europe will want to ensure that China plays by the rules.

But in order to make international organizations like the United Nations, the IMF and the World Bank more credible and effective, they must

undergo serious reform. It is manifestly absurd that the West makes up 12 percent of the world's population but takes up 60 percent of UN Security Council permanent seats. It's nonsensical that the head of the IMF is always a European and the head of the World Bank is always an American as the West's share of global GDP diminishes every year. This concentration of clout in the hands of a relative few has grave implications for these institutions' effectiveness and independence, making them instruments of the West. No other organization, not even huge global NGOs like the Bill and Melinda Gates Foundation or the Clinton Foundation, has the scope and legitimacy that the UN currently enjoys. For example, the United States for years has been trying to pressure China to take a more proactive role in fighting climate change. Predictably, China has resisted these pressures because they saw them as a clever yet transparent American ruse to curtail Chinese economic growth. Only when the United Nations Development Programme raised the issue with China did the Chinese government take heed, as the UNDP is seen as a neutral party in China. The UN and its many agencies may soon lose invaluable credibility if the West insists on monopolizing its power over these institutions.

Any reform of the UN should take into account three principles: democracy, recognition of power balances and the rule of law. Institutions of global governance can be made more democratic by ensuring that their leadership accurately reflects the composition of world's population. At the same time, we must also take into account geopolitical relationships among emerging and middle powers. Finally, the rule of law is essential to the mediation and resolution of thorny international issues and to governing the conduct of states on the international stage so as to prevent escalation of conflict.

In this rapidly changing world, it's a mistake to allow institutions of global governance to stay as they are. The 1945 rules-based order is no longer appropriate for 21st century circumstances. Global leaders must better prepare us for the challenges to come and equip our international organizations to deal with them. Leaders must find the courage to continue advocating for stronger multilateral cooperation. It is time for our captains

and crews to emerge from their cabins and start steering the boat.

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Article 6.

Foreign affairs

Pyongyang's Nuclear Logic

Jennifer Lind, Keir A. Lieber, and Daryl G. Press

February 14, 2013 -- In his State of the Union address, U.S. President Barack Obama described North Korea's recent nuclear test as a provocation that required a firm response. The intended audience for that provocation, though, is up for debate. Some commentators have posited that the test was a signal aimed at China, designed to demonstrate North Korea's independence from its great-power patron. Others think that Kim Jong-un was sending a message to the newly elected president of South Korea, Park Geun-hye. Still other North Korea experts have suggested that the test was actually meant for domestic consumption, to lift the sagging morale of a deprived public or for the regime to curry favor with the military. The intended North Korean signal is being analyzed and debated by U.S. government officials, who hold views across the spectrum.

A much simpler explanation exists. Pyongyang tested a nuclear device for the same reason it has been testing long-range missile designs: to see what works. In truth, the effort was less a signal than an attempt to master the technical capabilities that are vital to its nuclear deterrent.

This rationale should come as no surprise to those steeped in Cold War history. Between 1945 and 1992, the United States conducted 1,054 nuclear tests and fired an untold number of missiles. If the goal had merely

been to show the Soviets that the United States meant business, testing nearly twice a month throughout the entire Cold War would have been overkill. In fact, Operation Sandstone -- a series of three tests at Enewetak Atoll in 1948 -- was not intended to warn off the Soviets as tensions rose over Berlin. Nor was the series of 48 underground tests launched in the summer of 1964 designed to impress the newly installed premier, Leonid Brezhnev. And the United States would not have conducted a dozen atomic blasts at its Nevada test site in the first half of 1977 -- including the Cove, Dofino, Marsilly, Bulkhead, Crewline, Forefoot, Carnelian, Strake, Flotost, Gruyere, Scantling, and Scupper detonations -- just because new President Jimmy Carter was vulnerable to right-wing criticism.

The United States did what it did because it needed its ultimate deterrent to actually work, and because the technical requirements of the nuclear mission continually changed. The ruins of Hiroshima and Nagasaki were evidence enough that the United States could destroy cities, but deterring the Soviet Union was a far greater challenge. If the Soviets had invaded Western Europe, for example, U.S. bombers would have had to penetrate alerted Soviet air defenses, identify Soviet ground forces and industrial centers, and attack them. Accordingly, U.S. bombers had to be highly maneuverable and able to carry multiple weapons, so the bombs themselves had to be lighter and smaller than the ones the United States used against Japan. The Soviets put another wrinkle in Washington's plans when they began to deploy large numbers of their own nuclear weapons. The United States needed to find a way to potentially destroy the Soviet arsenal on the ground. Eliminating those targets -- numerous and often hardened -- required even greater numbers of bombs, even lighter designs, and more accurate delivery systems. So the United States updated its designs and tested. And tested. And tested again.

Like the United States during the Cold War, North Korea has apparently decided that nuclear weapons are central to its national security strategy. With few friends, its conventional military forces outgunned, an economy in tatters, and facing off against a superpower prone to deposing dictatorships across the globe, the Kim regime set about building an operational nuclear arsenal. And just as NATO planned to thwart a Soviet

invasion by striking targets in the Soviet Union and Eastern Europe, North Korea presumably plans to defend itself, should war erupt on the peninsula, by threatening U.S. regional allies and targets in the United States.

North Korea's mission requires small, lightweight warheads, and missiles that work -- and the only way to know that they work is to test them. So far, the weapons have proved unspectacular. The country's first nuclear test, conducted in 2006, was an embarrassment. Pyongyang had told the Chinese that the device would generate four kilotons of explosive power, but it ended up producing less than one. The second test in 2009 fared slightly better, producing between one and eight kilotons, although it is not known what size of a blast the North Koreans had sought. Moreover, Pyongyang has much more work to do before it can boast weapons that will actually fit on its missiles (which have been, themselves, a series of humiliating failures).

Observers in the West who presume that North Korea's behavior must be about signaling should remember NATO and the United States' own experience during the Cold War. The United States understood then that the ability to conduct nuclear operations was the very foundation of a credible deterrence strategy. Today, a sound strategy for dealing with North Korea should not ascribe ulterior motives to acts that the United States once considered rational and routine.

The view that nuclear weapons are merely political instruments -- suitable for sending signals, but not waging wars -- is now so common in Washington, London, and Berlin that it is hard to find anyone who disagrees. Yet those comforting assumptions are not shared by leaders everywhere. Beyond North Korea, Russia is cutting down its arsenal, modernizing the nuclear forces it plans to keep, and increasing its reliance on nuclear weapons in national defense strategy. China is slowly expanding its own arsenal, while substantially improving its weapons. And Iran seems so committed to going nuclear that it has been ready to endure crippling sanctions and risk foreign attack.

It is unfortunate that U.S. policymakers are so convinced of nuclear obsolescence that they have difficulty understanding the motivations of potential adversaries. It would be tragic, however, if their questionable assumptions prevent them from recognizing the deterrence problems that lie ahead and the grave difficulties that will be posed by adversaries, such as North Korea, that still cling to nuclear weapons.

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Article 7.

Foreign Policy in Focus (FPIF)

The Depths of Malaise in Palestine

Daniel DePetris

February 12, 2013 -- When talking about peace in Israel-Palestine, it is easy to narrow the conversation to the leaders who are responsible for making it. Over the past few years, there have been numerous profiles in newspapers and profiles in magazines attempting to document the two men who are supposed to make the effort—Israeli Prime Minister Benjamin Netanyahu and Palestinian Authority President Mahmoud Abbas.

Delving into the lives and minds of world leaders is an undoubtedly helpful, exciting, and informative way to find answers, but a conflict as multifaceted and complicated as the Israeli-Palestinian dispute cannot be fully explained without taking into account the opinions of the ordinary people who live the reality every single day. Millions of Israelis and Palestinians on both sides of the green line have had their voices drowned out by the very politicians, lawmakers, and personalities who purport to represent them.

The result is a host of unanswered questions. What does the average Israeli or Palestinian think about the chances for a lasting and comprehensive peace agreement? What types of concessions need to be given for a deal to be struck? Do Israelis have the political courage to sacrifice on settlements and Jerusalem so the conflict can finally be resolved? Can the Palestinians negotiate in good faith?

Luckily, polling organizations in Israel and Palestine have spent years trying to answer these very questions, often working together and sharing their resources during the hunt.

Two of the latest polls, one from the Jerusalem Media and Communications Center (JMCC) and the other from the Palestinian Center for Policy and Survey Research (PCPSR), are particularly telling. Unlike other surveys that confirm what most in the international community already think, the results of these polls are unprecedented, revealing a stark and disturbing malaise in the Palestinian territories.

The message is clear: frustration with the conflict is at a high point, the two-state solution is steadily losing credibility in the eyes of the people, and ordinary citizens in the Holy Land are starting to wonder whether a settlement can be achieved without another round of bloodshed.

Oslo Fatigue

When asked by the PSPSR whether Mahmoud Abbas's policy of peace talks or armed resistance by Hamas is the best way to achieve a Palestinian state, an alarming 60 percent of Palestinians surveyed threw in their lot with armed resistance (compared to 28 percent who favored negotiations). With the eight-day Israel-Hamas war having ended with a

ceasefire that many view as a victory for the Islamist group, Hamas Prime Minister Ismail Haniyeh finds his popularity having soared. Forty-eight percent of Palestinians say that they would rather pick Haniyeh as Palestine's next president instead of Abbas, who has struggled to secure the freedom of movement and self-determination that so many Palestinians once expected from his government.

The JMCC issued similar findings. By far the most disturbing figure in the poll is the exponential rise in support among the Palestinian public for armed operations against Israel—50.9 percent now view attacking Israeli positions in the current climate as a credible way to express their grievances and pressure the Israeli government to compromise. This is a 20-percent increase from the previous year.

The numbers can perhaps best be summarized by Ali Najjar, an 18-year-old Palestinian who lives in a refugee camp. "In my view," he said, "what was taken by force will only be returned by force. Twenty years after Oslo, we haven't gained one inch of Palestine."

Many young Palestinians agree. Indeed, the words summarize the how dire the situation has become for an entire generation of Palestinians, most of whom are too young to remember the signing of the Oslo Accords in 1993. Most have not seen any benefit from peace agreements or negotiations, and all of them have grown tired of the settlement construction in the West Bank, the killing of Palestinian civilians, and the internal fighting among Palestinian politicians that never seems to dissipate.

The Corrosive Status Quo

One cannot blame Palestinian civilians for feeling this way. The previous year was a terrible one for Abbas and his government. Settlement tenders and approvals in the West Bank rose to such an extent that the anti-settlement organization Peace Now named 2012 "the year of the settlement," with the Ministry of Defense authorizing an additional 6,000 housing units and Netanyahu pushing for the construction of 11,000 homes in the month of December alone.

The lack of economic support from donor nations and the restrictions that impede the Palestinian economy from functioning at anywhere near its full potential have also made for a deadly cocktail for Abbas' Palestinian Authority. Combined with the occasional holding of Palestinian tax revenue by the Israelis, the PA is finding it incredibly difficult to pay the tens of thousands of employees on its payroll.

The recent Israeli parliamentary elections perhaps best illustrate where the Palestinian issue is today: at the bottom of the barrel. Israeli politicians chose to focus their campaigning on social and economic issues, from the price of housing and cost of living to whether religious students should be drafted into the Israeli military like everyone else. The only Israeli candidate who spoke about the need to reengage the Palestinians in peace talks was the former foreign minister Tzipi Livni, whose party failed to reach double-digits in the incoming parliament.

The overall message is depressingly familiar to Palestinians: creating a Palestinian state in the West Bank, Gaza Strip, and East Jerusalem is simply not on the list of priorities for Israel at the current time. And the Palestinian Authority is proving itself to be an increasingly fragile governing body without the constant generosity of foreign countries; it's an institution that cannot adequately care for its people, let alone its employees who go months without pay. The average Palestinian is losing hope that peace is possible in his or her lifetime. Palestinian leaders may speak of ending the occupation, but for those who live under it, the occupation is so ingrained that escaping it has become a violation of the normal.

Some may take the more militant attitudes of Palestinians as confirmation that Israel does not have a partner for peace. Yet those attitudes can also be viewed differently: without a renewed effort at peacemaking, however frustrating and difficult it will be, the conflict will reach a nadir where searching for a peace partner will be irrelevant.

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Jeffrey Epstein
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POWER, FORTUNE AND SURVIVAL IN THE AGE OF NETWORKS

THE SEVENTH SENSE

JOSHUA COOPER RAMO

AUTHOR OF THE INTERNATIONAL BESTSELLER THE AGE OF THE UNTHINKABLE

The Seventh Sense
Power, Fortune and Survival in the Age of Networks

Joshua Cooper Ramo

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Part One: The Nature of Our Age

In which the revolutionary character of our era is explained. The need for a new instinct is introduced. The historical stakes are weighed.

Chapter 1: The Master
Chapter 2: The Age of Network Power
Chapter 3: The Unbuckling

Part Two: The Seventh Sense

In which we regard the world with a new sensibility. Connection, we discover, changes the nature of an object.

Chapter 4: The Jaws of Connection
Chapter 5: Fishnet
Chapter 6: Warez Dudes
Chapter 7: The New Caste
Chapter 8: "A mechanism and a myth": The Compression of Space and Time

Part Three: Gateland

A guide to power in the world that becomes newly apparent with the Seventh Sense.

Chapter 9: Inside and Out
Chapter 10: Defense in Depth
Chapter 11: Citizens!

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Preface

Three hundred years ago the Enlightenment and the Industrial Revolution began their pounding work on the foundations of an ancient order. Like twin hammers, these forces demolished most of what once seemed permanent: Kings, alchemists, popes, feudal lords – they were all undone.

Today, a fresh hammer is cracking away at our world. The demands of constant, instant connection are tearing at old power arrangements. The formation of networks of all kinds, for trade and biology and finance and warfare and any of a thousand varied needs, is producing new and still dimly understood sources of power. They are eroding the roots of an older order even as a new one is beginning to appear. In fact, this process is only beginning. The networks ahead of us will be even faster than those we have today. They will also be informed by artificial intelligence. The combination of these two forces – instantness and thinking machines – will further deepen an already profound change.

That last great shift of the Enlightenment was a violent and wonderful transformation. It produced winners and losers, triggered tragedy and lit fresh triumphs. What lies ahead of us is the same. A new landscape of power is emerging now. This book is its story, and the tale of the instinct that will divide those who master it from those who will be mastered by it.

HOUSE_OVERSIGHT_018235

Part One: The Nature of Our Age

HOUSE_OVERSIGHT_018236

Chapter One:
The Masters

In which the immortal problems of power are discussed, and the possibility of a new instinct is introduced.

1.

One morning in of 1943, a Chinese writer named Nan Huai-Chin packed his bags in Shanghai and began walking out of the city. He was headed west, and traced a route along the Huang Pu river, as he headed out towards E'Mei Shan several thousand miles away in Western China. E'Mei Shan – Eyebrow Mountain – was and is one of the holiest Buddhist sites in China.

Nan was an unusual young man. At fifteen, he had won a national sword fighting competition against men twice his age. At sixteen he had been admitted to the best university in Shanghai, where he excelled in the study of natural sciences and philosophy. If you look at photos of Nan in those years, more or less at the moment he left Shanghai for the mountains, you see a clean-shaven, and soft-skinned man. He is handsome, with electric eyes. You can see, if you know to look, the rough intensity of the man he'd become during the anti-Japanese war: A toughness in his stance; some hint too in his grimace of a sword-fighter's mercilessness. This was long before Nan was regarded as one of the finest living exemplars of the Chinese Buddhist tradition, before he became known as *Master* Nan. This was before his flight from China with the Kuomintang in 1949 once the communists came to power, before his decades of wandering, and his eventual return to the mainland. All that lies ahead of the man you see in the photo. The man in the photo is young, energetic. He is certain.

In Nan's youth, in his early sword fighting days, he had come to understand that mastering the blade of his sword involved really training his internal spirit to the highest possible level of sharpness. The spirit moved first, then – instants later – the sword. It was his desire to sharpen that inner blade that led him to E'mei Shan and the study of Ch'an Buddhism. Ch'an – you may know it by its Japanese name, Zen – is the steeliest of the Buddhist traditions, bred through the combination of the Buddha's ancient Indian teachings with the mystical philosophical habits of Chinese Daoism. Its adherents explain that enlightenment in Ch'an demands concentration strong enough to make and then smash diamonds. It produces, as a result, an unmatchable form of enlightenment. So, with the anti-Japanese war still smoldering, Nan traveled for a month through his convulsing country and up E'mei Mountain, where he found a Ch'an lamasery near the peak. Once there, during three years of constant effort and meditation and deprivation, he achieved a breakthrough to *samadhi,* that state of spiritual alignment in which the world and your own soul become as transparent as water. Fear vanishes, as does lust or any real confusion about the deeper currents of life. You become, the priests like to say, as resilient as a

HOUSE_OVERSIGHT_018237

natural mountain spring: No matter what mud is thrown in, it is simply and naturally bubbled away into clarity.

From E'Mei temple, with this fresh, clear-running mind, Nan began a quest to sharpen his spirit even further. The journey took him, for nearly a decade, from master to master in China, from monastery to university to rural huts. These were the places where the last bits of some of China's most ancient traditions had been carried, places where classical wisdom had survived a hundred years of national chaos. Nan's wandering education resembled the way in which, in millennia past, monks would make spiritual marathons around China, seeking an ever-sharper edge to their insights. Solitary monks would stride into packed monasteries and engage in tests of insight, contests to see who could feel the underlying nature of the world with greater fidelity. The aim was, always, to touch the energy flows moving, just unseen, below our lives. "Ten thousand kinds of clever talk—how can they be as good as reality?" So the famous Ch'an master Yun Men, who himself trained four great masters, faced down a King with pure silence in one such a battle.[1]

Nan was trying to cultivate in himself deep ways of feeling and sensing the world. During his wandering study, he followed a path that would lead him to enlightenment in more than a dozen different schools of Buddhism. He mastered everything from medicine to calligraphy. His youthful success and energy at sword fighting, it emerged, was a sign of a prodigal genius. He became, in the 20th century, recognized as one of those crucial human vessels by which really ancient tradition is preserved and carried forward for new generations.

After a few years of study, Nan saw the descending madness of Mao's China and slipped out of the mainland for Taiwan. He lived for decades between Taipei and Hong Kong and America. During this time his fame as a teacher grew. In the mid-1990s as China opened, Nan returned to the mainland. He had been invited by some of China's most powerful families, the children of communist revolutionaries who were groping for a sense of history and identity. They wanted to absorb the lessons of Chinese culture that Nan had internalized, they hoped to bend them into tools they could use to shape a Chinese future. Might the old habits of the country, with their ancient roots, have something to offer a nation nearly splitting with the energies of modernity? Nan agreed to set up a private school. He selected a site on the shores of Lake Tai in Zhejiang Province, not far from Shanghai. He chose the location carefully: The still lake water near his campus was like a giant bath of calming *yin* energy that balanced the urgent, uncertainly aggressive *yang* energy of 1990s China into a kind of harmony. Ash trees shaded the study rooms in the summer. Wild peonies erupted in pink and white each spring.

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[1] **So the famous Ch'an master:** "Yun Men's Every Day is a Good Day" in Thomas Cleary, *Secrets of the Blue Cliff Record: Zen Comments by Hakuin and Tenkei.* (Boston, Mass.: Shambhala, 2002) 39. Fir an excellent introduction to the thinking of Master Nan, see *Diamond Sutra Explained* (Primodia Media 2007) and *To Realize Enlightenment: Practice of the Cultivation Path* (York Beach, ME: S. Weiser, 1994)

HOUSE_OVERSIGHT_018238

It was here, when he was 92 years old, that I first came to know him.

2.

Before I moved to Beijing in 2002 a friend took me aside and offered this thought: "Your life in China will change the way you see the world. But if you want to get the most out of it, you have to understand that as important as being bilingual is, it is as important to be bicultural." I had not honestly thought of this as part of my plan, but it seemed like good advice. I have hewed to it as a personal law ever since. From my first days in China, I lived almost entirely among the Chinese. I can, for instance, nearly number on one hand the meals I shared with Westerners over my years there. This advice to learn to be bicultural really did change my experience of living in China. It changed how I saw the world. It presented moments of really honest and searching confusion. I had conversations where I understood every word and yet had no idea what my interlocutor meant. I had periods where I did not know which culture was pulling on my mind. But the decision produced, at least, a fortunate encounter that led me to Master Nan's school.

Several years after I arrived in Beijing, I was out for dinner one evening with a close Chinese friend. My friend is a remarkable woman. If you ask how China has gone from poverty to prosperity in record time, it is partly because of people like her. She had studied in the Chinese educational system, had moved overseas and mastered the technical arts of economics and finance, and had returned eagerly to help in the construction of modern post-reform China. Nearly any time the government had some new and difficult financial problem to manage, she would be shuffled into the nervous hands of some baffled Minister or Vice Premier. She had, in her various activities, helped put the Chinese stock exchange on its feet, rebuilt bankrupt banks, and had overseen the construction of China's first sovereign wealth fund. Though only a few years older than me, her unique skills and absolute loyalty meant she had seen much of the development of China's speed-train economy – part miracle, part near accident – from zero-distance range.

As she and I were finishing dinner that evening, a door opened to a private dining room near us in the restaurant. Chinese often eat out in private rooms, and the best restaurants are usually warrens of well-appointed secret spaces, a reminder that in China door after door after door leads to ever more secure sanctums—think of the nested power architecture of the Forbidden City. When the door near us opened, a stream of senior Chinese party figures paraded past, hovering around an intense, square-jawed and smiling man who was soon to become one of the most powerful figures in China. As this man walked past, he nodded hello to both of us. I asked my friend once he had left: "How do you know him?" I expected her contact with senior leaders on financial matters would explain the connection. Her answer surprised me.

"We both," she said, "have the same Master."

HOUSE_OVERSIGHT_018239

I had only been living in China then for about four or five years, so I was still a bit surprised to learn in this unusual way about what I would later come to know – and see and even experience myself – as the spiritual life of China's communist officials, particularly those at the absolute top of the system. The Master my friend was referring to was Master Nan. Though he was largely unknown outside of China – I am sure you had not heard of him until a few pages ago – in China he was an icon. After his return to the mainland in the 1990s, his books about Buddhism and philosophy sold millions of copies. His lectures are watched on DVDs and the Internet, and he owns a fond fame that reaches across generations and transcends politics or art or philosophy. You are as likely to find a copy of his book on the desk of a university President as stuffed into the back pocket of a tea-server in Chengdu.

As you can imagine, when my friend first introduced me to the idea of someone like Master Nan serving as a spiritual mentor to the figures struggling to master this huge country, figures I had met and worked with in the brutally rational business of everyday life in a modernizing China, it raised all sorts of questions. *We both have the same master?* But in China, one thing you discover pretty quickly is that honest understanding of anything isn't achieved by asking lots of questions, particularly not the direct sort. Yun Men had it right: Ten thousand kinds of clever talk get you nowhere meaningful. But with her one sentence, the dinner conversation, which had been moving pleasantly enough through the eddies of China's politics and economics, passed into deeper water, where it has stayed in the years since.

Master Nan's particular passion, I learned that night, was a branch of Chinese Ch'an Buddhism that had, about 1000 years ago, provided the seeds for the Japanese school of "instant illumination," known as Rinzai Zen. Rinzai is famed in the west for asking students to grapple with *koans*, the sorts of puzzles – "What was your face before your were born?" or "What is the sound of one hand clapping?" or just "Mu!" – that can never be approached or answered by reason alone. They require nothing but pure, trained instinct. Koans are not like math problems or word puzzles, so much as questions that have to be answered with your whole soul. We don't really have an educational concept like this in the west, but the aim of Rinzai meditation and learning is to arrive at *kensho (jianxing* in Chinese), a sudden and complete understanding of the true nature of the world. Such "instant illumination" marks a very eastern sensibility: Real truth resists the grasp of mere logic. It can't be simply explained, or taught with words alone. It calls on more immediate feelings, in the way we might fall in love or get angry. In Rinzai study, the aim is to tighten and compress your mind with meditation and focus and exercise – and the occasional slapping sharpness of a hardwood "enlightenment stick" – as a way to open it, with the goal of instant, blazing enlightenment. In such a moment, all sorts of invisible relations become unforgettably obvious.

I had been a student of Rinzai since I was 16. So it was that, in the springtime of the year after that dinner in Beijing, I was surprisingly, luckily invited to Master Nan's campus.

3.

HOUSE_OVERSIGHT_018240

It is often said that during the days when Master Nan's Lake Tai campus is open for training, when hundreds of rich and connected elites from all over the Chinese-speaking world converge there, it is the best networking spot in the country. But on the weekend of my first visit, the Tai Hu center was closed to outsiders. Only about ten of us were present. We were all, together, students. On our first morning we walked to a large hall overlooking the lake and sat down quietly on benches and meditated for three hours. And on our first evening, Master Nan sat with us during dinner, looking young and vital and 20 years short of his 92, barely eating. Above the bridge of his nose, I noticed, was a small marble-sized bump. This is the mark that emerges, according to Buddhist tradition, when your self-cultivation and meditation has led you to deep breakthrough, when energy begins to slip out of your head at that "third eye" spot and into the world, leaving a little bump as evidence.

As we finished dinner, Master Nan turned the conversation to me and asked me to speak about what was on my mind. In later years I would learn this was his habit, to hand the floor over to his guests for a bit – whether they were politicians or industrial titans or innocent visitors – before entering into his own reflections. He pursued me with careful questions, his voice purring with a thick coastal accent. The questions seemed removed sometimes from my main points, but I quickly came to see them as needles. ("When he uttered a phrase," it was said of Yun Men, "it was like an iron spike.") Many of those present were jotting notes: Whatever Master Nan thought important, his students felt, must be worth putting down.

I knew that the records of Nan's lectures and discussions were often circulated by email. With subject lines like "Understanding This Chinese Generation" or "Master Nan Answers Questions About Chinese and Western Knowledge," they were real-time maps of the usually invisible dance our daily lives do with history and philosophy. We live *now*, of course, but Nan was always aware that we lived within an historical flow too, in a particular moment amidst constant change. Remember that the foundational text of Chinese civilization is the 2500-year old *Yi Jing*, The Book of Changes. If Westerners are accustomed to consistent historical, Chinese begin with the idea of a flux of forces as the only constant. A world of ceaseless change means that valuable, useful education is less about facts than about the training of a vigilant instinct for reaction.[2] It was a version of this same aim that was at the heart of Nan's teaching, and that made his ideas so magnetically appealing.

The circulation lists on his lecture notes were the Chinese equivalent of a roster that included Ben Bernanke, Colin Powell, and Warren Buffett. They reflected the breadth of curiosity about his ideas, and the hunger to understand and digest changes in China and the world. "I just had a very senior leader here," Nan told me during a visit several years later. I had seen the high security at the compound and

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[2] **A world of ceaslesee change:** See Francois Jullien, *The Silent Tranformations* (London: Seagull Books, 2011) 70, and David Hall and Roger T. Ames, *Thinking from the Han Self, Truth, and Transcendence in Chinese and Western Culture* (Albany, N.Y.: State University of New York Press, 1998) 150

HOUSE_OVERSIGHT_018241

the military cars whipping in and out all day. "He asked me what books I could recommend to understand this period we are living in. I said, 'I could give you some books, but you wouldn't understand them.'" Nan laughed. The iron spike. "This can't be understood by reading!" Nan was trying to educate his students in the original principles of Ch'an: a set of psychological and physical tools to reveal deeper patterns in the world.

4.

After wearing his guests down with relentless dinner-time questioning that first night I was at Lake Tai, Master Nan began to offer his views of our age. What he saw, he explained, was a world pressing too hard on a fault line. We faced, he said, choosing his word carefully, an "ephocal" quake. We were at a moment when the river of change he had spent a lifetime feeling out was about to shift its course over the landscape, drowning many of the reliable, old routes. The origins of this change were buried in the very things we hoped might, in fact, save us from shock: money, information, speed. "People are now constantly connected to computers and machines, and this is changing the way they think. People just cannot make sense of what is happening," he said. "There is no respite. The world is going to go faster and faster in this regard."

"In the 19th century the biggest threat to humanity was pneumonia," he continued. "In the 20th century it was cancer. The illness that will mark our era, and particularly the start of the 21st century, is insanity. Or we can say, *spiritual disease*." He paused. "This next century is going to be especially turbulent. It has already begun. And when I say insanity and spiritual disease, I don't only mean inside the minds of individuals. Politics, military, economics, education, culture and medicine – all these will be affected."

I could sense the logic behind Master Nan's argument. The industrialization and urbanization of the 19th century had packed much of the world into Dickensian urban pits. These became petri dishes for pneumonia. Too much industry and urbanization, too fast. The 20th century of plastics and artificial, untested, unsafe materials had torn away at our genetic base and worsened cancers. Too much science, too fast. In our age, in the 21st century he felt a wasting disease would be carried by information, by cell phones, by packets of data, by every bitstream we jacked into our lives – and it would go right for our brains. Our institutions and our ideas about power and stability would fall apart. The remapping of force that the information revolution represented was a profound, destructive shift – what Nan called a *jieshu*, the Chinese word for a rupture in the fabric of human history. In such an era, the once reliable old habits would become useless, even dangerous. All that would matter were your instincts. Frankly, all you would have would be your instincts because no existing map could guide you through a completely new landscape. In fact, the existing maps, should you stubbornly continue to use them, would lead you along dangerous paths towards catastrophes you could not even imagine.

HOUSE_OVERSIGHT_018242

5.

The dining hall around us was dark as Nan finished his discussion that night. At our table we sat in a pool of dim light and waited on the Master as he considered his next thoughts. I knew that some of what drew China's great minds here to dinners with him was a sense that those old ideas of Chinese philosophy – born in an age of chaos and dating back to a time before rational calculation and scientific progress – offered hope. I asked Master Nan where he would begin on a quest to understand this age and how best to prepare. How to cultivate oneself?

"You know you can't just understand this easily," Master Nan said sharply. He was a little angry with me, I could see, for asking such a direct question – and he was also using the Chinese teaching technique of taking students through a range of emotions to accelerate their learning. Chinese philosophers believe we learn differently depending on how we feel, so a teacher making a student scared or insulted or proud is often just an educational tactic. Nan was working on my humiliation bone now: "This isn't like some idea I can *sell* you and then you can just go and use," he continued, his voice rising. "This is going to be hard."

Master Nan inhaled on his cigarette and waited a moment. "If you work, though, maybe you can be like Su Qin," he said, "the man who wrestled 20 years of peace out of 300 years of war." Su Qin was the hero of the Warring States period during which China collapsed into total chaos. He is remembered today, two thousand years later, for the way he had penetrated the madness of his age and how he found there deeper fibers of truth that he lashed into a stable peace. "Su Qin started as an idealist. He failed.

"You know, Su Qin was humiliated in trying to advise kings. Even his kin were embarrassed. His sister and mother refused to let him return to the family home. He was in so much pain over this embarrassment that he sat in front of a desk and read every book of history he could find for seven years. He tied his long hair to a beam above his desk so that if he fell asleep it would hold his head up. Sometimes he would stab a knife into his thigh to keep awake." Nan's voice was rising, his speech picking up pace. "But in the end, he learned. Su Qin learned. You should study him. If you do this, if you are sincere, if you work hard, if you learn these ideas, you can understand. Can you be that disciplined?" The room was dead quiet now. No one looked at me. In the silence, one of the guests passed around a plate of cut fresh fruit and cherries and sweet dried dates.

Nan's relentless, intense Ch'an Buddhism sort of enlightenment, delivered only after painful years of carbon-crushing intellectual intensity, expressed a clear ambition: To learn to feel through invisible relations and balances and to construct something promising and hopeful on the other side. Nan's long sessions of mediation or sword play, his furious pursuing philosophical dialogues that reduced students to an embarrassed sweating state, these were all aimed at sharpening a blade so as to instantly carve at the energy flows of our age. Did "spiritual illness" really linger ahead of us? What sort of tragedy did that suggest? What was it that, hair tied to the

HOUSE_OVERSIGHT_018243

ceiling, penknife jabbed into his leg, Su Qin had learned in those long, effortful years of study? What secret had he penetrated? What sort of education had he finally received at the end of his humiliations and breakthroughs? He had mastered the energy of his age – and the exact right sensibility to use it. Might we, Nan seemed to be asking, do the same?

7.

Faced with the mad unsettling of his world during the Industrial Revolution of the mid 19th century, the German philosopher Friederich Nietzsche once mused that survival and greatness would depend on having what he called a "Sixth Sense", by which he meant a feeling for history. Surely, he felt, an instinct for ancient balances and truths would provide a guide rail of sorts as the world lurched into a new age, along an uncharted road.[3] If you could say "This has happened before" or "This is how we got to where we are," Nietzsche believed, it was the first step towards knowing where to go next. Nan and Kissinger knew the need for something else for our age as well, for a different instinct. It wasn't just about knowing your history or feeling the real possibility of human progress or tragedy. Rather it was about feeling out the roots of the present in a certain way. All of our ideas – from how we love to what we think of politics – are taken from the feedback and experience of our lives, from what we've seen and done and felt and learned. We are the sum total of our experiences, in this sense. But what to do if changes happen at some deeper, insensible level where the old ideas and instincts, where the tools of sight and smell, of feel and taste and hearing don't fully answer? What to do when we are confronted with what we've never experienced before? Never even dreamed of, perhaps?

This book is the story of a completely fresh way of feeling our world. By this I mean a sensation that is as newborn as the lively sense of connection, of freedom, of electric uncertainty and hope that come with the knowledge that we are unboxing a new age. If Nietzsche's era demanded a feeling for history, our own age insists on a

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[3] **Surely, he felt:** Nietzche describes the "Sixth Sense" in *Beyond Good and Evil* in the following way: "The historical sense (or the capacity for divining quickly the order of rank of the evaluations according to which a people, a society, a human being has lived, the 'divinatory instinct' for the relationships of these evaluations, for the relation of the authority of values to the authority of effective forces): this historical sense, to which we Europeans lay claim as our specialty, has come to us in the wake of the mad and fascinating semi-barbarism into which Europe has been plunged through the democratic mingling of classes and races—only the nineteenth century knows this sense, as its sixth sense. The past of every form and mode of life, of cultures that formerly lay close beside or on top of one another, streams into us "modern souls" thanks to this mingling, our instincts now run back in all directions, we ourselves are a kind of chaos. In the end, as I said before, 'the spirit' perceives its advantage in all this." See Friedrich Wilhelm Nietzsche and Rolf Horstmann. *Beyond Good and Evil Prelude to a Philosophy of the Future*, (Cambridge: Cambridge University Press, 2002), 224.

HOUSE_OVERSIGHT_018244

sensation alive to the pull of constant, instant connection. This Seventh Sense reacts to what none of our other senses can notice, to the subtle undercurrents of a networked age. That moment of first connection you once had – to a computer, a friend, a fast-moving financial product, a miracle medical cure, an idea, a smashed up sound – is like the first time you looked at a Matisse painting or heard Beethoven (or Orbital). It switched on a new sensibility. But you have probably had – or will shortly – another moment. This is the instant a cold and creeping chill hits you, started by the uneasy sensation that something you've done has been recorded or predicted or watched and manipulated in some way you'd not quite imagined. That some strange force from a great distance has slammed into your life. This feeling is the sudden shudder of a bill come surprisingly due: You wanted to be connected? Okay, here's the cost. And the addition on both sides of the ledger, the massive benefits of our links and the rather terrible potential of those same threads, is still being settled. We can say at least that the sum of all the revolutions wrought by the instant mingling of the world's soon-to-be connected billions with each other and with machine intelligence, biological innovation and the tremors of a globalizing world will be, to use Master Nan's word, "epochal."

Most of us find ourselves torn now. Not just between future and past; not merely between the habits and loves of a slower age and the ceaslesss promise of something fast and new. We are trapped, as well, between two groups. An older generation now in power, blind to the laws of networks and connection, uses old ideas to battle problems of a connected age and makes them worse, ever faster. Terrorism. Financial chasms. Environmental imbalance. At the same time, an emergent class of powerful technologists fingers more influence than perhaps any group in history. Machines watch, learn, think and increasingly control nearly every element of our lives. This digital-age group understands networks; but if they have ideas about virtue, philosophy and justice, (mostly they don't) these feel susbsumed by their confidence in networks and control. Each group pulls at the legacy of the Enlightenment – our liberty. And, so far, we've no way of defending ourselves. No new instinct for life in this still unfathomable age of connection. The Seventh Sense is a feeling for just what constant connection means – and the start of (finally) a confident knowledge of how to construct our future and protect ourselves against what is even now descending upon us. A consciouness exists in the world, Master Nan would say. It extends over borders, across differences, between people. And it becomes, on networks now, visible in new, powerful and hopeful ways.

What I mean by a sensibility is really a kind of instinctive notion, a way to sense and then use the energy flows of our age that hovers perhaps just below what the rational mind alone can tell. Master Nan used to recall a famous story from the 2500 year old Daoist masterpiece *Zhuangzi*, about the butcher who worked for a famous and powerful Duke. One day the Duke saw the butcher cutting meat, his blade singing and moving with almost no effort. "Ah, this is marvelous. Imagine such mastery," the Duke said. "How have you achived this?" he asked. "What I follow is The Way," the butcher said, referring to the idea of a spiritual force, a natural energy which Daoisim tells us infuses everthing, from trees to the human heart. "When I started butchering, all I could see was parts of the ox itself. After three years, I could

HOUSE_OVERSIGHT_018245

see the the whole ox. Nowadays, I meet the ox with my mind and spirit rather than see it."[4] The butcher was not looking at his work; he was feeling the energy of the task. "A good cook goes through a knife in a year, because he cuts," the butcher concluded. "An average cook goes through a knife in a month, because he hacks. I have used this knife for nineteen years. It has butchered thousands of oxen, But the blade is still like it's newly sharpened." He was cutting not with his knife, but with an instinct – and the result was the highest form of mastery: accomplishment with nearly no effort. This our our aim: To see the world with our mind, not our eyes. So much of what will affect us in the future is invisibly stashed on a connected landscape we're only now learning to feel. It will emerge from the complex, adaptive sea of links expanding around us. We must tune our own instincts for this power, which will make our moves almost effortless. The ever-sharp mental knife laid upon the thick challenges of a new age.

There will be moments ahead for all of us – the most dangerous or terrifying or wonderful ones – in which things will happen that none of our old ideas or senses can help us understand. The truly *new*. We've had previews of such moments often enough in recent years: innovative devices, surprise attacks, unexpected and permanent economic quakes. A cracking of the old physics of wealth and power is underway around us, largely invisible to most of us, except perhaps in its strange and unnatural effects: everywhere terror, instant billionaries, the failure of ideas and institutions, millions of migrants loosed and drifting across old borders, but tethered to deeper fields of connection, data, and ideology. The Seventh Sense is the ability to see why this is happening. And to use what you see. This is not merely about brain power or sharpened intellect; it's about a gut reaction. Just as the demand for liberty or industry was once invisible and insensible to an age accustomed hundreds of years ago to feudal, agricultural habits, so we're likely blind to urgent pressures of our own. Surely you've felt this creeping anxiety yourself, the exciting nausea of movement coming from you know not where? The ability to sense and feel the deeper chord changes of history has, always, been the decisive mark of leadership and success in revolutionary periods.

Consider, for instance, Charles, the Duke of Brunswick-Wolfenbuttel who faced down Napoleon on the fields of Jena in what is now central Germany in October 1806. Brusnwick-Wolfenbuttel was then 71 years old. He was considered one of the most courageous soldiers of his age, with a record of astonishing victories. He looked over the sun-dappled fields along the Saar river on that fall day and saw nearly certain victory in the coming battle. He had Napoleon outmatched two soldiers to one. His men were masters of the subtle techniques of Frederick the Great, tactics that had delivered victory in far more perilous moments. But Napoleon, less than half the Duke's age at 37, stared across the same undulating land, the same poised armies and saw in the landscape something completely

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[4] **When I started butchering:** I've finessed the always-unstranslatable Zhuangzi. See for reference Burton Watson, Burton, *The Complete Works of Chuang Tzu*. (New York: Columbia University Press, 1968)

HOUSE_OVERSIGHT_018246

different and totally, lethally correct: An interlocking set of murderous gears that could be set loose by his artillery[5].

In the course of the French victory the next day Brunswick-Wolfenbuttel was first blinded by French musket shot and then bled to death. It was a poetic end. He had been, like so many of the Generals who would tumble before Napoleon in coming years, absolutely blind to forces perfectly clear and visible and usable to the revolutionary upstart. Napoloen's European opponents would come to fear and admire nothing so much as the Emperor's specific, almosty mystical sort of battlefield vision. He could look at a battlefield and see possibilities – certanties, in fact – that eluded older, famous men. They named his masterful insight the "Coup d'Oeil": an instant, apprehending glimpse of power waves[6]. He saw forces and facts in war that were obscured from his enemies by their own habits of mind and the limits of their creativity. The great Prussian military strategist Carl Von Clausewitz, who was made prisoner by Napoleon during the massacre at Jena, used his time locked up to begin compiling notes for his classic work of Western strategy, *On War*. "Genius," he later wrote, "rises above the rules." Mastery of strategy, Von Clausewitz explained, was not merely the result of steely courage, geometric calculation or even luck, as earlier writers had figured it. Rather, it was derived from the ownership of a sensibility that could discern the secretly running lines of power that made the old ways instantly irrelevant and appallingly dangerous.

Historians who mark out and consider the really long, century by century movement of humanity, often divide time into "historic" eras where fundamental, tsunami-like changes wipe clean old orders and other, more sedate periods where time dawdles like a quiet lake. This is the difference between living in Warsaw in, say, 1339 or 1939. The first period was sober and silent; the second was awfully awake. Historic moments like 1939 are marked by the fact that change comes to find you. It is often unavoidable. Your children are pulled into a World War. Your village is torn down. Your health is remade by science. The paleontologist Stephen Jay Gould called the march of these snapping changes "punctuated equilibrium," as the world is jumped from one state to another – and never turns back. He was largely considering the extinction of the dinosaurs, but we find the idea useful in thinking about history too. The Revolution of 1789 in France, for instance, which enabled the massive, volunteer armies Napoleon later brought to his wars, which were of unprecedented size. "Looking at the situation in this conventional manner, people at first expected to have to deal only with a seriously weakened French army," Von Clausewitz explained later. "But in 1793 a force appeared that beggared all imagination."[7] The

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[5] **An interlocking set of gears:** David Chandler, *The Campaigns of Napoleon* (New York: Macmillan Publishing, 1974), 464; For a discussion of this generational mismatch, see the essay "戴旭：从文化层兴衰面反思大国军事兴衰"or Dai Xu, "Reconsidering the military aspect of great power rise and fall from a cultural perspective" PLA Daily, June 8, 2015

[6] **They named his masterful insight:** Carl von Clausewitz, Howard, Michael, trans. *Clausewitz On War*, (Washington: Library of Congress, 1998) 102

[7] **But in 1793:** *On War*, p 591 (1984)

HOUSE_OVERSIGHT_018247

European riots of 1848 were another such example. Or the ideological and military surging of 1939. Our very own age. There is a feeling of this sort of inevitable punctuation in what is underway around us now, the insertion of a single period at the end of one era and the first, italicized letters of a new one. Impulses and connections we don't fully understand and can't yet control are at play. Our imagination is beggared too now. Often. These forces are, we have to confess, wiping away one system. But they are also producing another.

What I mean by the Seventh Sense is the ability to see both these old and the new worlds around us, to feel too the real and the virtual – and to know power as it flows through and between each. Rattling one apart. Enlivening another. I don't mean here blinding technological optimism; nor do I mean absurd conservative historicism. The Seventh Sense is the ability to contemplate politics, economics, warfare, innovation, genomics now – really every hot-connected discipline and sense in one glance the new and the old power, and of course the fault lines running between them. Connected and yet-to-be-linked. Colliding. Melding. Repelling. Our future will be less an isolated technological paradise than an intermingling of real and virtual. It will not be an age of blacked-out virtual reality goggles like Oculus Rift or the blinding and submersive feeling of novels like *Ready Player One* but, I think, a bit more like a semi-transparent screen, on which real and virtual worlds mash together. Hololens or Magic Leap glasses that project virtual images on the real world, for instance. Or the feeling of *Snowcrash*, Neal Stephenson's masterpiece novel whose charaters move effortlessly between net and city. Maybe even (probably most accurately) the game *Ingress*, in which the reality of streets and buildings and homes was augmented into a giant chessboard and populated by hundreds of thousands of us in the last few years. These cultural landmarks matter, they are worth learning about and exploring. They stand out as trailguides to a fresh sensibility in the same way Nijinsky's 20th century dances or Goethe's 19th century poetry once did.

We flip back and forth between real and virtual in our every day lives now, popping our head from screen to street. Our art, our music, our finances – they make the same passage. To see both fields at once, to see the way they blend and pull on each other, does demand a new sensibility, of course. And though, eventually, this new instinct will be commonplace, for now at least it must be defined, refined, and learned by each of us. Like Napoleon looking at a battlfield and discovering how to spot the violent potential of industrial war. Or, Einstein reaching the deeper, invisible truths of physics as he left Newton behind: "There is no logical path to these laws," he wrote later of the leaps that had carried him to relativity, "only intuition."[8] This is what Nan was trying to point to; the need to train an instinct for the epochal changes ahead. Whether the future that emerges from our simultaneous confrontation with real and network phenomenae will produce a speed-blasted information paradise or a terrifying dystopia is hard to say now. That will be decided largely by choices made in the next couple of decades. It will be decided by

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[8] **Or, Einstein:** Einstein, Albert, *Essays in Science* (New York: Philosophical Library, 1934), 4

HOUSE_OVERSIGHT_018248

people who do have the Seventh Sense. Even, I think, by people who are reading this book.

Why start this journey into the churning, still-confusing and affronting world around us now by the shores of Lake Taihu? Why begin with the sentiments of a slower culture that Master Nan embodied, passed like delicate and still-warm tea, with so much calm in the face of all this urgency? It's not only because of Master Nan's insight that this world is tearing at our minds, that the faster we move the sicker we'll get. It's something else. The training of an instinct, of a really fresh way of looking at the world, demands a kind of calm. Understanding of anything, after all, is most durably assembled in slow conversations, in patient probing. It is developed as much from brushes with music and literature as it is from any direct, slamming confrontation with the truth. The birth of an instinct requires a rewiring of our minds, a reframing of our hopes, and this can only be done at the pace of contemplation. (It's the best way to keep the fear at bay.) We seek those stilled, freeze-framed moments where we'll pause amid lightspeed fast networks to think about why they work and just what they are doing to us. Tranquility, for a moment at least, in the face of the alternately horrible and wonderful way the world is being remade. That's what you'll get here, in the following pages. Nan's model statesman Su Qin, knife stabbed into his own thigh and slouched with exhaustion is a sort of totem for us. *Knife in thigh*. Stop. Think. Even, hard as it may be, *wait* for the right path to present itself. No matter how uncomfortable it may be at times, it is better to be unconventional than conventional in our revolutionary age. This is the only way to cultivate a Seventh Sense. The old methods will not teach you a new way.

Let me tell you what is going to happen: In coming years there will be a struggle between those who have the Seventh Sense – who are born with it or trained to it – and those who don't. New, network forces all around us will take on old, established ones – they already are – in business, politics, warfare, science. Then – because those who don't have the Seventh Sense for network power will lose, as anyone who tries to stop the future always loses – a new age will begin. This age will involve violent, historic wrestling between different groups with different versions of the Seventh Sense.Competing interests and ideals and aims will fire these contending forces. Networks will fight networks. Some of the plans of these connected age groups will be good, others evil, and anyhow the winners will be ruthless. Then, and this is where it will get particularly strange and incredible, there will be a battle between those with the Seventh Sense and the very systems of connection, machines and intelligence they have built. Human instincts laid in competition against the machine instincts. That struggle? I'm not quite sure how it will turn out. But for now, at least, we can say this: The future sits almost like a cold-eyed dare in front of us. *Just try to avoid this!*

HOUSE_OVERSIGHT_018249

Chapter Two: The Age of Network Power

In which the Seventh Sense reveals a fundamental insight: Connection changes the nature of an object.

1.

Several hundred years ago the forces of the Enlightenment and the Industrial Revolution, like twin hammers, began working away at the roots of an ancient order. The powerful ideas of liberty, freedom of thought, science, democracy and capitalism – these all layered one upon the other. They washed, like irresistible tides, across the institutions and kingdoms and beliefs of Europe and in a process of revolution, of invention, of destruction and creation, they put a period at the end of one era, and began the very first lines of a new human story. These forces produced what we know today as the modern world: Trains knit new markets, science tripled life spans, democracy liberated politics. Confronted with this really irresistible pressure, a gulf opened. The world started to cleave. On one side were the nations and peoples that our modern economists would come to know and label as a "Convergence Club."[9] This group mastered and refined and then used the tools of their era to become industrial, democratic, scientific and rich.[10] They left the age of kings and feudal lords, of alchemists and all-knowing priests behind. At the same time, a "Divergence Club" appeared. These nations missed the essential turn. They were trapped. Old ideas, useless habits of power, inescapable history – varied shackles held them back from the punctuated shift to a new, more advanced equilibrium. Russia, China, much of Latin America and Africa – for them, the leap to being honestly modern was fatally elusive. Even today, they struggle to catch up.

We are now in the earliest stages of a shift that promises to be still more consequential than the one that enlightened and industrialized our world over several centuries after the Dark Ages. The essence of this shift is best captured by the prodigious explosion of different types of connection emerging around us now – financial, trade, information, transport, biological – and the innovative combinations that follow these and other fast, fresh links. Modern, highly-connected systems are different than those with less connection. And, as we'll come to see, they are particularly different from those with *slower* connection. We experience power through networks now, as once we experienced it through brick-bound institutions like universities or military headquarters or telephone company switches. You can no more understand the operations of Hizb'allah or China's central bank or the most valuable Internet companies today without at least this frank admission: Their

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[9] **On one side:** William J. Baumol, *Convergence of Productivity Cross-national Studies and Historical Evidence* (New York: Oxford University Press, 1994)

[10] **This group mastered:** See Joel Mokyr, "The European Enlightenment, the Industrial Revolution, and Modern Economic Growth", *Max Weber Lecture,* European University, March 27, 2007

HOUSE_OVERSIGHT_018250

power operates as much through light pulses running through fiber optic webs as it does in any physical sense. Think of the most influential geopolitical forces. The most lethal militaries. The greatest new commercial or financial efforts. All now depend on and are nearly defined by their fluency with different sorts of connection.

Networks emerge when nodes – which can be composed of people, financial markets, computers, mobile devices, drones or any lively and connectable object – link to other nodes. Networks can be defined by geography, or by language or currency or data protocols or any of a thousand particular features.[11] *People who live in Bangalore*, is a network. As is, *Switches running DNSSEC protocol on the Internet* or *Businesses transacting in Rupiah.* An engineer might say: Network power is simply the ceaseless summing, at any instant, of all these bundles of connection. Real, physical networks hum magnetically now in cities that now pulse and grow with accelerating, connected speed. New York City is network, in this sense, as is Beijing or – in a less evolved way – the Alaskan steppe. So while it's tempting to call the 21st Century the "Urban Century", in fact the billion-people a decade rush into cities is a symptom. A larger hunger for the constant knitting of lives together, for fresh and efficient connection drives us.[12] Of course completely, powerfully virtual instances of networks exist too: knit webs of computers teaching themselves how to read, or the fast, paranoid and careful buzzing of constantly alert cybersecurity firewalls. All of these systems are defined by relations. Their power comes from the number, the type and the speed of the connections they hungrily establish and then use. Networks don't merely speed up our markets, our news, or our innovation – they revolutionize the nature of their power. Broad-based interconnection can cause and even determine events.

These expanding, ever-thicker webs of data and linkage can be mapped, and taken together they reflect something we are coming to know as "Network Power".[13] By this phrase we mean not merely the Internet or twitter or crypto currencies like

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[11] **Networks can be defined:** For an excellent overview of networks the following texts are of use: Albert Barabasi, *Linked The New Science Of Networks Science Of Networks*. (S.l.: Basic Books, 2014), Mark Newman *Networks: An Introduction*, (Oxford: Oxford University Press 2010); Remco van der Hofstad, *Random Graphs and Complex Networks. Vol. I*, (Eindhoven University of Technology, 2015); Alexander R. Galloway and Eugene Thacker. *The Exploit a Theory of Networks* (Minneapolis: University of Minnesota Press, 2007), and S. Boccaletti, V. Latora, Y. Moreno, M. Chavez, D.-U. Hwang, "Complex networks: Structure and dynamics," *Physics Reports*, Volume 424, Issues 4–5, February 2006, Pages 175-308

[12] **A larger hunger:** Brandon Fuller and Paul Romer "Urbanization as Opportunity," *Marron Institute Working Paper* No. 1, 2014

[13] **These expanding, ever-thicker webs:** See Castells, Manuel. *Communication Power*. Oxford, UK: Oxford University Press, 2009; and Castells, Manuel. "Network Theory| A Network Theory of Power" *International Journal of Communication*, Volume 5(8 April 2011)

HOUSE_OVERSIGHT_018251

BitCoin – these are, of course, expressions of a kind of network power. But "Network Power" is something larger. It represents a potentially comprehensive grasp, new in human history and enmeshing billions of connected lives and tens of billions of linked sensors and machines. It is becoming, with every passing moment, more comprehensive: more sensors, more links, more points and more speed. Cascades, epidemics and interactions are ubiquitous on all these networks, producing unexpected innovation in their collisions: the weaving of genetics and databases, for instance, or of terrorism and mobile messaging[14]. Scientists who study networks call this sort of change "Explosive Percolation," by which they mean an instant shift in the very nature of a system as it passes a threshold level of connectivity.[15] This melding of nodes into a single fabric is not unlike the linking of water molecules one to another as the temperature drops. One moment you have something you can drink; the next you have ice. So: One moment you have a world of simply connected users, the next a billion-person platform like Facebook or YouTube solidifies. One day you have tumbling, angry fundamentalists; the next a linked terror movement. And because the impact of terrorism – which might be best defined as violence with an aim of causing psychological impact – depends on connection, exploding the landscape of links instantly expands its effects.[16] The network enables a new kind of terror. It changes its nature. Expands its impact. Such elemental phase transitions, where more means different, appear everywhere in linked natural systems– the formation of crystals, for example, of the collapse of an ecosystem when the last of a keystone species is hunted down. They appear on networks too. So you might say: A phase transtion lingers ahead of us in our security, our finances, our politics. The age we're entering now will be as different from the age we're leaving behind as the Enlightenment was from the dark feudal era that preceded it.

The Enlightenment's revolution of free ideas and men and trade and capital demanded a new sensibility. Our age is similar. It insists already on a fresh feeling for the power that emerges as a result of connection. There's an irony here: At the very moment when we might expect ourselves to be most free – liberated by wireless connections, by easy jet travel, by never-off communications – we find ourselves, inescapably, enmeshed and dependent. Mastery of connection turns out to be the modern version of Napoleon's *Coup D'Oeil*. Connection increasingly defines the most elemental pieces of our lives. The old individualistic, me-first instincts don't answer as well as they might once have when "me-first" now demands connection of some sort in order to get what you might want: Am education, better medical care, a pizza. What is true for the machines all around us now is true for us too: We are what we are connected to.

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[14] **Cascades, epidemics and interactions:** Dirk Helbing, "Globally Networked Risks and How to Respond," *Nature*, 2013, 51-59.
[15] **Scientists who study networks:** D. Achlioptas, R. M. D'souza, and J. Spencer. "Explosive Percolation in Random Networks." *Science*, 2009, 1453-455.
[16] **And because the nature of terrorism:** See Anthony Richards, *Conceptualizing Terrorism*, (Oxford: Oxford University Press, 2015)

HOUSE_OVERSIGHT_018252

Centuries from now, our great-great grandchildren will look back at our age and name it as we have named "The Enlightenment." Perhaps they will call this era "The Great Connection" or the "The Enmeshmnet" or somesuch. They will spot the winners and losers of our age as we do in our own review of history. That distant generation will identify a new "convergence club" emerging among us now, even if we can't quite name its members yet. Already we can see lavish rewards accumulating to the people and nations and companies who have established an early grip on this new sensibility. They understand and manipulate connective power. What they all share is a feeling, as instant and certain as an instinct, for what it means to be enclosed, constantly, by ever growing masses of connection. A set of forces, invisible to many, is now applying a merciless and grinding pressure to the familiar structures of an older age.

The struggles of our cherished institutions – the US congress, the military, the news media, our educational system, our once-inclusive capitalism – to achieve the very aims that they once elegantly and efficiently met is only the visible evidence of this shift. Buried underneath their lurching collapse is the real source of this change, a new connective energy. Power is now passing with a rippling, ripping energy from old, once-useful people and institutions and ideas and into these new platforms and protocols, built for an age of connection. If this passage has so far only wiped out encyclopedias, telephone companies or taxi medallions, it is merely because it is just beginning.

2.

The Seventh Sense, in short, is the ability to look at any object and see the way in which it is changed by connection. This is *the* essential skill. Whether you are commanding an army, running a Fortune 50 company, planning a great work of art or thinking about your children's education. You need to be able to look at a car, a hotel room, a share of stock, a language, a translation machine and say to yourself: Connection changes the nature of an object. It changes the nature of every object around it. This book is the story of just how and why that happens and of the way in which an instinct for this power now rests behind the fattest fortunes and the greatest successes of our age. Connection changes the nature of an object means connection changes the nature of your life, of mine, of our government, of the wars we fight and the peace we secure. The heart of the problem ahead of us is not small. It is nothing less than the most significant shift of power balances since the Enlightenment and the Industrial Revolution. How high are the stakes? If the Enlightenment is our reference, then I think we can say they are nothing less than total.

Of all the Seventh Sense ideas, this single concept is the most fundamental: *Connection changes the nature of an object.* A medical diagnostic machine is impressive; one that is connected to a database of information that can accelerate and improve or perfect a diagnosis is revolutionary. The act of linking our bodies, our cities, our ideas – everything really – together, introduces a genuinely new dynamic to our world. It creates hyper-dense concentrations of power. It breeds

HOUSE_OVERSIGHT_018253

fresh chances for complex and instant chaos. The emergence of surprise, tragedy, of wealth and hope will be more common now than in less revolutionary times. To follow the logic of the French philosopher Paul Virilio, for a moment: *The train produced the train accident. The plane produced the plane accident*[17]. Surely we can count on the network to produce the network accident – and many of them. In such a world the question of what you "have" – by which I mean what you are connected to – determines what you "are." You have friends on a social network. The US has a currency platform. Some new startup has an artificially intelligent machine. We all have possibilities and vulnerabilities we only dimly understand.

The great insight of the Enlightenment was that the nature of an object – a person, a piece of land, a vote, a share – changed when it was liberated from old fetters of tradition, ignorance, habit or fear. That single shift triggered centuries of disruption, of wars, of creativity and great human advance. The world realigned itself. The Seventh Sense era will be similar. When we are connected, power shifts. It changes who we are, what we might expect, how we might be manipulated, attacked, enriched. It is too early to map with any real fidelity the landscape that will emerge as a result, but we can say at least this: The nature of an object, *any object*, changes when it is connected. We need to say too: We are relatively early in our age of connection. It's not just that so much of the world remains to be linked; it's also that the nature of connection itself is changing. It is becoming instant. It is increasingly sharpened and enhanced, we will see, by the use of artificial intelligence. Basic connection is a powerful force; instant, AI-enabled links? You can imagine it must be something else entirely.

Let's take as an example a tool you're using right now, the English language. Any language is an "object" of sorts, a tool whose power depends on how and where it is used. Just as widespread use of the dollar or the British Pound or gold – for trade, for finance or for stashing under mattresses – marks a network of economic exchange, so English is a mesh for information sharing. When Spanish and Lebanese and Russian researchers gather to design a drug molecule, when astronauts talk in the International Space Station, when bankers settle finance policy in the midst of yet another unexpected crisis, they are using a powerful, standardized, shared tool that makes their work possible and efficient. English in this role, like French before it, has an appealing leverage: The more people who use it, the greater the incentive to learn it.

But when we think of English in a network sense, we see it is more than simply an object. It's a means of connection, something that information scientists call a "protocol". You may know the word from the realm of diplomacy, where protocols ritualize and decide everything from where the President sits at a dinner to how a letter must be addressed. In technical terms a "protocol" is also a rulebook too. Some network protocols you may have heard of – HTTP, DNS, SWIFT all serve as links in this sense. They translate digital bits into organized web pages, secure

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[17] **To follow the logic:** Paul Virilio and Philippe Petit. *Politics of the Very Worst: An Interview by Philippe Petit*. New York: Semiotext(e), 1999

HOUSE_OVERSIGHT_018254

packets or financial vouchers. Protocols embody shared rules. Their subtle, decisive power is to place each bit of data in a reliable, predictable order, just as diplomatic protocol might seat ambassadors at a negotiation. "Protocol," the theorists Alexander Galloway and Eugene Thacker have written, "is a system for maintaining organization and control in networks."[18]

In a world of older, more traditional power distributions Americans might worry about a day when another language, another "protocol" in a sense – Chinese or Spanish, say – would pry the central connective role away from English. Protocols are hard to change, of course. So many people have learned English; whole systems depend on its use. To suddenly switch the world's airline pilots, bond traders and computer programmers to Chinese or Spanish would hardly be worth the immense cost and the colliding confusion such a transfer would demand. But it's here where the Seventh Sense axiom, that connection changes the nature of an object, gives us a new view. For the first time, as a result of connectivity, a once unimagined possibility exists: rapid, real-time machine translation. Fast, ubiquitous network links mean that the central role of English is boiled away by another language than by a connected, intelligent network skin. "Good morning," is less likely to be overtaken by a greeting from some other language as it is to be effortlessly, invisibly transmuted into "早上好" or "Buenos Dias." Fast access to a great translation algorithm will be more important than the ability to speak English (or Spanish or Chinese). Even as an advocate of learning other languages, it's hard not to feel that the American parents now plowing their children urgently into Chinese classes are missing the point. Fluency in any second language in the future will be an arcane specialty. Better to teach the kids how to build an AI, or to debate the moral reasoning of Confucius and Socrates than how to order dinner. The machines will take care of that. Power in a connected age will pool, then, not in the mouths and minds of English speakers, but rather into the hands of anyone who controls the best translation server.

Connection has changed the nature of several objects here: The language itself, the people who use it – pilots, commodity traders, machines, you and I. You can see how the ability to design, build and turn on (or off) the fastest, smartest, most connected language machines becomes a nexus of fresh power. What will replace English isn't Spanish or Chinese, but a protocol. This sort of specialized data-pipe will permit instant, always-improving translation. It will become as crucial to the operation of the global economy or research laboratories or entertainment companies as English now is. *More* crucial, in fact, because these machines will enable vast new communication links with a fidelity far better than pidgin-level speech. They will consider not only what we say, but what they suspect we *mean* to say in the quest of ever clearer discussion. The pre-network instinct of *Fear Chinese! Fear Spanish!* is the wrong one. As is the idea to teach the world Chinese or Spanish as a source of power. Rather, *Can we control this turbo-smart connected language platform?* is the right question. So many of the threats we worry about today have been similarly

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[18] **"Protocol":** Alexander Galloway and Eugene Thacker, "Protocol, Control, and Networks" in *Grey Room* 17, Fall 2004, pp. 9

HOUSE_OVERSIGHT_018255

simplified and misplaced. *Fear deflation? Fear ISIS? Fear the RMB?* What we should be contemplating with great care is the connected skein that enmeshes us and all these connected knots of worry. We will see, over and over again, the way in which connection shifts, alters and even destroys the way an object moves and lives. The main point here is straightforward: New links, exploding into operation around us everywhere now, alter everything from how terrorists operate to how investments perform. And the failure to spot, use and understand that fact will be a source of our biggest future tragedies. Do you feel the global economy is more stable now than in 2008? Are we less susceptible to terror now? Is your data more secure than in the past? What do all these problems have in common?

Perhaps we're targeting the wrong things.

3.

If the idea of a Seventh Sense for our changing world is quickly apprehensible enough – *It's that gut feeling that seems to animate wild new businesses or attacks or risks* – the deeper logic will be harder to name and master. We will have to consider the most ancient instincts for power and safety in light of the very newest technological experiences: speed, machine intelligence, really constant connection. "Instead of thinking in terms of surfaces – two dimensions – or spheres – three dimensions – on is asked to think of nodes that have as many dimensions as they have connection," the French philosopher Bruno Latour has written of a network age. "Modern societies cannot be described without recognizing them as having a fibrous, thread-like, wiry, string, ropy, capillary character that is never captured by the notions of levels, layers, territories, spheres, categories, structures, systems."[19] Familiar borders, like the ones dividing science and politics or military power and civilian safety begin to erode when everything is linked. Computing machines and networks were once locked into usefully narrow silos, unconnected: banking, medical monitoring, power grids. In the past you could mark them as having "levels". But now they overlap and inform each other, meshed into that stringy surface Latour describes.[20] The Seventh Sense is a feeling for just how this world might be navigated; how those fibers might be pulled and yoked to new purposes.

This multitude of interwoven links is why networks and their pieces spill now even into the non-digital elements of our life, from how we grow our food (with GPS-guided, self-driven tractors) to how we fight our wars (from a distance, using constantly connected drones.) As a result, many of the technical choices we're about to make will be strikingly political. Who has access to what data? Where is the line

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[19] "**Instead of thinking"**: Bruno Latour, "On actor-network theory: A few clarifications," *In: Soziale Welt47* 369-381

[20] **Now the overlap and inform:** Richard Mortier, Hamed Haddadi, Tristan Henderson, Derek McAuley, and Jon Crowcroft, "Human-Data Interaction: The Human Face of the Data-Driven Society", *Social Science Research Network* (October 1, 2014)

HOUSE_OVERSIGHT_018256

between human choice and machine intelligence? Why is one computer system better than another? These decisions – and the people who make them – will determine power distributions. They will reverberate through our future with the same constant noise as the Bill of Rights, the Magna Carta, the Analects or the Koran still do. The real contests ahead will be over networks, and we will come to understand in this book how these struggles will unfold and how to fight them – but keep in mind that this means, in fact, a deeper conflict. A fight about values. Networks are like any organized system; they reflect the aims and ethics and habits of the people who build them. The price of meshing so many different aims and sensibilities, hopes and hatreds, will be costly. When Nan said that really, fully grasping our world would be *expensive* this is what he meant. Particularly if he's right that we'll all be going half mad under the pressures of constant connection as we try to make the shift. We will pay with our old ideas, our current fortunes and – if we're not careful – our safety.

Engineers know this idea that network design shapes the real world as "Conway's Law."[21] Melvin Conway was an early AT&T systems designer who noticed that the organization of any connected telephone system had an impact on the communities or offices it touched. Who could call who was a kind of power map. The physical world, Conway realized, could be shaped and influenced by something other than a physical force; it could be reshaped by information flows, by connection. The expansion of airline routes to Indonesia, for instance, was a network design change that tilted real-life economic patterns. New flights enabled tourism, manufacturing, investment. In our connected age, the design of research studies, voter databases, genetic information sharing networks, financial webs – all of these will create bumps in the surface of our every day lives.[23] The way in which phones or data links or mobile devices are tied together changes the way we act when we use them or when we handle them to touch each other, even if the design of these systems is insensible to us most of the time – the way a marble under a carpet might create a surprising bump. Networks can organize themselves in many different ways. And in the choice of layout, or the evolution of that layout in response to pressures of profit or technology, a great deal can be decided. "When you decide what infrastructure to use for a project, you're not just making a technical decision," the programmer and investor Paul Graham has written. "You're also making a social decision, and this may be the more important of the two."[24]

You might ask: What drew tens of millions of people to watch live as Steve Jobs unveiled some new Apple device in the last years of his life? Of course, partly it was the cool technology, the warmly charming charisma of the man. But something else was at work, I think. What Jobs was unveiling atop those black-backed stages over

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[21] **Engineers know this idea:** Melvin E. Conway, "How Do Committees Invent?" *Datamation,* April, 1968.
[23] **In our connected age:** Barbara Schewick, *Internet Architecture and Innovation,* (Cambridge, Mass.: MIT Press, 2010) Chapter 1
[24] **"When you decide what infrastructure to use":** Paul Graham, "Great Hackers", on paulgraham.com July 2004

HOUSE_OVERSIGHT_018257

the years as we waited for him was nothing less than whole new worlds, connected landscapes that emerged entirely from systems Apple was secretly breeding. He wasn't merely introducing a phone; he was changing how we were going to experience life. "Every once in a while, a revolutionary product comes along that changes everything," Jobs began his famous rolling introduction for the first iPhone in 2007. "In 1984 we introduced the Macintosh. It didn't just change Apple. It changed the whole computer industry. In 2001 we introduced the first iPod. It didn't just change the way we all listen to music. It changed the entire music industry." Apple devices were cracking open paths to whole new worlds in this sense. The company develops an app for podcasts; a new media form is born. It builds an architecture for video calling; our relations to each other deepen a bit. What Jobs was presenting was new and – until that very instant – unimagined universes of possibility that we'd all explore. No wonder the world tuned in.

When we speak of "architecture" in a digital sense we mean the design of the inside of a computer – how the chips link to each other – or the layout of a phone system, the mechanics of a block-chain or encryption tool, or the ethereal construction of a datascape so it can be better used to train artificially intelligent programs. These are design choices that, just like the ones about where to put a door or a freeway, conclusively decide and shape movement. They affect speed. Politics, social norms, technological needs – these and other forces all shape the architecture of digital systems. But –and this is where a new sensibility comes into play – the architectures, in turn, touch and twist politics, social norms and technology. Instant communication, social webs, fast-spreading news – all of these forces redound powerfully on the real world. They affect how we think and act. And, as a result, controlling these connections is a profound source of power. It's also true that architectures and designs dropped into different places have different results: Think of how an open computer system plopped into the Middle East might be used differently than one placed in the American Midwest.

It was these sorts of vibrations, the ones made by power pulsing through certain forms or networks in history, that led the Orientalist scholar Karl Wittfogel to his famous "Hydrological Hypothesis" in the last centrury. Ancient agrarian societies – Egypt or China, for instance – developed political orders that were decided by their need for large scale irrigation, Wittfogel explained. Without water, these societies were dead. Without control of that water? Exposed to constant chaos. Chinese dynasties tumbled and Egyptian prosperity collapsed as unexpected, unpredicted droughts and flooding tore them apart. Taming water became the aim of all politics. An unusual centralized effort emerged. It screwed these scattered, nomadic societies into a tight, enduring and largely effective authoritarianism. Wittfogel argued that the "irrigation societies" of Egypt, China, Mesopotamia, and South America all reflected this link between survival and water control. Power pooled in the hands of what he called a "Hydraulic Bureaucracy". China's "Yu the Great", for instance, rose to power around 2800 B.C. because of his skills in throttling the unpredictable and deadly Yangtze flows. "Contrary to popular belief that nature always remains the same," Wittfogel wrote, "nature changes profoundly whenever

HOUSE_OVERSIGHT_018258

man, in response to simple or complex historical causes, profoundly changes his technical equipment."[25]

Control of water in those ancient ages and control of information in our own are not so different. We are in the midst, after all, of a change in our own "technical equipment." We should read Wittfogel with one eye on our own age, particularly his warnings. "Like the tiger, the engineer of power must have the physical means with which to crush his victims," he wrote of those older orders. "The agromanagerial despot," he said of the masters of those connected water systems, "does indeed posses such means." We should ask: Are we watching the emergence of an infomanagerial despotism? Who controls the dataflows we rely on now? The protocols?

If we want to earn an honest understanding of how power works now, we need to begin by looking under the carpet in for the marbles, in a sense. We need to touch and follow the networks themselves, observing their construction and flow as Wittfogel once traced the transmutation of ancient water systems into the politics of an earlier age. We too need to go down, inside the connected systems of our era before we can come back up and begin, confidently, to act. That journey won't always be easy because it will require us, as we'll see, to consider some ideas that make no sense using our current way of thinking. But, remember: The idea of a democracy sounded like a laughable joke to hereditary heads of state until the 18th century – *Let the peasants vote for what they want?* The implications of our new networks will set uncomfortably against many of our own habits and biases – or at least what we've been told our habits and biases should be by an older generation. But once we have mastered this new instinct, there will finally be a day after which we will look at the world and really feel the new logic at work. We'll be Napoleon, not Brunswick-Wolfenbuttel. And from that day on, everything will honestly be different.

4.

We are still early in this age of network revolution. It was less than 50 years ago, after all, that the first digital communication switches emerged. Today, devices, places, people – are all losing what we might think of as their innocence of isolation. The "Internet of Things" will expand the range of connected devices – phones, refrigerators, heart-lung machines – from 10 billion today to 50 billion in less than a decade. And even with 50 billion connected points only 2 percent of the world's people and devices and locations will be linked[27]. The analysis of this linked space is a young discipline, younger even than the nearly newborn technologies at play. It was only in the mid-1990s that the first sophisticated studies of "network science"

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[25] **"Contrary to popular belief":** Karl August Wittfogel, *Oriental Despotism; a Comparative Study of Total Power* (New Haven: Yale University Press, 1957)
[27] **"The Internet of Things":** See "The Zettabyte Era – Trends and Analysis" from Cisco Systems (San Jose) 2015

HOUSE_OVERSIGHT_018259

became technically possible. They have since become essential, as crucial to our network world as the first maps were to explorers centuries ago. Fundamental papers, by now-legendary researchers like the mathematicians Steven Storgratz and Albert-Lazlo Barabasi or the biologist Simon Levin, identified simple laws running in single networks. The Internet, financial markets, jungle ecosystems and even our own brain connections were found to exhibit similar, often surprisingly common habits.

Unfortunately, most of our leading figures still think in terms of disconnected dangers, of risks that can be reduced to nouns: Atomic bombs, fundamentalists, hacks. To be sure plenty of these sorts of dangerous nouns confront us now. But the sharpest edges of our problems come from the fact that these nouns are part of networks, which spring them into connected, surprising action. Computers, airplanes, derivatives – they snap and break systems when connected into cascading, fast threats. When Master Nan spoke of spiritual illness, I think this is particularly what he meant. Total confusion about our world, followed by all the emotions of the lost: anger, denial, irrationality. "A commander in chief," von Clausewitz wrote of an older age of land warfare, "must aim at acquiring an overall knowledge of the configuration of a province, of an entire country. He must hold in his mind a vivid picture of the road-network, the river-lines, and the mountain ranges without ever losing a sense of his immediate surroundings."[28] This sort of command mastery is still relevant in an age of networks. It is as important for the design and operation of our economy, our politics, our data and our security as it is in considering problems of war and peace. But who of our current leaders holds in his or her mind such a vivid map of the ethereal and essential networks running around us now? Who owns that subtle overall knowledge and then acts with the confident sensibility such wisdom would produce?

At this early moment in a new revolution, our leaders are blind. It's not simple technical fluency that eludes them – though this is among the most embarrassing of their deficits. It's that avoiding cyber accidents, controlling the spread of nuclear weapons, handling global warming, stemming fast financial crises, restoring equitable economic growth – all of these puzzles yearn to be tackled with a new sensibility. Not least because often they are *produced* by a fresh set of links and instincts. These problems linger not as independent fractures on a solid base, but rather as markers of spiderwebbing, connected cracks pressing out on knotted up networks. It is only by tackling them with network ideas that we can hope to make progress. That the rise of ISIS and the forces of global income inequality are driven by the same laws can only be understood with a knowledge, or better an experience, of connected power. Our leaders are preparing us to fight expensive new wars we need not fight, to confront enemies who might best be regarded as partners – even as they flail at the to corrosive problems of a new, emerging order simply because they can't see or feel the essential links of power that are, even now, making the familiar dangerous and the dangerous familiar. "We got to know the *nature* of calculating by learning to calculate," the Austrian philosopher Ludwig Wittgenstein

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[28] **"A commander in chief":** Von Clausewitz, p 110

HOUSE_OVERSIGHT_018260

observed in his "On Certainty" at the end of his life.[29] So with networks. We will get to know their nature by learning to use them. By watching what they do, observing them in their surprising movements. We know at least already that puzzles like the future of US-China relations or income inequality or artificial intelligence are simply not addressable with traditional thinking because they occur on a network surface now. Old-style ideas about each of these will likely lead us down dangerous paths. Our leaders today are, as a result, imperiling us in ways they can't even understand. Honestly, these figures are not mentally prepared to fight any sort of battle on this landscape. They probably never will be.

I'm not saying effective leadership now demands you know what "the instantiation of a class" in object oriented programming means – or that you master the technical roots of some other crucial, philosophical idea of connective design. But a feeling for the laws of networks, for the normalness of connection and the pressures that it produces is essential at least. That the terrorists of ISIS or the founders of gaming app companies are better at growth hacking – the subtle art of using data, connection and instinct to breed massive virtual communities – than our own institutions or our leaders should unnerve us for a couple of reasons. First, because it demonstrates a mastery of new power tools that move with astonishing speed, assembling nation-sized movements and forces in incomprehensively brief periods of time. But we should also worry – and this is as crucial – because that fast pace is colliding with a set of slower-moving instincts, institutions and people who still control substantial levers of power.

At the same moment in time that many of us are alive with the joy of being around something that is beginning, most of our leaders are locked sadly or with terror into the ending of something else. Same exact moment. Different instincts. It reminds me of Virginia Woolf's novel of transitions, *The Years,* when the once-commanding Colonel Pargiter finally passes away, liberating his daughter Eleanor into a world of adventure even as the change dooms Crosby, the family's long-serving maid. "For Crosby, it was the end of everything," Woolf wrote. "She had known every cupboard, flagstone, chair and table in the large rambling house, not from five or six feet distance as they had known it; but from her knees as she had scrubbed and polished; she had known every groove, stain, fork, knife, napkin and cupboard. They and their doings had made her entire world. And now she was going off, alone, to a single room at Richmond."[30] The people now lamenting the decline of television, of newspapers, of a disconnected age, who are baffled by constant connection or apps of the moment or machines that learn should be given their quiet moments with the old structures. They knew that world from their knees, built and maintained it as much for us as for them. Elements of that slower unconnected era must be

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[29] **"We got to know the nature of calculating":** Ludwig Wittgenstein, *On Certainty* ed. G.E.M. Anscombe and G.H.von Wright Translated by Denis Paul and G.E.M.Anscombe, (Oxford: Blackwell 1969)
[30] **"For Crosby":** Virginia Woolf, *The Years,* (New York: Harcourt, Brace & Jovanovich, 1937) p. 216

HOUSE_OVERSIGHT_018261

preserved. But, also, we must move on. These people will never grasp the opportunity that lingers in front of us now.

This book is not, in any event, written for them. It is written for those of us who are inheriting the possibility of their inventions, the price of their errors. And it is aimed too at the people and the generation who are coming to power and who are – in some senses—already in power, even if they don't appear to be just yet. By this I mean the cohort bred into the age of connected acceleration; the first generation of leaders and students and warfighters and entrepreneurs to not find the digital strange, but to find it natural and curious and wonderful in its power. It is written for those who will have to manage machines that are smarter than humans, networks that move faster than we can calculate, and cascades of chaos and conflict and creation as this new era settles in. It is for anyone too who has ever begun to speak about the strange tensions of our age, who has begun maybe with the lines, "Maybe I'm sensitive or something, but…" as they feel the tickle of their own lives, minds and cells increasingly intertwined, electrified. It is written for those afflicted with an aching feeling that we're being torn apart. Pulled into foolish conflicts and dangerous failures by old figures who don't understand this age. Pulled into sacrifices of liberty and freedom by young technological wizards who can't balance the miracle of their cold inventions with our hot, human needs for freedom and control.

But I should say too that this book is not, either, a full-throated endorsement of the technological elite. Yes, it's wonderful that we are at the beginning of a new period. But it's not quite right to say that *where the network age begins, the old one ends.* In fact, that's a dangerous conclusion. To begin with we're at an extremely primitive point in our understanding of networks, comparable to where economics was in the 1800s or medicine centuries ago. We have a small, modest collection of tools to analyze and think about and consider the complex physics of a networked world. We barely understand the operation and evolution of many single networks today – and really only sort of grasp one or two types of design with any real depth. But networks of networks? Instant networks? Artificially intelligent ones? We have basically no laws or experience with these yet.

The headlong rush ahead into a world of constant connection will, of course, be balanced, resisted, braced against, undermined, fought and manipulated. Networks touch everything, remember? The idea that such elemental control – of you, of me, of our finances or our nations – would move with anything less than a few explosions is naïve. Revolutions don't occur quietly. Consequently, the very thing that makes many of the greatest tech minds of our age magnificent – a sense of unstoppable determinism, a disregard for history, a slavish and instinctive urge to follow what we'll come to know as a Seventh Sense – is a bit of a disadvantage at times. I know many of these men and women; their iron certainty is only a bit more dazzling than the success they have had in building something from nothing in a human instant. But that confidence in the new leads already to crushing collisions with the sorts of older ideas – privacy, localism, slowness – that echo throughout

HOUSE_OVERSIGHT_018262

mankind's history precisely because they touch in subtle ways on the human heart, on what it means really to live.

A friend of mine who runs one of the leading technology firms told me of the unnerving realization that the most important figures at the firm were under 25 – and no senior person had much of an idea about what they were doing. This is an inversion: Usually in a society the most power accrues to those with the most experience, and judgment and perspective. Today, tremendous even decisive influence clusters in the hands and machines of a young caste whose very fluency with the norms of a revolutionary age blots out a whole set of important connections, a group that instinctively feels networks but is deaf to the music of philosophy, history and even tragedy that should inform the operation of so much power. To love risk, to love creating and building – this is fine. Wonderful even. But it's also not enough.

"It happens that programming is a relatively easy craft to learn," the MIT scientist Joseph Weizenbaum observed in the 1970s, as computers emerged into academic life. "Almost anyone with a reasonably ordered mind can become a good programmer with just a little instruction and practice. And because programming is almost immediately rewarding, that is because a computer very quickly begins to behave somewhat in the way a programmer intends it to, programming is very seductive." The mistake, Weizenbaum warned, was to think that easy programming of a machine was really a predictor of anything other than getting a machine to follow commands. It didn't mean easy programming of a complete operation. Or of science. Or, godforbid, to think you could easily program the world. Programming, he warned, "appeals most to those who do not yet have sufficient maturity to tolerate long delays between an effort to achieve something and the concrete appearance of success. Immature students are therefore easily misled into believing that they have mastered a craft of immense power and of great importance when, in fact, they have learned only the rudiments."[31] Tempting as it may be to call for our world to be turned over to entrepreneurs or technocrats, to let their tools of wired efficiency tear with a fast disruptive enthusiasm into our politics and economics, the reality is that the world (thankfully) does not respond like a cold machine. That delay between an effort to achieve something and its realization that Weizenbaum mentioned, it's the essence of being human. The delay is filled with worry, hope, debate, exploration, error, success. In short, it's a hitch that should never be ground out of our system, no more by technology than by authoritarian or totalitarian or fundamentalist doctrines that have ever promised instant solution to any problem. "Just let the entrepreneuers do it" or "Just let the machinces do it," is no more a solution than "Just let the Nazis handle this," could have been.

So this is our dilemma: Old, white-haired, network-blinded leaders (and young figures who think like them despite their age) pull us from Washington and other

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[31] **"It happens that programming":** Joseph Weizenbaum, *Computer Power and Human Reason: From Judgment to Calculation*, (San Francisco: W.H. Freeman 1976), 276

HOUSE_OVERSIGHT_018263

capitals and traditional power centers into a world where their ideas and policies constantly fail. They don't understand networks; never will. At the same time a new, rising generation lashes us into connected and amazing meshes. We welcome this connection. Centered in Menlo Park or Seattle or Zhonguancun or Shenzhen, these figures understand networks perfectly, but not yet much else. Old and new, each group works anyhow on our freedom. We are pulled dangerously between these forces. Problems seem to get worse. What we need to find is a way out of this trap. A fusion. A blended sensibility of both the edgiest ideas of connection and the most unshakeable and brutal and inarguable requirements of power. This is the Seventh Sense. It is our only possible protection.

5.

In the last century, as the economist Fredrich Hayek watched Europe both struggle against and flirt with the then-appealing ideas of Nazi and Soviet socialism, he marked the fundamental conflict of his age as the one between individual liberty and central planning. Recall that at that moment in history, the 1930s, America and much of Europe were in deep depression, their political systems struggling. The rapid growth in the USSR and Germany looked awfully appealing to many. The political stability of totalitarian ideologis had a certain placid charm in some quarters. But, Europe was, Hayek argued, walking nothing less than a road back to serfdom. Was man happier, better off, more justly fulfilled by the chaos of a market and democracy or in the orderly machine of authority, of clicking heels and machines? Hayek voted with his feet. He fled the Nazis in 1938, and he worried for the rest of his life that in the attempt to manage the risks of free markets and minds, the Europe he loved was running into socialism. "Is there a greater tragedy imaginable," Hayek wrote, "than that we should unwittingly produce the very opposite of what we have been striving for?"[32]

Hayek thought two safety catches of might protect mankind from the totalizing control habits of Soviet-style thinking: First, an unkillable human instinct for individual freedom, the squirm humans have always shown under the boot of too much authority. And, a second protection he thought, would be the really terrible, absurd inefficiency of centrally planned systems. No bureaucrat, no economist, could possibly out-perform the productive chaos of a market or an election in the long run Hayek felt. Finding the right price, matching supply and demand – it was impossible to think this could be done by some technocrat in a room somwhwere. This was what markets were for. This is how they encouraged profit, free-thinking, invention. Chuchill's famous line, that "Democracy is the worst form of government except for all the others," contained a certain truth: civilizations, yoked by democratic and market rules, reached more durable outcomes than despots or oligarchs. Hayek, as we look at his judgment now, was correct. People wanted to be free; the dream of central planning collapsed under its own weight with the USSR in 1989.

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[32] **"Is there a greater tragedy":** F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994),

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In our own age, a fundamental conflict lingers as well. This is the struggle between individual liberty and connection. We have to ask a version of Hayek's question: Are we happier, better off, more justly fulfilled through ceaseless linkage to the fast systems all around us? The appeal of constant connection is not a mere economic fact. It's become a feature our personalities and psychologies and even the biochemistry of our brains. To be disconnected, in so many senses, *hurts*. And while the human twitch for freedom remains as alive as a protection for us all, Hayek's second safety catch is eroding. Networks of deep connection, speed and intelligence will be powerfully more efficient than central planning; they know more than any central bureacrat might have. And they may yet be even more productive at times in their connection and intelligence than our existing structures or markets or electoral systems. Think of the way centralized, linked dispatch systems make a "sharing" economy of on-demand cars and rooms available in ways the market itself could not. Similar alluring evolutions lie ahead in medicine, in finance, in politics. The temptation to throw all in for some sort of technological political fusion, one that promises better returns on our time and money in exchange for our liberty, will grow. When we depend so much on connection for our identity, our work, and our safety how far from John Stuart Mill's line from *On Liberty* might we tread: "Over himself, over his own body and mind, the individual is sovereign."[34] Are we sovereign over our own bodies and minds? Over the machines? This is not a puzzle today's power class can or should touch. They may accidentally lead us to disaster. Hayek's fear, that in pursuing one end (freedom) leaders would secure its opposite (tyranny), is what we should share. The tools of the network age are ripe for misuse. In some senses, they are built for misuse: They are opaque. They are blindingly fast. They seduce and enmesh us with their new power. They demand, as a result, new sensibility for their final control.

There are many ways we will explore the Seventh Sense. The rise and fall of startup technology companies or terror groups or epidemics will lead us. We will examine, carefully, the tensions of a network age to understand where the cracks are coming from, and where new ideas are emerging. But I'm trying at least to write a bit with that challenge of Master Nan in mind. If we are, really, facing an ephochal change then we should handle the problems of our era with particular care; we should study the opportunities with real urgency. Two hundred years from now when the great companies and billionaires and revolutionaries of our age are crushed down below the horizon of history, it is the massive movements of states and populations that will remain, with their awful or wondrous traces. Will we live in an age of war or peace?

Is that something we can actually decide?

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[34] **When we depend so much:** John Stuart Mill, *On Liberty and the Subjugation of Women*, (New York: Penguin Classics 2007) 19.

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HOUSE_OVERSIGHT_018266

Chapter Three:

War, Peace, Networks

In which The Seventh Sense reaches towards the questions of war and peace and power that will flavor our lives, like it or not.

1.

One afternoon in the fall of 2009 I received an unexpected call from the Pentagon. The US was, then, nearly a decade into the wars of Afghanistan and Iraq. Each, in its own way, possessed a strange and shifting character, the sort of dim premonition of a greater violence that has always most unnerved warriors and politicians. The old soldier's saying – *Fear chaos as much as the enemy* – seemed to animate, constantly, the progress of these two fights. Once, before I gave a speech to an audience of newly promoted one-star generals in 2010, a four-star general pulled me aside for a moment. He explained that I'd be speaking to a crowd of officers who had come of age pacing the murderous streets of these wars, watching soldiers under their command killed by an often invisible enemy. "You have to remember that these men have been seared, *seared*, by a decade of combat," he said. The best American military minds had tried, with characteristically direct and relentless energy, to box the wildness of these wars. In books and papers and thousands of patrols, through millions of hours of language training, and endless risky nights, they had tried. It never quite seemed to work. There would never be a durable sense of mastery. The wars, which appeared a certain and unfairly tilted fight to American victory at the beginning, had run longer than any in the nation's history. They were engines of chaos and fear.

The American Marine Corps General Victor Krulak once observed, "The war you prepare for is rarely the war you get," and you could find this phrase whistling through the years of American combat after 9/11[35]. One of the lessons of both Iraq and Afghanistan – and of the post-World Trade Center wars generally – was that the Pentagon and the fighting services had been unready for what they faced. Soldiers had arrived in Baghdad with forest-colored uniforms, thin-skinned transport, tank-led battle plans – all wrong and mostly dangerous. The most feared weapons system of the era told you something of the tone of the new millennium's wars: $50 to $100 Improvised Explosive Devices (IEDs). Hidden smashups of dynamite, duct tape, cellphone detonators and as much stubbly, impaling iron as could be found. They were impossible to deter. Rapidly deadly. The IED threat, one officer later reflected, "is a contemporary example of conventional militaries being confronted with a tactical surprise with operational—if not strategic—implications." [36] Like so much in

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[35] **The American Marine Corps General:** Victor Krulak, "A New Kind of War", in *First to Fight: An Inside View of the U.S. Marine Corps* (Bluejacket Press, 1984) 179

[36] **The IED threat:** Andrew Smith, "Improvised Explosive Devices in Iraq, 2003-09: A Case of Operational Surprise and Institutional Response" *Letort Papers* (Carlisle, PA: Army War College April, 2011) 9

HOUSE_OVERSIGHT_018267

our age, small-sized problems were spilling rapidly into crises of strategy. One hot battlefield instant – an explosion under an armorless truck, say – could freeze the operations of a billion-dollar division. Nearly everyone begins to ask, sometimes out loud: *Why did that happen?* Followed pretty quickly by: *What the hell are we doing here?* The little bombs were shaking more than the Humvees.

Walking into the Pentagon, one is struck by cascading sensations of immensity and volume and, frankly, gravity. Surely, you reflect, there must be someone here with a plan for everything? But there was not; there is not now. Yet the massiveness, the ineffable historical density and weight of American power, is so breathtaking that its frequent impotence in the face of a changing world represents a particular and unforgettable and, well, searing shock. The soldiers who had experienced those cold, failing nights at the edge of superpower rippled with unease. This was the slim comfort of life inside big, old and lamed structures confronting the fast, blithe and unstoppable future.

By 2009, with the wars in Afghanistan and Iraq settling into a low boil, America's generals again began wondering what other cracks were spreading around the world. The Unknown and the Future seemed to have an uneasy parallel meaning. The diplomats worried about this too, of course, but with soldiers dying every day, the questions had a particular urgency for the military. The top of the command chain asked incessantly about what they might be missing. What fissures were running even through their own building, masked by its scale but waiting quietly to make their best plans look foolish and dangerous? And: How they could possibly confront this world with 30% less of what they had a decade ago? They made a few phone calls. I received one of them.

2.

It was hard not to notice, if you picked up one of those incoming queries from Washington and were asked to draft your views on how this uncertain world might be approached, that one of the main aims of the American military in recent years – reducing the number of terrorists – appeared to be backfiring. This was an irritating feature of many global problems. In spreading market capitalism ever wider, the world was also digging an ever wider moat between rich and poor, for instance. In trying to make the world modern with more connection we were, we found, lashing ourselves to some very unmodern risks. And in waging the most expensive war on terrorism in human history, the US was uneasily discovering that it was creating more terrorists. Secretary of Defense Donald Rumsfeld had sketched the nature of this puzzle in an October, 2003 memo with acid clarity. He asked: "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?"[37] Though

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[37] **He asked:** Donald Rumsfeld, memo, 16 October 2003, available at globalsecurity.org.

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this was a simple question, nearly fifteen years into the wars it was still hard to answer. There were a lot of dead terrorists. There were also a lot of new ones.

As the war against terrorism had progressed in the years since 2001, it had produced at least this: a huge amount of data. Inside the Pentagon, analysis teams poured over records of phone calls and text messages. They examined maps of personal relations, and studied granular statistics about who had been killed and why and when. All of this information went into targeting computers and databases, and what became more and more apparent with each passing year was that the spread of terrorism after 9/11 looked like nothing so much as the spread of a disease. This was, at first, no great insight. After all, revolutionary ideas, dangerous ideologies or just plain panic often look like epidemics. But what was shocking as you studied the Pentagon numbers was the speed of this infection. Disease epidemics, even the most virulently aggressive ones like Ebola or drug-resistant tuberculosis, move at the pace of human contact; they can be watched and blocked and even quarantined. But the contagions associated with terrorism were warp-driven to a pace well beyond what the soldiers and analysts could match or even fully monitor. "Is our current situation such that 'the harder we work, the behinder we get?'" Rumsfeld asked in 2003.[38]

To be constantly behind. This was a commander's nightmare. Among other things it was that sense of never quite catching up that had so seared the new generals in the audience of my speeches. But it seemed to be an inescapable reality. One day a guy in Baghdad would figure out how to make an Explosively Formed Penetrator (EFP) – a sort of pipe bomb that becomes a flying chunk of red-hot steel and can smash through a tank from 100 yards away – and ten days later the same design of projectile would take out an official thousands of miles away in rural Afghanistan, before US troops had had a chance to update their defenses.[39] *Behinder.* An American commander would arrive in a new town in Iraq, receive a briefing about who he could really trust, and discover a week later half of them were showing up on terrorist call logs. *Behinder*.

The Americans knew why this was happening. The data made that clear enough. The proliferation of roadside IEDs, for instance: Obviously there was Al-Qaeda Institute of Technology, no central IED academy where bomb makers could gather to safely study trigger design or leisurely swap placement ideas.[40] Such a place would have been flattened by a Tomahawk or a drone within hours of its discovery. And though tomes like Tarek Mahmoud el-Sawah's famous 400-page guide to bomb making were often picked up on raids, they were out of date. (El-Sawah's tips included

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[38] **"Is our current situation":** Rumsfeld 2003 memorandum as above
[39] **One day a guy:** Anne Stenersen, "'Bomb-making for Beginners':Inside an Al-Qaeda E-Learning Course", *Perspectives on Terrorism*, Vol 7. No. 1 (2013)
[40] **Obviously there was no Al-Qaeda Institute of Technology:** Matthew Bolton, "From minefields to minespace: An archeology of the changing architecture of autonomous killing in US Army field manuals on landmines, booby traps and IEDs" *Political Geography* 46 (2015) p. 47

HOUSE_OVERSIGHT_018269

things like using Casio watches as timers.) No, the force at work was buried inside a network of personal and technological ties, sometimes explicit, other times almost ethereal in their nature until they were made real in a blast. By 2011 you could peel back some corner of the web and find sites like *Al-Shumukh's Special Explosives Course for Beginners*, where dark diagrams were uploaded, debated, refined and re-drawn, like some sort of hobbyist site for car bomb geeks[41]. Deeper still, encrypted chatrooms and messaging services pulsed invisibly, firing off real-time tips (use aluminum not copper for detonation packs) and suggestions (Marines are easier to target in the morning). When soldiers said they were fighting a "terrorist network" they really meant it: the force arrayed against them was a self-repairing, growing, constantly-learning web.

The Pentagon had, after a few years of confronting this problem, organized a taskforce to deal at least with the IEDs, the "Joint IED Device Defeat Organization" (JIEDDO).[42] The group specialized in miraculous engineering. They absolutely lived up to the can-do, American spirit sound of their name: Gee! Do! Scientists and warfighters in JIEDDO devised ways to secretly surveil streets so they could fire on bomb-planting terrorists. They developed slick, blast-deflecting new designs for cars and pioneered armor that could absorb the hit of repeated surprise blasts. Gee! Do! was, its motto ran, trying to, "defeat the IED as a weapon of strategic influence."

That made good sense, of course. It was a bit weird that $100 pipe-bombs were disrupting America's ten trillion dollar national interest. But: Defeating *the device*? You could sense a limit in the way that mission statement was drawn out. It wasn't enough. Beating the devices wasn't the same as chewing apart the network that produced them. That was the real target. The devices kept coming with their own innovative, murderous rush, with the *gotta-have-it* new pressure we know as the desire for the latest phone or video game or flat-screen TV. This raised an important question: Just what did it mean, really, to beat a network? Could you win? Could you ever get *aheader?* In fact this is a question that resonates in many parts of life now. That feeling of constantly slipping behind, one that is tied to the heart of a connected order, a world where each additional link brings both a rich pipe of new data and a sense of what you might be missing or not quite understanding. To be *aheader* marks, we will see, the nature of a real Seventh Sense. When you can fully feel the network, understand its logic, then you can touch and use new sources of influence to reshape your business or your career or solve the problems in the world that

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[41] **By 2011:** Stenersen as above

[42] **The Pentagon had:** On the establishement and background of JIEDDO: "The Joint Improvised Explosive Device Defeat Organization: DOD's Fight Against IEDs Today and Tomorrow," U.S. House of Representatives, Committee on Armed Services, Subcomittee on Oversight & Investigations report November, 2008; "IEDs: the home-made bombs that changed modern war,", *IISS Strategic Comments* Volume 18, Issue 5, 2012. Also LTC Richard F. Ellis, USA, Maj Richard D. Rogers, USAF. LCDR Bryan M. Cochran, USN, "Joint Improvised Explosive Device Defeat Organization (JIEDDO): Tactical Successes Mired in Organizational Chaos; Roadblock in the Counter-IED Fight" Submitted Joint Forces Staff College, March 2007

HOUSE_OVERSIGHT_018270

bother you most. The war-or-peace dilemmas of foreign policy are an essential case – when they go wrong, they hammer all of us. And we can see in the ripples of global power ideas that are of use in nearly any sphere. How, for instance, to fight a network. The struggle of JIEDDO is, in a sense, similar to something all of us face now: Old vs. new. In any event, in the case of the IEDs, here was the most powerful nation in human history, backed by hypersonic missiles, always-on radars, and endless jet fuel that found itself unable to stop a group of half-educated and promiscuously backwards terrorists. You had to ask: What was wrong? And did the failure suggest something even deeper about the position of the dominant national power of the era? About the nature of our age?

3.

A few days before Christmas of December of 1787, Thomas Jefferson sat down in Paris to write a letter to James Madison.[43] Madison was on the other side of the Atlantic, in Philadelphia, and struggling with refinements to the new American constitution, which had been drafted in the spring and summer just passed. The two men were frequent correspondents. They wrote to each other with an easy familiarity, revolutionary to revolutionary. Jefferson was then 44, and had settled hungrily into his role as the American minister in France, "violently smitten," as he wrote, by the charms of The Continent[44]. Madison was 36, twenty years removed from the election of 1808 that would elevate him to the Presidency as Jefferson's successor. Madison would become, in a sense, America's first "Foreign Policy" President, prosecuting the war of 1812 and negotiating with France for the Louisiana Purchase. He was known already, in 1787, as "The Father of the Constitution."

Jefferson begins his letter with a few of the charming literary asides we expect from him: He asks Madison about some nuns he wants to help teach his children, inquires after about a packet of carefully chosen South Carolina rice that has gone missing in the oceanic post, delaying his plans to impress French palates with an American crop. But then Jefferson turns to what he knows must be on Madison's mind, the new constitution. "I like much the general idea of framing a government which should go on of itself peaceably," he says, admiring the elegant balance that emerges so carefully from the pages of the document. The American constitution, Jefferson felt, reflected political arrangements new in the history of human governance, between people and power, between states and the center, between agriculture and commerce. He is, he says, "capitaved" by the details of what he has seen.

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[43] **A few days before Christmas:** Thomas Jefferson and James Madison, *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776-1826*, (New York: Norton, 1995) Vol 1. pp, 457-459

[44] **Jefferson was then 44:** Thomas Jefferson and Douglas L. Wilson. *Jefferson Abroad*. Modern Library ed. (New York: Modern Library, 1999) letter to Madame de Tesse, 20 March 1787

HOUSE_OVERSIGHT_018271

Such a system, Jefferson wrote, was particularly appealing to him because it contrasted so sharply with the violent shearing of daily life then underway all around him in Europe. "France, with all its despotism, and two or three hundred thousand men always in arms, has had three insurrections in the three years I have been here," he marvels. In fact, France's revolutionary age was only just beginning. The fall of the Bastille was 18 months away; the flight and death of the King five years off. Paris would soon see a time when one riot a year felt like peace. You can't miss in Jefferson's letter, and in the others he exchanged with Madison that winter and the following spring, his instinct that the world was changing, that it was being riven by urgent new forces, and that America must be positioned for the fresh order both internally and in her foreign policy. Jefferson knows what this new age demands – liberty – and in that spirit he fires off suggestions for Madison. It is in this December, 1787 letter that he remarks that he "does not like" the absence of a "bill of rights", a hint that led to an adjustment of historic import.

It is possible to regard the transformations of politics, economics and military affairs over the past centuries, the sorts of bold remakings that tore apart places like the Bastille or built up instruments like the American Constitution, as emerging from a few crucial periods, the sorts of historic turns that mark moments when power makes an epochal shift. It is striking how, in passing through these periods of unthinkable change, America has benefited so much, so fully. The country was, to begin with, born out of the social and political revolutions of the 18th century. The national liberation that pulled Jefferson from his Virginia farm and into politics was the first of the great, revolutionary movements that convulsed and fractured a dozen European powers. France followed America, as did Germany and Italy and soon most of the continent. "The boisterious sea of liberty," Jefferson called the new political order[45]. It required a strong stomach. Tempests of accumulated social pressures – the Reformation, the Enlightenment, the Scientific Revolution – had passed over one *ancien regieme* after another like powerful waves. America, begun on fresh land and with new ideas inked onto clean paper, had a natural advantage in the situation of her birth. "I think our government," Jefferson concluded in his letter to Madison, "will remain virtuous for many centuries."

A second transformation of global order began in the middle of the 19th Century, as Jefferson and Madison's age ended. Their period had largely been one of *internal* revolutions, as the nations of Europe realigned their domestic orders. What came next were furious contests between these countries. We might think of this new period as starting with the Franco-Prussian war of 1870 and as running, with increasing violence, through to the summer of 1945 and the end of World War Two. In this era, Europe's statesmen struggled from one tragically collapsed balance to another. The demands of industry and nationalism and ideology and economy could only be reconciled, it seemed, by war, as if it was absolutely necessary to devour the old buildings and the young men before a new order could settle in. The scale of this

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[45] **"The bousterious sea of liberty"**: Thomas Jefferson to Philip Mazzei, *The Papers of Thomas Jefferson, Volume 29: 1 March 1796 to 31 December 1797* (Princeton University Press, 2002), 81-3

HOUSE_OVERSIGHT_018272

violence, like the scale of the industry that produced it, defied anything even the wisest minds could foresee. Eventually the entire world was pulled into the fire. "In the autumn of 1919, in which I write, we are at the dead season of our fortunes," the economist John Maynard Keynes wrote after the Paris Peace Conference settled The Great War, dimly aware that an even deader season lay somewhere in the future in the form of another war[46]. During this murderous 75 year run, in the reviving of European and then global fortunes, America played a decisive if reluctant role. As in that first period, she emerged richer, more central, and more modern.

A third struggle, the Cold War, immediately followed the end of this second period. This contest was intensely material and as ideological as any conflict in hundreds of years. It represented a struggle at the level of the most fundamental question of politics: How should life be lived? Two totalizing, uncompromising worldviews were placed in opposition. This 45-year struggle occurred under the threat of nuclear disaster, which gave it an aspect new in human history, the potential for complete destruction. It was possible to find sober-minded theorists pondering problems like this one: "Let us assume that for 10 billion dollars one could build a device whose function is to destroy the earth," Herman Kahn wrote in the 1960s, with a spirit typical of his age in his slick, sickly worrisome masterpiece *On Thermonuclear War*[47]. Yet in this period too, over time, America found herself in an axial role, first carrying one end of the risky fight and then, at the conflict's surprising and jubilant conclusion in 1989, discovering the country was in a position of unprecedented, unchallenged power. As with the two earlier shifts, this one had brought with it an arrangement nearly ideally tuned, yet again, to America's advantages.

I mention all this here because while it may be fashionable to speak of the period just passed as the "American Century" – and to wonder whose century comes next, the reality is that for two and a half centuries, through some of the most violent and wonderful changes in human history, America has had a remarkable run[48]. A senior American military official once asked me, a week or so before he sat with the Chinese President, how best to begin his remarks. "You might say," I suggested, "that America respects what China has done in the last thirty years. To have brought 400 million people out of poverty as Beijing has done is an historic accomplishment. But he must understand that America, particularly in the last intense century, has paid in nearly countless dollars and in the cost of hundreds of thousands of American lives, to establish an order that has benefited billions. The scale of this accomplishment is, by a great measure, historic." America has been an emblematic, profound force. It has been a country tuned exactly to the needs of her age. Three times over. Inevitably, the world now asks: Can this continue?

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[46] **Eventually the entire world:** John Maynard Keynes, *The Economic Consequences of the Peace* in *The Essential Keynes* (Boston: Penguin Classics, 2015)
[47] **It was possible:** Herman Kahn, *On Thermonuclear War*, (Princeton, N.J.: Princeton University Press, 1960)
[48] **I mention all this:** Henry Kissinger, *Diplomacy*, (New York: Simon & Schuster, 1995. See chapter one, and Paul Kennedy, *The Rise and Fall of the Great Powers* (TK London, 1988)

HOUSE_OVERSIGHT_018273

4.

Today the world is entering a new era of revolution. The fourth wave of fresh, turbulent dynamics to confront America since Jefferson gamely predicted those centuries of virtuous prosperity back in that 1787 letter to Madison. Driven by incredible technological shifts and their economic, military and social implications, new forces are beginning to tear into the established global order. Among the most fundamental puzzles now is the problem of an American national mission. What does America seek to achieve in the world? And how? On what basis will the United States secure the chance to continue "peaceably", as Jefferson would have it?

Because the country plays such a central role, these questions' answers will affect the calculations of every nation, of every new force yearning for influence. They represent the crucial background against which we will all live, build businesses, travel and learn. You might feel, sitting in Silicon Valley or Iowa, that such shifts don't matter to you now, but the cold truth is that the international system is unlikely to be arranged, in two or three decades' time, along the lines that bind it now. Too many violent forces are at work. But must this be a disaster? The technological demands of our age are forcing a new sensibility everywhere. Research labs, medicine, science, finance and the arts are all hunting now for a new outlook. The need for a fresh perspective is also reflected in the biggest of all historical questions, the one that will decide if we live in an era of peace or one of fear, uncertainty and tragedy: How is the international system to be ordered?

The idea that the stability of the world system might honestly be at stake right now feels incredible to the generations of Americans born after World War II. A struggle for global order? Real, sharp, bloody nation-imperiling violence? Though we know such traps are a recurring feature of human history, we have been mostly numbed and reassured by the passing of optimistic, fast and prosperous decades. We know mostly a blur of IPOs, of rising real estate prices, and confident growth out of every crisis in our memory. Survival and stability have been, fortunately, the least of the national concerns. The sly aside of Jules Jusserand, the French Ambassador to Washington for 20 years in the last century, about America's position in the world pretty much summed up our views: "On the north she had a weak neighbor; on the south, another weak neighbor; on the east, fish, and on the west, fish."[49] Most Americans now alive grew up relying on the durable institutions and ideas and structures built by the World War Two generation. We ride on their roads, fly into their airports, and use the schools and media they built. We absorbed their habits of consumption, home ownership, optimism and energy. This inheritance produced an historic level of prosperity. It inspired other nations. And – along with those fathoms of fish and friendly neighbors – it assured a position of real world leadership. Since the end of the World Wars, America has fought six expensive smaller wars and lost

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[49] **The sly aside:** Jules Jusserand quoted in George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776*, (New York: Oxford University Press, 2008), 6

HOUSE_OVERSIGHT_018274

five. This record appeared to have had little impact on the nation's dominant global position; it did little to unnerve a comfortable sense of national destiny.

Much of our current confidence can be measured by the astonishing degree to which we embrace the scrambling of even the most elemental parts of our lives, from how we bank to how we drive. Most societies in the past were largely *terrified* of disruption. If you had arrived in prosperous 17th century Holland and proposed to "disrupt agriculture," or radically change people's banking habits, you would have been lynched. Our age is different. Many of the most unsettling forces in our world are ones we encourage, feed and push along. If I had said to you a decade ago – "I'm going to record all of your movements so you can spend less time in traffic." – is that really a deal you would have accepted? But if you use a GPS mapping system on your phone, you have. That Orwell's sick prognostication of technocratic life would be one you'd embrace? That it would describe a desireable *feature* of network life? "You had to live – did live, from habit that became instinct – in the assumption that every sound you made was overheard, and … every movement scrutinized."[50] If I had told you we were going to build a world wide high-speed data system that would, as a side effect, make it simple for children in London to connect with, learn from and then join terrorists in Syria – would you have thought that wise?

The optimistic bumper sticker of our age – that any disruption is good disruption – marks a wonderful feature of the American character. It is, perhaps, to be expected of a nation built by immigrants who overturned their own lives in the hopes of something better. To pull up and leave home for a land where you did not speak the language, knew little of the culture, and faced a blank sheet of the future, demanded faith. You had to believe too: *Any disruption is good disruption*. But no nation, even the most heroically hopeful, is immune from the forces of history. Edmund Burke's old line, that "every revolution contains within it the seeds of evil," runs like a counterpoint through the hopeful music of the age now. America's remarkable spirit does not make the demand for a national outlook, for an American grand strategy, any less real. We're starting to be aware of just how dangerous this age can really be. In many ways, our very confidence and sometimes blindly certain feeling of destiny probably makes it even more essential that we have a sense, as we rest in Silicon Valley or Iowa or wherever, of where we are going, and why.

The phrase "grand strategy" is one that carries a particular meaning when we think about problems of global balance. It means the way in which *all* of a nation's powerful tools of economics, finance, ideology, politics, and other resources can be used, together, in the service of security and prosperity.[51] To get the terms right, we

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[50] **"You had to live":** George Orwell, *1984,* Signet Classic Edition (New York: Signet Press, 1961), 3

[51] **The phrase:** For a good general introduction to the problems of grand strategy B.H. Liddell Hart, *Strategy*, (New York: Faber & Faber, 1967); Paul Kennedy, ed., Grand Strategies in War and Peace (New Haven: Yale University Press, 1991); Edward N. Luttwak, Strategy: The Logic of War and Peace (Cambridge, Mass.: Belknap Press of Harvard University Press, 1987); Peter Paret with Gordon A. Craig

HOUSE_OVERSIGHT_018275

usually talk about "tactical", "operational" and "strategic" levels as we watch the gears of history churning away in war and peace. The "tactical" level is the most practical. It's the choice to use machine guns instead of tanks to secure a street in Kabul, for instance, or to buy up gold for a central bank or permit high-frequency stock trading. Tactics are where policy decisions crunch into reality. The most brutal shocks are first felt tactically: roadside bombs or mis-designed, crashing computer code.

A level above the problem of tactics sits the question of operations. It's here where decisions are made about just how various levers of power might best be moved. Should we send bombers to slow Iranian proliferation or rely on cyber attacks? Will tax dollars fix our infrastructure faster than tolls? Macarthur's landing by surprise in Incheon on the morning of September 15, 1950, Operation Chromite, was an operational decision. "Within five hours, 40,000 men would act boldly, in the hope that 100,000 others manning the defense lines of South Korea would not die," he thought before the battle. "I alone was responsible for tomorrow, and if I failed, the dreadful results would rest on judgment day against my soul."[52]

Policy gets implemented through operations. It is the level where clever bureaucrats and parasitic office politicians prey, where they can most easily undermine the ambitions of visionaries. But it is also the place where inspiration works on the will and passion of companies or armies or research labs. Server farms, data mining algorithms, trade treaties—these are the operational chessboards of our era. Operations is where the bolt tightening for revolutionary change occurs. It is intense, relentless operations that ensure stability in the face of shock or growth or collapse. "The exploding popularity of Internet services has created a new class of computing systems that we have named *warehouse-scale computers,"* the Google data engineers Luiz Andre Barosso and Urs Holzle wrote in famous, revolutionary paper several years ago as they described the operational revolution that lets Google serve terabytes of data, instantly, every day.[53] The massive data centers they had built, they realized, are so large that they are nothing less than computers that are the size of massive buildings. Solar fields are their power supply; entire rivers are their cooling tubes. And they enable nothing less than magic: instant knowledge, connection to distant lands, a constant picture of what humanity knows. This is the growing, heroic scale of operations now.

Above the operational and tactical levels is what we call the strategic dimension. It is here where overall design is considered and moved. Without it, operations and tactics are incoherent. Strategy imagines how whole structures like nations or

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and Felix Gilbert, eds., Makers of Modern Strategy: From Machiavelli to the Nuclear Age (Princeton, N.J.: Princeton University Press, 1986) and Sun Tzu, "The Art of War", Filiquarian (1986)

[52] **"Within five hours":** Douglas MacArthur, *Reminiscenes* (Naval Institute Press, 1964), 354

[53] **"The exploding popularity":** Luiz André Barroso and Urs Hölzle, *The Data-Center as a Computer* (San Rafael: Morgan & Claypool, 2009)

HOUSE_OVERSIGHT_018276

corporations might be directed in the service of really ambitious goals: European peace or the fiber-speed transformation of telecommunications or billion-user financial grids. It's thin air up at this level, honestly, by which I mean that at these elevated heights you see the most ambitious athletes of human power at work: The maniacal CEO, the egotistical statesman, the mad dictator. Hundreds of millions of lives are in play; even more in some cases. By a "grand strategy" we mean the very peak of this sort of consideration. It represents, in the world of global affairs, the construction of a strategic idea that suggests how military, diplomacy, markets, and politics might be harnessed, firmly, in service of a singular aim. Grand strategy is a basic stance towards the world. If it works, it liberates creativity and national energy. It sets a clear direction[54]. It protects against the steep price of surprise. Grand strategy holds, in a single concept, the nature of their age and our plans to use that nature for the aims – security, prosperity – that gird a nation's life and decide its future. Like it or not, we all live under the umbrella raised by grand strategic choices.

"Containment" of the Cold War period, "Balance of Power" from Europe's 19th Century Age of Revolutions, or the "Tributary Alliances" that shaped a thousand years of Chinese power – these were all big, essential organizing grand strategic concepts. They shaped security decisions for durable empires. Each balanced ideal aims like freedom or the preservation of dynastic continuity against technological revolution, economic crisis, ideologies and the numberless other forces that can crack empires. Each idea reflected the demands of the age, and as a result each tells us something about power in those eras.

The Chinese strategist General Liu Yazhou observed a few years ago in a widely circulated essay, perhaps a bit too eagerly, "A major state can lose many battles, but the only loss that is always fatal is to be defeated in strategy."[55] There's something a bit cold in that line, but it expresses a hard truth. Massiveness and deep commitment to a particular, flawed view of the world can turn strength to weakness in a heartbeat. In our connected age this sort of reversal can happen with a particularly devastating speed. In the past, traditional measures of power – tanks, airplanes, national wealth – declined or rose as a gradual process. It took years for Genoa to fund and build an expeditionary force to gut Venice's Adriatic designs. Decades passed as Germany built her naval fleet. But in our age, such slower-moving measures are of limited use. Network systems rise and fall with astonishing speed. Once-successful firms in technology, companies like Wang or Fairchild Semiconductor or MySpace, found themselves unseated in months, after years of growth. New firms can emerge as if from nowhere and erase once cherished balances, demolish once strong names. Google unseats Britannica. Ride-sharing firms vaporize taxi medallion economics. "Change or die," the old computer

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[54] **If it works:** Hal Brands, *The Promise and Pitfalls of Grand Strategy*, (U.S. Army War College Strategic Studies Institute, August 2012); Jennifer Mitzen, "Illusion or Intention? Talking Grand Strategy into Existence", *Security Studies*, 24:1(2015), 61-94

[55] **The Chinese strategist:** Liu Yazhou, "Da guoce" on aisixiang.com (2004)

HOUSE_OVERSIGHT_018277

programmer's line, runs on a very fast clock in a world of constant innovation, and it applies to nations and ideologies, your habits and mine. Think of General Liu again for a moment: "A major state can lose many battles." Those five lost American wars over the last 50 years weren't fatal. They wore only a bit on our national pride and our position because they weren't *strategic* losses. But our next errors, which may come without the firing of a single shot, could be far more costly because of the slick, strategic slope on which we are now moving. "It is one thing to struggle heroically to get out of danger," Liu wrote in another manifesto. "But it's better to see the danger before it even begins to sprout."[56]

5.

Six paradoxes trace the immensity of the gaps we now face.

First: We find ourselves confronted, almost daily, with an unnerving mismatch between our interests and our means. The most powerful nation in human history finds itself unable to achieve even simple military and diplomatic goals.

Second: A global crisis of faith in our institutions is now under way. No significant institution, from the US congress to the Euro to your local newspaper, is more trusted than it was a decade ago. Many of our most essential institutions seem destined to be victims to the logic of "forced obsolescence" that makes our phones, our cars and our televisions of ten years ago feel like antiques.

Third: The connected age lets us see and measure, with historic precision, the problems we face – yet we can do almost nothing about them. Global warming, wealth inequality, species destruction, nuclear accidents, terror killings – we can see all of these in rattlingly sharp detail, instantly, miraculously. Watch the Fukishima reactor meltdown! See BP oil leak into the Gulf of Mexico in HD! The rise and fall of markets, the moves of distant wars, rivers of refugees appear almost as if we were tuning into a football game. *But we can only watch*. "Hey, do something!" we want to shout as we see financial or ideological or religious chaos spill towards us. But nothing seems to move; and what does move makes the problems worse. This impotence of being "just spectators", works like a nutcracker on the credibility of the people and institutions we expect to fix these problems.

Fourth: Many new challenges exhibit a worrying non-linearity. Small forces produce massive effects. One radical teenager, a single mis-placed commodity order, or a few bad lines of computer code can paralyze an entire system. The scale of this whiplashing grows every day, because the network itself grows, it turns pindrop noises into global avalanches. Dangers, accidents, crises were once local. A drought in California was, largely, a drought in California. A slowdown in China hit Shenzhen or Shanghai, not South America. Now, as networks overlap and influence each other, crises cascade at a new, stunning and comprehensive scale. And while we know

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[56] **"It is one thing to struggle":** Liu Yazhou, "Tan junshi gaige yu quojia anquan wenti"

HOUSE_OVERSIGHT_018278

effective foreign policy or politics or economics can't be improvised, the speed of the networks now outstrips the velocity of our decisions – even as citizens expect reactions at the ever-faster pace of their own connection. Think about the speed with which answers are expected in almost any job; all those pressures are yet more extreme at the highest levels of government.

Fifth: Though the changes working through the global order depend generally on innovation rooted in American institutions, corporations and ideas, there is now an uneasy sense: This order is slipping from American control. Look back just two decades. Then America stood as the sole superpower, the global leader in finance and economics and technology – and embracing other nations into rules we'd written. Today, allies and enemies alike wonder: Is global order is collapsing? At what speed? And: What comes next?

And, sixth, perhaps obviously to you by now: We don't know where we're going – and our leaders don't seem to have much of a clue either. Though nations are capable of adjusting activities at the tactical and operational levels – devising better drones, sharper monetary policy – we've still set no clear strategy. American negotiations are aimed now at small problems, not the heart of the issues we face. In what area of our national security today do we appear more confident than a decade ago? What nation does conduct the confident, creative, energetic an global negotiations of the sort that mark a power with a clear sense of direction?

Taken as a whole, these six paradoxes represent nothing less than the potential unbuckling of the greatest power the world has ever seen. And because the whole world is connected to that power, still more of the system may yet be rattled apart. We are surrounded today not only by fish, but enmeshed in a world of connective links that are the tissue of our real power – and a source of danger. *A sense of direction.* You have to feel as you look at this rotten, dangerous landscape we've made for ourselves in recent years. *We need a sense of direction.*

6.

In response to these challenges, America's leading figures are now proposing a range of ideas that don't honestly resonate with much confidence. Really they are having a debate about if they should use more of the old style of power or less. What they aren't doing is grasping the nature of the age. So no clear, imaginative and coherent picture of where we might head yet exists. In fact, as you're probably starting to suspect, the very best ideas of our incumbent figures may yet make the world more dangerous, may firmly and enthusiastically pull us into connective webs of danger and waste and mis-calculation they don't see. With our Seventh Sense we'll be able to spot and think about many of these dangers in a new, better and more rational way, free from the blinders of habit, but we should know what the world looks like to the blind.

Two approaches are predominant among the most respected American elites, who – as leaders of the leaders of the establishment represent an important group for us as

HOUSE_OVERSIGHT_018279

we consider what *not* to do. The first approach proposes something known appealingly enough as "Smart Power."[57] The concept was summarized most sharply by President Obama in 2014, when he said American policy ought best be guided by this tight precept: "Don't do stupid stuff.[58]" And while it is hard to disagree with this sort of charming, solipsistic formulation – there's not a long list of politicians supporting a strategy of "Do stupid things"? – "Smart Power" is no more a foreign policy vision than "Good Weather" is a strategy for farming. It suggests in some way there is no need for a strategy at all. Faced with a problem, just make a smart decision. "I don't really even need George Kennan right now," Obama remarked at one point during his presidency, dismissing the need for a strategist of real stature – and, by implication, the need for any strategy at all.[59]

Such a stance reflects an instinct that the great strategic question of our day – the future – has pretty well been worked out. In such a view of history, all we need to do is not screw this up too much. The root of this idea is an absence of a long view of history and a discomfort I think about the application of cold power. There's a misplaced confidence at work here, an assurance that American-style power, our model of politics and economics, is the best, final and only answer to the question of how the nations of the world might be best organized. Americans need, in this telling of history, only patience. The world will catch on. And I suppose that if you grew up in the United States after World War Two, such a vision of the world certainly would be consistent with your own experience. The problem is that such a comfortable posture is at odds with nearly any book of history you might pick up, from *The Peloponnesian Wars* to Churchill's *The Hinge of Fate*, all of which will remind you in the most violent terms that liberty and freedom demand struggle and defense; that epochal changes come whether we want them or not. Also that nations that look invincible can find themselves nearly unwound in an historical instant. Great Britain mastered the globe in 1937; three years later she was gasping for air; three decades later she was an afterthought. "Freedom is the sure possession of those alone who have the courage to defend it," Pericles told his Athenian audience nearly 2500 years ago in as they mourned a full year of war-dead sons and fathers – and no peace yet in sight.[60] Or, Churchill, famously: "Never, never, never, never give up."[61] We should be embarrassed to hold "Don't do stupid things" against these mottos.

Admiral Hyman Rickover's famous advice as he surveyed the nuclear navy he'd built in the last century has it about right at every level: "To find meaning in life one must

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[57] **The first approach:** Joseph S. Nye, Jr, "Get Smart", *Foreign Affairs*, July/August 2009
[58] **The concept was summarized:** Jeffrey Goldberg, "Hillary Clinton: 'Failure' to Help Syrian Rebels Led to the Rise of ISIS" *Atlantic Monthly*, Aug 2014
[59] **"I don't really even need":** David Remnick, "Going the Distance: On and off the Road with Barack Obama", *The New Yorker*, January 27, 2014
[60] **"Freedom is the sure possession:"**
[61] **Or Chuchill:**

HOUSE_OVERSIGHT_018280

be willing to act."[62] This is as true for nations as it is for each of us. We must be willing to act. It's easy to be sympathetic to the desire for less action. Nothing we've done in recent years seems to be working. But, as we'll see, that's because we've been using the wrong tools. Our enemies? They are developing the right ones. They are willing, and eager, to act. To travel the world now is to encounter in nearly every capital figures who have a different reading of history or the future of the global order. They see the world not as some ready-to-eat American political order but rather as a churning, uncertain, urgently worrying vortex. They wonder: What might we build? They look at America's global leadership with the hungry eyes of an Internet startup eyeing an old, unconnected market. "Don't do stupid things," is an invitation for these forces to poke at the world, to take risks, and to remind us that so much of what later seems brilliant appears stupid or insane when it begins.

In the years since "smart power" became fashionable, another proposition has emerged from a different group of elite thinkers. It is, in a sense, the flipside of that strategy-free posture of passivity. It was distilled by a well-regarded cluster of academic foreign policy specialists in 2012 as America began withdrawing from Iraq: "Don't Come Home America!" they called their essay. As they explained, "The United States' globe-girding grand strategy is the devil we know. A world with a disengaged United States is the devil we don't know."[63] According to this logic, the country's globe-striding posture, while expensive and exhausting and admittedly inefficient, is a crucial element of our rich national power. Yes, we spend 15% of our GDP on security activities, but we reap far more in return: Access to the best minds in the world, a secure life, a culture of open debate and personal liberty.

The problem here is that "Don't Go Home!" feels, for the most part, like a costly groping after something to hold onto. Articles and speeches and policy ideas that flow from this hopeful camp have a shimmering and expensive unreality, one that American domestic sentiment would be unlikely to support for long and that jostles against our experience of recent years. Are more aircraft carriers, overseas bases and jet fighters really the cure for the dangers we face? The ideas of this group have an appealing simplicity, or maybe I should say an appealing *familiarity*, because they echo instincts about power that were once true. The energetic engagement with the world they suggest is attractive, but America has work to do at home and – we can all see – the ambitious overseas tasks of recent decades have not, in any event, been really finished. Instead of a confident, conclusive, "Job well done!" comfort we still sweat with nervousness. *What is coming next?* After all the blood and treasure, after 850,000 soldiers in Afghanistan and $3 trillion dollars – we were left with expanded swamps. Like "Don't do stupid things", "Don't Go Home!" tells us little about the picture of world order that might emerge in the future. (It also tips us to this: Probably as a general rule no credible grand strategy starts with the word "Don't".)

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[62] **Admiral Hyman Rickover:** Rickover speech date TK

[63] **As they explained:** Stephen G. Brooks, G. John Ikenberry, William C. Wohlforth, "Don't Come Home America: The Case Against Retrenchment" *International Security*, Volume 37, Number 3, Winter 2012, pp. 7-51

HOUSE_OVERSIGHT_018281

So we should say it coldly: We have, as of yet, no strategy. We have no shared picture of the world as it might be. You. Me. Our leaders. None of us. And the experience of other, fast-collapsed empires should way on us. "The struggle to survive," the historian John Darwin has written of the British Empire, "was waged in an age of revolution: a Eurasian revolution that cumulatively (but very quickly) destroyed almost all the global preconditions on which the British system had depended since the 1830s."[64] So in our age. Many of the essential determinants of American power are being revolutionized by new, connected forces. The world syste will change in coming years. Our only question is will the changes reduce us as they once shrunk Britain, or will we draw on them to establish a longer, more durable system. At the moment, in a time of fascinating explosions of ideas and insights and connection, the American foreign policy approach is deeply and strangely unplugged from these risks and possibilities. The world has changed – is changing profoundly – from the one in which most students and practitioners of international affairs were educated. And here's the reality: Nothing can stop this change. The last two decades have brought massive and persuasive change in so many disciplines. And in foreign policy? In the consideration of problems of war and peace which, if not handled properly will rain tragedy on every other effort we might have in mind? Not much has changed. Except this: A growing sentiment of pessimism that suggests maybe America can't hold on. Great powers get one century to rule, the logic goes, and America's is now up.

It's not merely that we lack a "China Strategy" or a "Middle East Strategy", it's that we've failed to discern an overall grand strategy that would produce a coherent answer to the question of what to do about China or the Middle East – to say nothing of how those forces might be played off another with clever diplomatic harmony like instruments in a symphony. It is hard to know if this puzzlement represents a failure of imagination or of nerve. Does it mark arrogance or confusion? Or just an ignorance of the profound, revolutionary nature of the forces now at work?

Today when leading officials remark that their main concern is a rising China or revanchist Russia or that we live in a world where, as Secretary of State John Kerry said, "terrorism is the principal challenge," they are missing the point. The fundamental threat to American interests isn't China or Al Qaeda or Iran. It is the evolution of the network itself. Constructed of switches, chips, data, code, exploits, sensors, AI bots, financial instruments, trade, currency and more, the network is itself a weapons system. Its architecture, a wonderfully humming maze of change and contagion and instability, determines its terrifying dangers and marks its vast opportunities[65]. It touches – decisively – each and any particular problem we would care to name.

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[64] **"The struggle to survive":** John Darwin, *The Empire Project*, (Cambridge: Cambridge University Press, 2009) 477

[65] **Its architecture:** For an excellent overview on the politics of contagion, see Tony D. Sampson, *Virality*, (University of Minnesota Press, 2012)

HOUSE_OVERSIGHT_018282

Terrorism, we have to understand, is merely one example of network danger and power. So is China. And Russia. And these may not even be the most dangerous or devastating network battles that will take place in our lives. It's a commonplace to say now that the international system is in the greatest period of upheval in more than half a century. But often this sort of remark is accompanied by a list of moving pieces that seem to be unconnected: China's rise, the return of Russia, changes in the Middle East, globalization and then reverse globalization. "Who would have thought the post Cold War era, which was supposed to be characterized by 'softpower' and economic interdependence would be so violent?"[66] one team of scholars recently wrote, reflecting the genuine wonderment of many "experts" who failed to predic the end of the Cold War and then, largely, the nature of what has come after. Who would have thought? Well, as we'll see, anyone who understands networks.

Thomas Hobbes – the 16th century British philosopher long considered an early master of the analysis of cold, brutal power – once put it simply enough: Nations, he said, *need* to be mastered. "During the time men live without a common power to keep them all in awe, they are in that condition which is called war," he wrote. "Such a war as is of every man against every man."[67] A precondition of peace, for Hobbes, was that some country or force or tribe decisively grips a region, an empire, even the globe. "A common power to keep them all in awe," fulfilled a need for order. In our connected age, the common, awesome power is already here. It is networks. The battle now is for and on of this genuinely historic, still curious force. They will be attacked, throttled, trashed, accelerated, used, upgraded, won and lost and inflicted on each of us and our security by those with a new sensibility. To feel the world with a Seventh Sense will reveal a whole new landscape of power; it will permit us to see the fibers of a new age and then weave them into how we see and think and, finally, act. That essential, decisive terrain of our new age is, to the "Smart Power" and "Don't Come Home" crowd, still largely invisible and, anyhow, incomprehensible.

7.

Just as rivers or mountains or air currents drove commerce and combat in past eras, networks will strongly, probably decisively, influence the dynamics ahead. Today you can't, after all, operate on the rivers or mountains or in the skies or space without lively, near-instant connection. The space these interlocking networks occupy represents a new geography. It is growing every day, as if it were a giant new continent fusing together under the surface of the sea. We are, as the team at Gee! Do! discovered, moving from a world in which nations battled nations to one in which nations battle networks. And a world where networks battle networks. In coming years, networks will surely break nations, as once nations broke each other. It is linked the systems of trade and economics and biology and data that will create

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[66] **"Who would have thought":** Robert Hutchings and Jeremi Suri, *Foreign Policy Breakthroughs: Cases in Successful Diplomacy* (Oxford: Oxford University Press, 2015) p. 2

[67] **"During the time":** Thomas Hobbes, *Leviathan*, (Cambridge University Press, 2002) 88,

HOUSE_OVERSIGHT_018283

the conditions for the practice of diplomacy in our future and, when that fails, the landscape for decisive military or economic moves. Mastery of these systems will provide a rich set of creative ways to increase our security, far more effective than the unilateral and inconclusive military force we largely turn to now. A sensibility for networks will unmask developments that look friendly as in fact deeply dangerous. It will reveal that some of what may appears a threat is in fact an key to security. But this instinct for seeing differenlty has largely not settled upon our leaders.

Already the emergence of network power is producing strange collisions. Iran versus Twitter. The hacking collective Anonymous striking against Mexican drug lords, terrorists and Russian television. Tor versus the NSA. The use of financial networks to crack human trafficking webs. Biological surveillance sensors in cites used to fight disease contagion spreads – a network of machines laid against a network of bugs.[68] I mean this at nearly every scale. Waves of networked autonomous armed drones, for instance, may be among the greatest tactical military threats of the next few decades; the only hope of defense against them will be still better-enabled, self-thinking and learning defensive meshes, themselves capable of response at a pace dictated by links of machine learning and communications. Writing in 1890, the great American historian and admiral, Alfred Thayer Mahan, produced "The Influence of Sea Power upon History" in which he attempted to convince an age obsessed with land forces of the enduring, decisive power of armed ocean fleets. Hannibal's smashing attacks against Rome, Mahan wrote, or Napoleon's failure against England – in each case "mastery of the sea rested with the victor."[69] Our future will bring, almost certainly, a study of the "Influence of Network Power upon History". Here is a a line as true in diplomacy as it is in business or politics: Mastery of networks – the links of data and trade and security information and finance and others – will rest with the victor.

For the most part, the order the American and European world has been accustomed to since the Treaties of Westphalia ended the Thirty Years War in the 17th century bottled the power to make large-scale change inside states. Nations held a monopoly on the use of force, in a sense. They used it. Violent, state on state struggles were the defining events of global affairs. In such a world, the country with the most power, the greatest material reserves, the strongest sense of national destiny, also enjoyed the most security – and the most options. A few hundred thousand British imperial troops overmastered India in this fashion. And a handful of really powerful nations struggled over centuries for dominance of the whole system. Statesmen sought, and even occasionally achieved, temporary balances between the lurching and violent resets of wars that erupted like a sort of pressure-

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[68] **Biological surveliance:** The foundational text of network battle thinking is John Arquilla and David Ronfeldt, eds. *Networks and Netwars: The Future of Terror, Crime, and Militancy* (Santa Monica: RAND, 2001). For a discussion of the biological issues, see Eugene Thacker, "Living Dead Networks", in Fiberculture Journal No. 4 (2005)
[69] **Hanibal's smashing attacks:** Mahan, *The Influence of Sea Power upon History 1660-1783* (Boston: Little, Broan & Co. 1890), iv

HOUSE_OVERSIGHT_018284

release valve for the over-inflated ambitions, nationalism, and hatreds that steamed up between nations.

On our modern networked systems, however, power is different. On fast connected webs of nearly any sort, tiny forces applied can have immense impacts that leap from one domain to another. One erroneous commodity trade can snap-scramble a marketplace – and then tip a bucket of chaos into nations, companies and trading firms, One hacker, sneaking into the back-door of a computer network, can – to us a term of art – "brick" a nation's expensive security systems into devices as lively as a doorstop: STUXNET spinning Iran's centrifuges into planned madness, for instance.[70] Here's the essential, dangerous insight about safety in a connected world: It once required a big industrial force to defeat another big industrial force. Such grinding victories required time. They could be prepared for. They could be avoided, even. No more. Even the most formidable physical structures of our world – militaries, markets, governments – can be rendered swiftly immobile by virtual attacks on their connected nerve systems.[71] These strikes – or, in some cases, these *accidents* – baffle and then paralyze at network speed, by which I mean less time than it took you to read this sentence. When the American national security strategy speaks of a "long struggle" against terrorism or a rising China, it doesn't acknowledge how fast some of the turns ahead may be.[72] Yes, a decades-long battle for control of essential networks and platforms and protocols lingers ahead. But I fear some of the changes ahead will whiplash us with their speed. Generals in World War One lamented that the whole war might have been prevented if diplomatic communication had been conducted at the stately speed of the horse-carried message. It was the damn velocity of the telegraph that baffled the judgment of statesmen, they claimed. Figures whose every instinct runs at a pace far slower than what the age demands were then – and are now – a menace.

The great 20th Century theorist of political realism, Hans Morgenthau, once referred to nation states as "blind and potent monsters."[73] He felt a sort of nervous evil as he studied the moves countries made on the stage of world history. Some of this unease was surely a result of his own life, marked by a lucky escape from Germany in 1937, as Hitler was finally perfecting a national machine of lurid and murderous potency. I suspect Morgenthau would have been terrified now by the always-on, all-seeing connected mesh that encloses us. Connected forces move at times like a potent and capricious monster too, smashing businesses or national economies or ecosystems

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[70] **One hacker:** David Raymond, Tom Cross, Gregory Conti, Robert Fanelli, "A Control Measure Framework to Limit Collateral Damage and Propagation of Cyber Weapons", *Proceedings 5th International Conference on Cyber Conflict* (NATO CCD COE Publications, Tallinn 2013).

[71] **Even the most formidable:** Daniel Geer, "Heartbleed as Metaphor", *Lawfare* Blog April 21, 2014

[72] **When the American:** See 2014 US National Security Strategy

[73] **The great 20th Century theorist:** Hans Morgenthau, "The State of Political Science," *Politics in the Twentieth Century Vol. 1,* (Chicago:University of Chicago Press, YEAR HERE)

HOUSE_OVERSIGHT_018285

with little useful warning, and anyhow with a merciless and unstoppable efficiency. Connected, surprising terrorism has cost trillions to fight; linked-up network businesses have demolished, surely and even gladly, trillions of dollars of old profit sources with their cold, clicking efficiency. Skype blitzes hundreds of billions of dollars of long distance telephone profits, for instance. And replaces it with free. Amazon, in the space of a few years, cripples marketplace ideas built at the cost of trillions of dollars.

The world we're entering into now, one of constant, sensor-filled data streams that give us a real-time feeling for everything from the temperature of your car before you get in to the pace of your heart as you sleep, means the potent, network forces of our day are not "blind" as Morgenthau's states were, but gifted with an exactness of vision. They see everything, always, more than we or our leaders do. They see it constantly. They never forget. Networks seem to have an irresistible and amazing energy that impels them to find and then exploit pin-holes. Think of Al-Qaeda coolly regarding the American airline network in 2000, for instance. Or rising powers now poking at weaknesses in the international order that we've not yet begun to consider, let alone patch up. Whether confronting mobs of network-organized terrorists or cascades of computer error, we often discover the unnerving truth that on these connected systems there is no plug to pull.

Networks of one sort or another are hardly new in international affairs, even if the sheer scale and speed of our modern systems is totally, revolutionarily fresh. The spiderwebbed tendrils of the Ganges River, for instance were a network that fed the Mughal Empire in the 16th and 17th centuries.[74] The Yangtze and the Yellow and the Mekong river systems each marked out vital webs that carried wealth and knowledge into a half-dozen, spectacularly rich Chinese dynasties. Egypt and Mesopotamia developed great powers that endured for centuries along the Nile and the Euphrates. Later, networks of trade overlaid the Mediterranean, which became the heart of the wealthy Carthaginian, Roman and Byzantine empires. And the greatest geographical empire in history, Great Britain, was nothing if not a network power, run on sea lines. Waterways, for centuries, pulsed with power. They were vital for trade, essential in war and crucial for national freedom.

Network empires emerged on land too, assembled from connected webs of politics, of silk and tobacco and gold, or from shared religious passions. These sorts of networks, sometimes as thin as the trail of a single adventurer like Marco Polo, carried promises of prosperity (and intimations of violence) as they spread. Baron Antoin-Henry Jomini, Napoleon's inspired tactical accomplice, was onto something when he remarked that it was the interior, networked lines of communication and logistics that had decided and delivered victory for history's great empires. "Methods change," Jomini observed, "but principles are unchanging." The skeins of links running *inside* national war machines were as essential for security as any

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[74] **The spiderwebbed tendrils:** Peter Turchin, "A theory for the formation of large agrarian empires"; Jean-Paul Rodrigue, Claude Comtois, and Brian Slack, *The Geography of Transport Systems* Routledge 2006 p. 10-15

HOUSE_OVERSIGHT_018286

ability to strike out – a lesson Jomini and Napeoleon expensively re-learned at the end of their gasping supply lines in Russia in the winter of 1807.[75] In our own day, jet-meshed networks, commercial webs, satellite links and finance platforms span the omnipresent routes of America's global reach. So as we consider the information networks evolving now: the growing connected world that is the largest, fastest, most comprehensive network in history, we should ask ourselves the question Jomini might have raised: Will an even greater empire be based on control of information-powered networks?

This new world of connectivity won't immediately devour the old. In fact, the classic and the revolutionary will contend for some time, side by side. Cyberweapons and nuclear ones in a strange dance, for instance: Imagine that you're ruling a country with no hope of building your own platforms for medicine, finance, information or security.[76] You will be, as a result, uneasily and permanently dependent on the nations or groups that do control these elemental, algorithmic and efficient tools. If you're running a medium-sized country there's no chance your own IT industry can develop a search engine with the reach and fluency of Google; or a cybersecurity system with the omnipresence of some Chinese database. Might this make you more eager for nuclear weapons? For an atomic hedge against the day you find yourself threatened with national unplugging? Networks, we'll discover, don't lift us above the old conflicts so much as they complicate them. They fill the old hatreds with new fidelity; sharpen the old grudges and make it easier than ever to slap at the world when you're angry. While it is tempting to say that we've moved from a world of "cold weapons" like planes and tanks to a world of "hot weapons" where digital light pulses and biological infections will prevail, really it is the strange blending of these cold and hot systems that is so interesting, so dangerous. Ever more precise exploding iron bombs, made from a fusion of GPS data and TNT, will be a part of our future, as will pathogens tuned by computer and delivered according to network intelligence about where a contagion might best be started.

Orwell's well-worn line – "The history of civilization is largely the history of weapons" – settles uneasily onto a networked world.[77] The networks are, so clearly already, becoming weaponized. And a great strategist should know and use the materials of his day. Napoleon had a gunpowder-burn familiarity with his artillery; Mao possessed a wizened guerilla sensibility. The electric, shifting and shocking materials of our global networks are going to be used in pursuit of power anyhow, so we had best consider how to become fluent with their real nature, how turn them to our advantage – and ideally find a way to use them to so profoundly change the rules of conflict that hurried, unconsidered and useless reaction will be all our enemies can manage. Over the centuries shifts in power and wealth were achieved

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[75] **The skeins:** John Arquilla and Ryan Nomura "Three Wars of Ideas about the Idea of War," *Comparative Strategy*, 34:2 (2015), 186

[76] **Cyberweapons:** Mary Kaldor, "In Defence of New Wars," *Stability*, 2(1) 2013: 4, pp. 1-16,

[77] **Orwell's well-worn line:** George Orwell, "You and the Atom Bomb" in *George Orwell: In Front of Your Nose, 1946-1950*. (Nonpareil Books 2000) 7

HOUSE_OVERSIGHT_018287

by armies, by naval and air attacks. Now it is the ownership and use of connection, of networks and machine intelligence that will deliver real, perhaps even final, leverage.

If the strategic aim of Europe's leaders after Napoleon's violent emergence and defeat was to restore a balance of power, if America's grand strategic purpose after World War Two was the containment of the USSR and her totalizing ideologies, nations now must try for positions of security and for command during the uneasy transition ahead. The wellbeing of the whole system becomes a concern; entities, protocols and ideas that threaten the system's health are the most urgent dangers, even as they represent seats of potentially historic power. We should ask: How is it that international cooperation occurs in an age of connection? Will it happen through slow, incremental movement? In sudden bursts? In fact, the routes to cooperation are rarely easy in any age. They involve overcoming old bureaucratic ideas, deeply held instincts of national interest, broken and humid and sometimes murderous psychological needs – all while accepting a new picture of power – and fresh risks and responsibilities. Our problem now, even in the face of these snapping traps, is to define a clear vision of our future security – and then to make a path to get there. No route exists today. "Originally, there were no roads in the world," the Chinese writer Lu Xun observed in a famous story at the start of the last century. "It is only by walking on them that paths are made."[78] Ours is an age of first steps.

The social scientists John Padgett and Walter Powell, after considering examples of epochal, collapsing change in political and biological systems of all sorts – Renaissance finance markets, coral reefs, innovation clusters, and others – summed up their conclusions in a little koan-like package of logic: "In the short run, actors create relations. In the long run, relations create actors." [79] The nouns we worry about now, and the ones we hope for, take their meaning and their risk and energy from relations. Your genome connected is different and more hopeful than it is alone, unplugged, slipping into cancer. This idea that relations create actors is a powerful basis for a new, enduring – even decent – grand strategy for an age of revolutionary connection. It should also offer a check against some of our horrible miscalculations: America invaded Iraq, for instance, intending to replace one state with another. Instead we replaced a state with a network – and not one that we controlled. That web still resists our old habits of control. Relations of family and faith and clan link and activate murderous, relentless actors. The super power had all the nouns: Tanks, planes, soldiers, money. But we did not have the networks. We could not create relations. No move of ours held for long. We were like the team JIEEDO – trying to defeat the wrong thing entirely.

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[78] **"Originally, there were no roads":** Lu Xun, "My Old Home" in *Diary of a Madman and Other Stories* Trans. William A. Lyell (Honolulu: University of Hawaii Press, 1990.) 89–100, though the translation of the line here is my own.
[79] **"In the short run":** John F. Padgett and Walter W. Powell, "The Problem of Emergence" in *The Emergence of Organizations and Markets,* Princeton University Press, 2012

HOUSE_OVERSIGHT_018288

As a start let's at least fix the weird language of our current foreign policy world: We don't live in what they like to call a "Post Cold War" era anymore. (Who, after all, called the Enlightenment the "post-Feudal era"?) We live in what is probably best called "The Age of Network Power." A world of connection is responding to a powerful logic of its own. It builds new platforms, sometimes defined by users or by technology or by the way in which currency or weapons move. Melvin Conway's deep engineering insight was right, the design of networks does affect our real world. Even now it is shuffling us into "convergence" and "divergence" clubs. What is next is the struggle to decide who is in which club. What businesses will win? What technologies? Which ideas? Our only chance will be to learn a new instinct for just how power moves on networks. And it's to this that we will turn now.

HOUSE_OVERSIGHT_018289

Part Two: The Seventh Sense

HOUSE_OVERSIGHT_018290

Chapter Four: The Jaws of Connection

In which the Seventh Sense explains the strange, new way power behaves on networks .

1.

The Envoy, Frank Wisner Jr., had gotten the phone call on a Thursday, late in the afternoon, and within a few hours he was on a plane. It was an unusual request from the White House and from the State Department – and though he was a man who had lived a life of many unusual requests, he knew that this one had a certain significance, a *weight* you might say, if you were the sort of man who measured such things in human lives.

The Envoy was such a man. His father, Frank Wisner Sr., had been one too. Senior was one of the most famous and effective of America's Cold War spies. He'd run the Office of Special Services in Southern Europe during World War Two and then built operations for the Central Intelligence Agency in the years after. He was a tough man, from a generation of Americans that had fought and won wars and who, unquestioningly, weighed their actions in human lives. As a spy in Romania in 1940, Wisner Sr. had watched the Red Army, like some sort of sick machine, round up and then execute scores of his friends. The course of his life was set. "Wisner landed like a dynamo," William Colby – a future CIA director who worked for Senior – observed. "He started operating in the atmosphere of an order of the Knights of Templar, to save Western freedom from Communist darkness—and war."[80]

Frank Wisner Jr., was known too as a dynamo. He was 72 in the winter of 2011 when the White House called. He'd had already a storied career as a diplomat, following a rough trace of his father's man-on-a-mission trajectory, also with a bit of that secretive Knights of Templar feeling: Princeton, Vietnam, the Philippines, the halls of the State Department in Foggy Bottom. Wisner had become the first phone call for some of America's leading corporate figures when they found themselves billions of dollars backwards in some strange land, even as he'd remained closely in touch with the most explosive policy puzzles. Iran. North Korea. He was a voluble and opinionated man, but somehow also discreet, exact and patient. The combination made him at once totally reliable and a great deal of fun. He had been, over the years, a warm and personable figure in my own life, the sort of man who took the long view of any problem, who lay his hand comfortably on your knee with reassurance when some promise came undone and threatened a bit of chaos. He was like an ideogram of reliability: Bukly, bald, coiled, loyal. He'd seen it all, you felt.

Frank Wisner Jr. had served as Ambassador to Egypt for half-a-decade in the 1980s. Almost inevitably, his careful manner and easy charm led him into a close relationship with Hosni Mubarak, the Egyptian president. Mubarak was an urbane former fighter pilot who had come to sudden and surprising power after the

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[80] **"Wisner landed":** William Colby, *Honorable Men: My Life in the CIA* (New York 1978), 73

HOUSE_OVERSIGHT_018291

assassination of Anwar Sadat on a calm afternoon in October 1981. Wisner arrived a few years later. Though not quite a friend, Wisner had cultivated a directness at least, with Mubarak. He'd become a mirror in which the Egyptian president might see how different stances towards America or Israel would appear to the rest of the world. So when, in the winter of 2011, the White House saw Mubarak facing waves of unimagined protest, at a moment when it looked like the Egyptian president would become the latest head of state to topple amidst the accelerating discontent that would be known as the Arab Spring, they sent Wisner with a message for Mubarak: *No killing – and it is time for you to retire.*

Wisner later recalled the tension of Cairo when he arrived. The city felt nervous in a way he'd not seen before. He landed in the early morning and went almost immediately to see the President. The situation would be brought back to normal, Mubarak assured Wisner. Soon. He'd fired most of his cabinet a few days earlier. He had promised reform, and had begun studying what might be done first, and how soon it might be carefully attempted. He hinted to Wisner that the rumored transition of power to his son Gamal was not, after all, inevitable. But, Mubarak said, he wasn't going anywhere just now.

Wisner tried another tack: He asked if the President would like to leave the country. Maybe a trip for medical treatment? Mubarak dismissed the idea. He'd seen worse, he reminded Wisner. Mubarak had been sitting inches away from Sadat on that fateful October day in 1981. He himself had survived six assassination attempts. In fact, he said he intended to go on television again that very evening. He would speak directly to the protestors. He would tell them and the Egyptian people of his plans for reform and for a gradual transition of power. He would remind them of the greatness of their national spirit. He would evoke the immensity of their ancient history. And he would be sure they understood that he would stay, he would die on Egyptian soil. *You can tell that to the White House too,* Mubarak told Wisner. He vouchsafed, at the end of their talk, at least some of the assurances the envoy had come to collect: No violence. A graceful departure at some point. Elections, even. But all on his timetable.

Around Mubarak in those days, Wisner recalled, he saw bafflement. Resolution admixed with surprise. These men in that Egyptian power structure, all wealthy and comfortable and perfectly secure, had thought their places impregnable. They were, after all, the thin human line between the modern world and the boiling mad Islamic fundamentalists who hungered to rule the country. They'd arrested the usual dissidents, closed down the normal channels, checked with their informants. Nothing. The old, reliable vents for unrest hadn't worked. The pressures grew. It was perhaps easy to understand why they thought they'd survive. They'd never failed. Mubarak had been president for *30 years.* For now, at least, the syllogistic logic fluttering through the President's own arguments reassured them: Egypt wants stability. Only I can deliver stability. Therefore, Egypt wants me.

Wisner left the Presidential Palace. He reported what he'd learned back to Washington and, work done, headed to the airport. That evening he found himself

HOUSE_OVERSIGHT_018292

waiting for his flight in front of a TV in the crapped-out lobby of an old hotel on the road out of town, watching Mubarak's promised speech. The President projected total confidence on screen. This was the Mubarak Wisner had known in the 1980s. There had always been a barreling self-assurance about the man; it was alive in him now, facing the unthinkable. Ruggedly handsome and perfectly controlled. You could almost believe, as Wisner did for a moment, "This was a great man who had led a country through difficult times. He will endure." *Six assassination attempts.* Mubarak had always been a survivor.

Yet as he watched, Wisner knew the challenge the great man faced. Did Mubarak, he wondered? Did he even understand what was happening around him? That he was giving the speech on television, in the face of this strange revolutionary movement that was unfolding on the smart phones of Cairo as much as on its streets, was a subtle admission: Old power struggles to handle new rules. Wisner had seen tapes of the earlier speeches, the ones intended to calm the crowds which had in fact inflamed them further. He knew just how fine the edge Mubarak now paced. Mubarak needed to address the protestors on their own level. He needed to show he understood. There was only one thing he must not do, Wisner thought as he watched. He must not address the protesters paternalistically, as a father might speak to a child. On the screen in front of him, Mubarak continued in his steady, slightly strident voice. "I am speaking to you all from the heart," he said. "A speech from a father to his sons and daughters."

Two weeks later, Mubarak was gone.

2.

Imagine, for a moment, you are Mubarak – or really any successful early 21st century autocrat. You've managed several decades of control in your Middle Eastern, North African or Asian country. Perhaps you've inherited your position from your father or an uncle. They've taught you about power. Keep it tightly controlled. Replace key officials regularly. Execute your enemies from time to time. You've learned the virtues of the hard crackdown. You've sent your security officers to the best military schools in the US and Europe, and taught them to temper their firm grip with (a bit of) humanity. In short, you've mastered the use of a strong hand and the establishment of a certain national logic that suggested your name – Qadafi or Mubarak or el-Abidine ben Ali – as a synonym for stability, for prosperity and even pride. This seems to you like the most stable possible order. You know that someday it might have to change, but that day seems a long way off. You delay reform. You prepare your son to take over. Meanwhile, your citizens begin to acquire the Internet and cell phones. And one day in 2008, following a financial crisis far away from your own shores, you begin to notice an unnerving trend.

On the streets of Iceland and then Spain and then Chile and then Israel and Ukraine and Turkey and Mexico and then New York City, thousands or hundreds of thousands of citizens gather. There is no one leader of any of these protests. Instead these movements breathe and grow like an organic whole. The discontent is diffuse

HOUSE_OVERSIGHT_018293

even if the result is similar: Mass gatherings, control of some essential public space – a square, a stock exchange, a park. All organized, it appears, using completely ethereal techniques: Text messages, video postings, chat rooms. Similar movements appear around in the world. In Iran, in Italy, in Russia. "Occupy Wall Street", blossoms in New York City, a protest against wealth inequality and finance. It becomes a self-franchising social movement, appearing in hundreds of cities: Occupy Hollywood. Occupy Central in Hong Kong. Occupy – strangely – Vegas.

Then in Sidi Bouzid, a Tunisian town you've never heard of, far away from all these unstable looking mobs, a spark lands. A local man has set himself on fire. Police (worse, a police *woman*) had confiscated his scales and his fruit and then tossed him around for no reason other than that he was poor and could do nothing about it. It is November 2010. Within hours protests begin in Sidi Bouzid. They spread to Tunis. [81]Then Tripoli. Then Damascus. You watch as the anger, moving on once-invisible technological lines of video and text, demolishes the stability of all of North Africa. Over the next two years leaders are pushed from power in Egypt, Tunisia, Libya, and Yemen: their names, instead of being symbols of stability, instantly cast as sources of injustice. Other countries – Syria, Algeria, Sudan, and Bahrain tumble for periods into the black hole of civil violence. Some people mistake all this for a democratic revolution. Over time, however, it's clear this is hardly that. Something more complex is emerging from the violent mist. New, nearly virtual terror groups organized themselves in the vacuum, hyper-lethal versions of connected protest. A new kind of political energy, a method of linking people and ideas and an easy destructive power, is alive. It seems to be as active in cynical, murderous fundamentalists as in the optimistic peace-hoping youth. Democratic revolution? No. Revolution? Yes, clearly, that.

A few years later, after you've been replaced or are on the run, after your own country has had upheaval and you've had your visit from a well-meaning American diplomat urging you towards a quiet retirement house in Saudi Arabi, the Spanish social philosopher Manuel Castells will name the disease that undid you. Castells is perhaps an unlikely figure to diagnose the political illness that infected so much of the world after 2008. An elfin, kinetic figure with a disorganized mop of grey hair, he sports the wardrobe of an accountant and a rolling Spanish accent that flavors his speech with a surprising taste of romance. It's a mixture that seems somehow ideal for a world often on his lips: "Reevolootion." With the meticulous care an anthropologist might bring to documenting a distant, undiscovered tribe, Castells has spent decades finger-poking, classifying and explaining networks. In the late 1990s his books, lectures and research set the frame for the world we inhabit: fast-changing, ripped through by communications and technology, linked in unusual ways. "The network society," he explained, "represents a qualitative change in the human experience," he explained. [82]

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[81] **They spread to Tunis:** Mohamed Zayani, *Networked Publics and Digital Contention: The Politcs of Everyday Life in Tunisia*, Oxford University Press (2015)
[82] **"The network society":** Manuel Castells, *The Rise of the Network Society* (Malden, Mass: Blackwell Publishers, 1996), 508

HOUSE_OVERSIGHT_018294

Inevitably, Castells became curious about how such a change was affecting politics. Speaking to an audience at Harvard in the spring of 2014, he reviewed what he had learned in the past decade – and particularly in the years since 2008, much of which he had spent dropping into the ground-zero sites where network protest and dissatisfaction were exploding. "We are witnessing," he told the audience, "the birth of a new form of social movement."[83] Information technology was breeding massive, rapidly moving social waves. These movements went from invisible to irresistible in instants. They pressed for political change or for economic justice or even for – and this was odd for such wired up efforts, but anyhow – a return to a pre-technological age. In most of these countries, the older organizations had little appeal to a new generation of protesters. The political parties smelled of rot. The media was state-owned or controlled by billionaires. For a generation used to instant empowerment, the time to work inside these broken structures seemed impossibly long. And, anyhow, another option existed. Twitter or Facebook or YouTube had taught them. So riots in those dozens of cities, unplanned and uncontrolled, emerged.[84] The "Collective Action," of popular movements for hundreds of years from Bastille-raiders to labor actions, was replaced – upgraded? – into "Connective Action." People who'd never met and who shared very different histories and desires, were connected, fused together by lightspeed bits in hope or fury or vengeful rage.[85] This was, perhaps, predictable. It mirrored the linked, fast-spreading dynamism of the 2008 crisis itself. As the British central banker and economist Andy Haldane observed, the world had never before suffered a genuinely *global* financial crisis, with every county on the planet, tied together as they were by finance and technology (and fear), tumbling off a cliff at the same, nano-second instant. [86] In one three month period, the entire global economy shrunk by five percent.

As fast as shocks like that economic one spread, these linked network social reactions seemed to move faster still, echoing each other, with ever louder and more complex results. The technology itself became as important to the emergence of new groups as their ideas. The terror phenomenon of ISIS, for instance, emerged almost entirely along skeins of digital connection, and was itself a reaction to the network-led disruption of the Arab Spring – and the earlier fracturing of older order in Iraq. When President Obama dismissively called ISIS the junior-varsity squad of terror and said there was nothing much for the West to worry about, he was reflecting the

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[83] **"We are witnessing":** Manuel Castells "The Space of Autonomy: Cyberspace and Urban Space in Networked Social Movements", Speech at Harvard GSD, February 2014, available online

[84] **And, anyhow:** Raquel Alvarez, David Garcia, Yamir Moreno, and Frank Schweitzer. "Sentiment Cascades in the 15M Movement." *EPJ Data Sci. EPJ Data Science*, 4:6 2015

[85] **People who'd never met:** W. Lance Bennett & Alexandra Segerberg "The Logic of Connective Action", *Information, Communication & Society*, 15:5 (2012)

[86] **As the British central banker:** Andrew Haldane "On Microscopes and Telescopes", *Speech at Lorenz Center Workshop on Socio-Economic Complexity*, March 2015, p.20

HOUSE_OVERSIGHT_018295

same dim, comfortably dangerous instincts that undid Mubarak. *These kids can't possibly amount to much*. The youth of these groups, the very fact that they were *not* the varsity team, their intimate fingertip familiarity with virtual spaces – all this gave this new generation of movements energy, appeal, attraction. Even in countries that looked technologically "backwards" by American standards, linked systems speed-bred revolution, they gleefully filled in for a failed traditional media, and they accelerated and enabled the creation of groups as different as the Syrian Electronic Army and Occupy Hong Kong.[87]

Traditionally, such a long list of hopeless exclusions (no money, no friends, no access, no power) added up to an easy judgment of irrelevance. But ISIS was like the the Iranian bloggers and American social justice campaigners and Swedish digital pirates and vengeful Houthi fighters who were all staring back, confidently, at the people who had the money, the friends and the power – and the drones. Obama and Mubarak and – fill in the blank with a powerful name or institution – were too slow. Out of touch. Their connections were all wrong. So while the individual parts of the new networks – young students, poorly trained armed fighters – were soft and human and easy to destroy, they still tore unstoppably at old power. Tied together, the connected systems themselves were capable of more than their individual strength might suggest. What they shared wasn't simply a single issue or identity. It was cheap, constant connection. And they were, frankly, furious.

The old guys were crafty, of course. They tried to shut down the technology itself. Or they aimed at crucial points on the network. "Arrest or kill the leaders you can find!" was the sort of order that bolted stability back onto Iran, for example. Other governments found they could crack the will of the protesters by going after their relatives. "Relational repression," as it became known, was the closest a big power could get, quickly, to using one network to fight another. And there were other strategies: The Egyptian military, for instance, played a deadly serious long game. They gave in on a few points. They let the massed opposition and Islamic networks come to power. But this was merely a pretext, a way to map the ties of these groups, to coldly study how they functioned and record the secret sources of their power and influence and money. Then, when the Egyptian population tired of these failing, amateurish new leaders – as the military knew they someday would – the generals moved.

Skeptics would demand of Castells: What the hell did any of these protests really accomplish? What sort of *reevolootion* was it that left nothing but chaotic sink holes in Tripoli and Damascus? What they accomplished, Castells conceded, was mostly destructive. But that was the point. This smashing at old laws, the cracking apart of ideas of power and control had changed the landscape. And it had revealed a hidden logic of connection. Irrelevant? That was like saying earthquakes or epidemics should be overlooked. In their vibrating apart of once-solid structures, networked social movements told a great deal. They revelaled interconnected fault lines. They

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[87] **Even in countries:** Edwin Grohe "The Cyber Dimensions of the Syrian Civil War: Implications for Future Conflict," *Comparative Strategy*, (2015) 34:2, 133-148

HOUSE_OVERSIGHT_018296

showed how groups could suck power into themselves from networks, along invisible lines, and animate themselves as if by connection to electricity. The protesters and terrorists understood power that existed simply because of connectivity. They understood how easy it was to connect. And so they had an instinct that eluded the comfortable men in the palaces. The usual reaction of authorities – *Round up the usual suspects* – didn't work because, as Castells noted, "The usual suspects were networks." You couldn't arrest a network.

3.

Before we can go much further in figuring out how network power might be used – to close up those six worrisome paradoxes, to create massive new companies (or invest in them), to rebuild our politics – I think we need a picture of sorts in our heads of this new landscape. What does a network look like? How does it's design affect its operation? Yes, it's true you can't arrest a network. But can you say something about how it's different? Can you spot the parts that are dangerous? When someone like Castells says to us, "Power is moving," what does that mean exactly? Where is it going? What I want to do now is begin to assemble an image of a network, and to show what that sort of linked design tells us about where we are now and where we're going. Then, with such a picture, firmly in our minds, we can ask just what these networks are for, after all, and how they might be used.

It is an old chestnut of historians and anthropologists that power – the ability to make or cause things to happen – is often determined by structure. When I say, "Superpower" I am painting a picture of the international system with a single word. "Highway," does the same – and tells you something about logistics, trucks, economic power. Or "City." This is why "org charts" have such a decisive power. Think of the map of power in your family or your office or a nation. Who makes the decisions? Why? The way we bottle up our lives in firms or congresses or universities flavors just about every other decision we make[88]. An imperial CEO, prone to visions and control creates a different sort of firm than a boss who moves among his employees nearly as an equal. An army that moves from the top down is different than one that lives, as Mao said of the Chinese guerilla forces that mastered the country against steep odds in 1949, "as if they were fish and the people were water." Power is always packed into structures of some sort. Emperors, kings, presidents and congresses all reflect certain arrangements. But those arrangements change; power moves. You can see leaders struggle with this constant shifting: Think of the "Englightened Despotism" of the 18th Century as Frederick II of Prussia, Joseph II of the Hapsburgs and Catherine II in St. Petersburg each struggled to marry the then-new ideas of liberty with older instincts of control. History is, in one sense, nothing but the tale of the movement of power. Once the idea of an Assyrian king emperor was new, as was the notion of a President or a Pope. History is paced by the arrival of new species of all sorts; and by the death of others. This is as true for institutions as is it for bugs. With this caveat: No one gives up power easily.

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[88] **The way we:** See Venkatesh Rao, "The Amazing, Shrinking Org Chart", on Ribbonfarm.com, May 28, 2015

HOUSE_OVERSIGHT_018297

Here's what's unnerving about this for us now: There are whole approaches to power that look extremely reasonable until one day they look insane. For thousands of years the idea that one feudal lord should control thousands of serfs seemed perfectly reasonable to the lords and serfs alike. John Maynard Keynes' famous line about Egypt – *Just because you built the pyramids doesn't mean you get to use them* – marked a whole approach that seemed inarguable for centuries, even if the experience of it was inarguably awful[89]. Features of the world – moats, massive cathedrals, pyramids, sweatshops – exist only because distributions of power permitted or enabled or encouraged them. The quotidian interactions of our lives – how we shop, where we hang out with friends, the kinds of performance or politics we follow – these all produce long-lasting structures. Malls, democracies, war zones.[90] Pushing power into networks, we can see already, creates whole new arrangements. Some are as unimaginable to us now as a voting booth would have been to an Egyptian slave. When we say that ours is a revolutionary age, it's not because you can watch videos on your phone. It's because of *why* you can watch video on your phone – and what that implies for the old, nervous structures around us.

4.

Before the age of the Enlightenment and Industrial Revolution began most political and economic power was extremely *concentrated*. A few kings and feudal lords controlled most economic production. Priests decided who could speak to God, and how and when. Finance was dominated by a few families, largely working in the secretive counting rooms of early banking capitals such as Amsterdam or Genoa or Lyon. Knowledge about the world, a sense of science and of history and even geography, was closely held, fiercely opaque. Inside monastery walls or university halls the aim of protecting (and editing) what the world knew far outstripped any hunger for new ideas, for innovation or dissemination. In those times a lucky or brutal few decided the economic, political and intellectual lives of many. You can picture power as balled up almost, in the hands of a tiny and fortunate elite.

Over time, cracks appeared in this system. One of the earliest was also one of the most fundamental: The schism that split the Catholic Church. This was, at first, the work of a young German theologian named Martin Luther in the 16th Century. Luther was a man whose view of life, he would say often in later years, was shaped by a single sentence: Romans 1:17. "The righteousness of God is revealed from faith to faith, as it is written: The just shall live by faith." *The Epistle to the Romans*, as Romans is formally titled, was a letter from Saint Paul to a collection of recalcitrant,

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[89] **John Maynard Keynes' famous line:** Keynes, *The Economic Consequences of the Peace,* p. 16

[90] David Murakami Wood and Stephen Graham "Permeable Boundaries in the Software-Sorted Society: Survelliance and the Differentiations of Mobillity" in *Mobile Technologies of the City* eds. Mimi Sheller and John Urry. (London: Routledge. 2006) Chapter 10

HOUSE_OVERSIGHT_018298

spiritually mordant Jews in Rome. His message was among the simplest and most compact and personal possible: The transmission of faith requires nothing more and nothing less than faith itself. Romans teaches us that believing in God, which is *faith*, is enough for access to all the riches of heaven: God's righteousness, an afterlife, forgiveness.

By Luther's age, however, access to those riches was not so simple. Among other things, spiritual control had become a source of lucre for the church. The glory of the Catholic Church, her magnificent cathedrals and clothes, and her insidious habits of selling passes to heaven in the form of indulgences – this was a deployment of faith and power marked by a venality that grated against Luther's from-faith-to-faith sensibility. When he saw his own congregation increasingly slipping away to churches with priests who would do what he would not, which was to market and sell indulgences, he saw a rank, strange hypocrisy: The Church as an economic instrument. His rage boiled over in the summer of 1517, and he summarized his case against the Church in the 95 Theses that he nailed to the door of his local church on October 31st. *Papa non vult nec potest ullas penas remittere preter eas, quas arbitrio vel suo vel canonum imposuit*, he wrote in Thesis Five: No matter what you might pay him, the Pope can't influence what happens to you after you die. Or, Thesis 78, *Euangelici rhetia sunt, quibus olim piscabantur viros divitiarum*. Indulgences are nets with which one fishes for the riches of men.

As much as Luther was crying for a restoration of Saint Paul's sense of a personal faith, he was also starting a difficult and – for the Church – unpleasant argument about power. Our relation to God, Luther meant, is *our* relation. It's not something to be brokered or sold or negotiated. It does not require fancy clothes or cathedrals or hierarchies. For Luther, this new logic had engendered a profound spiritual crisis. He recalled, later in life, the very first time he'd encountered the possibility of direct access to God, in the pages of Saint Augustine, probably around 1508. "When I came to the words 'thee, most merciful father,'" he wrote, "the thought that I had to speak to God without a mediator almost made me flee."[91] Who was he, Martin Luther, to speak directly to God? But from then on, Luther's experience of God, his own sense of power honestly passing from faith to faith – and not from faith to church to faith – embodied an extremely heretical idea about power: faith without a middleman.

Such a concept undid much of what had been taken as inarguable doctrine. The Church immediately understood the danger. They rushed to label Luther as heretical and, later, crazy. In arguing that the Catholic Church, with all of its magnificent trappings of faith, was really a useless toll gate, Luther was picking at a still larger, more significant question: How should power be split? If Luther was right, and God should be accessible directly to each of us, then some other questions tumbled after that one. Should we have direct access to political power? To ideas? To money and land and control of our own economic destiny? Could "from faith to faith," be recast as "from idea to idea" or "truth to truth" or – and this turned out to be the really

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[91] **"When I came to the words":** Preserved Smith, *The Life and Letters of Martin Luther*, (Boston: Houghton Mifflin, 1911) Introduction

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violent shift – "from citizen to citizen as equals"? The Church was merely one of many institutions that had sat massively, reliably, comfortably (and greedily) between people and power.

Luther, it later emerged, was not alone. An era of awkward answers had begun. The Prussian astronomer Nicolaus Copernicus, for instance, had preceded Luther by a couple of decades with his own questioning of the unquestionable. "Those who know that the consensus of many centuries has sanctioned the idea that the earth remains at rest while the heavens move around it would regard it as an insane pronouncement if I said the opposite," he wrote. Machiavelli, Galileo, Erasmus, a growing list of great, transformative names – they were all working away in this same questioning spirit. Their insane pronouncements, when proven true, opened the way to still further insights. The Enlightenment had begun. The old power centers acted almost as if nothing had changed; maybe they believed nothing would ever need to. "What was, still is," the Catholic Church pronounced confidently (and absurdly) at the Council of Trent in response to Luther's Reformation. But there was no turning back. As the German philosopher Immanuel Kant wrote, the motto of the era could best be summarized as: *Dare to know!* "The Enlightenment," he explained, "requires nothing but freedom."[92]

This, it emerged, was a hell of an expensive requirement.

4.

In the years after Luther's 95 Theses, Europe was torn apart. The continent's longstanding image of power – balled up, concentrated, unquestioned – was ripped away. Another picture emerged. The idea of personal access to God, a kind of "one man, one prayer" approach to religion, which opened in turn other fundamental struggles. The credibility of nearly every sacred body that had once depended on controlling people and limiting their choices – the Church, those kings, feudalism, myths – faced a creeping erosion. "Human knowledge and human power come to the same thing," the English philosopher and statesman Francis Bacon observed in the midst of this shift in his artillery shell of a book *The New Organum.* Human knowledge, he means, *is* human power. You can imagine the energy, the promise of the book as it was passed in Latin copy to Kepler in his study in Linz (then Lintz), to Gallileo in Venice a decade before his imprisonment. It was this same human power to question even the most sacred ideas that the masses of Enlightenment Europe would use, gleefully at times, to claw apart most of the old structures.[93] Luther's heresy led initially to the Wars of the Reformation, battles that pulled every European royal family into a struggle between church and state, and then between each other. The bloodletting of The Thirty Years War, the first truly pan-European

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[92] **"The Enlightenment":** Immanuel Kant, "An Answer to the Question: What is Enlightenment?" *Kant: Political Writings,* (Cambridge: Cambridge University Press, 1991) p. 54

[93] **"Human knowledge":** Francis Bacon, *The New Organon. Cambridge Texts in the History of Philosophy.* (Cambridge: Cambridge University Press, 2000) 32

HOUSE_OVERSIGHT_018300

conflict, established in its aftermath a new balance that let each King select the religion of his subjects. *Cuius regio, eius religio* as the agreements of Westphalia decided in 1648 – or *Whose realm, whose religion.* This produced some stability, but not for long. You could read that line, after all, very personally and see what it demanded next: *My* realm, *my* religion.

In a sense, this revolutionary tumult was necessary to pull power from a comfortable, established *asymmetric* arrangement, in which a few people controlled so much, and into something more *symmetric*. Luther's Reformation thinking made God directly, instantly accessible to anyone. (Just as Copernicus' scientific way of thinking gave us, eventually, the ability to question if God existed at all.) Individuals – and the very birth of the idea of *individualism* was another heretical slap at the old institutions – could balance and contend and argue as equals. The notion that men were "created equal" became increasingly evident in this generation, even as establishing that equality triggered the French Revolution, the American Civil War and countless similar conflicts. Democratic systems aspired to enshrine this new balance, shifting countries from rule-by-birth to rule-by-majorities. In economics, markets reflected the new picture of power too. *How good is that product? What is the price? Is there demand?* became the essential questions, not *Which Lord controls that field.* Releasing power into the busy arms of businessmen, politicians, scientists and artists meant ideas, politics and innovations contended one against the other. They got better. They evolved. And the sum of all these interacting pieces made sustained economic growth into a reality for the first time in history. In a "commercial society," Adam Smith explained in *The Wealth of Nations*, "Every man lives by exchanging, or becomes in some measure a merchant."[94] Smith didn't mean everyone was really a merchant, rather that in a world of markets each of us – our labor, our ideas, our capital – is a commodity. We are liberated, but only to compete. For votes, for jobs, for resources.

If the old faiths and institutions couldn't stand the pressures of these powerful, equalizing forces, then new ones had to be built. "The scaffolds humans erect," the Nobel prize-winning economist Douglass North called these foundations.[95] The idea of equality of influence or power – not merely opportunity – demanded new containers: voting booths, congresses, unions. Rule of law was one of the most urgently essential: a single code that could be laid down evenly across a society, demanding that principles of order outweighed the habitual advantages of prominence or power or birth. Law aspired to make men equal in front of courts. This, in turn, suggested a new degree of fairness up and down the social order. Broader literacy, the standardization of measurements or the birth of universal credit and currencies were all tools for spreading access. Museums, scientific congresses and industrial fairs helped turn sparks of theoretical knowledge into the

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[94] **In a commercial society:** Adam Smith, *The Wealth of Nations*, (Oxford: Oxford University Press, 2008) 32

[95] **"The scaffolds humans erect":** Douglass C. North, *Understanding the Process of Economic Change*, (Princeton, N.J.: Princeton University Press, 2010) 48

HOUSE_OVERSIGHT_018301

practical heat of industry.[96] Ever-more efficient use of iron, of steam, of electricity all reflected a virtuous loop of theory and practice, between the lab and the market, the scientist and the businessman.

This fusion of the instinct for competition, for constant new innovation, delivered the modern world you and I live in today. "All fixed, fast-frozen relations," Karl Marx and Friedrich Engels wrote in 1849 about the speed of this change, "are swept away. All new-formed ones become antiquated before they can ossify. All that is solid, melts into air."[97] As more people "dared to know", the big ideas and big thinkers attracted an audience. Arguments started. New ways to record and share the answers appeared too. Locke or Newton or Darwin were as notable for the crowd of debating, curious citizens they attracted as for their ideas. Such contentious discussions were designed to elicit truth, to give individuals that same shocking sense Luther had felt on discovering a powerful idea by himself; but as important was that these debates were recorded – written and then distributed in journals, books and letters. For most of history, after all, knowledge suffered from its own fragility and asymmetry: There was always a chance, maybe even a likelihood, that some important insight would be lost in a plague, strangled as heretical, burnt up in a library fire, or dissolved by some military misfortune. This is why, for instance, we have almost all of Shakespeare and why we are missing so much of Sappho. Widespread knowledge changed this. A solid, inarguable base endured. "If I have seen further," Newton famously wrote, "it is because I have stood on the shoulders of giants." Those shoulders for Netwon were enshrined in libraries, scientific journals and the massive sense of what had come before swaddled in the Cambridge walls that surrounded him. In this sense, the preservation and advance of knowledge, the new symmetry, was not only the largest shift of power in history. It was also the best thing that ever happened to the human race.

In other ways, of course, it was very nearly the worst. Symmetry had a darker edge. It meant that nations decided the strategic questions of the day by throwing massive, deadly power at one another in unprecedented volume. With each passing year, Europe's engines of science and industry were grinding out tools of unprecedented destruction. Napoleon's greatest victories were enabled as much by the industrial strength of French artillery factories as by the liberated masses of the French revolution. When France was unseated by the British Empire, it was manufacturing scale and naval depth that tipped the balance. London's clubby mastery was, in turn, challenged by Germany's efficient, iron-and-blood commercial engines. Size and scale and safety became linked. This sense of the undeniable power of industrial mass was Winston Churchill's only comfort for two nervous, lonely years after 1939 as he paced the hours until what he hoped was America's entry into The Second World War. "I knew that the United States was in the war, up

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[96] **Museums, scientific congresses:** Joel Mokyr, "The Intellectual Origins of Modern Economic Growth", *The Journal of Economic History*, Vol. 65, No. 2 (June 2005) p 290
[97] **"All fixed, fast-frozen relations"** Karl Marx and Freiderich Engels, "The Communist Manifesto," in *The Economic and Philosophic Manuscripts of 1844 and the Communist Manifesto* (Amherst, N.Y.: Prometheus Books, 1988) 212

HOUSE_OVERSIGHT_018302

to the neck and in to the death," he wrote the day after Pearl Harbor. "Hitler's fate was sealed. Mussolini's fate was sealed. As for the Japanese, they would be ground to a powder. All the rest was merely the proper application of overwhelming force."[98] Or, the reverse of that coin: Admiral Yamamoto grimly to Emperor Hirohito: "If you tell me that it is necessary that we fight, then in the first six months to a year of war against the U.S. and England I will run wild, and I will show you an uninterrupted succession of victories. I must tell you also that, should the war be prolonged for two or three years, I have no confidence in our ultimate victory." [99] *Ground to a powder.* This was symmetry at its most pounding and decisive. Mass against mass. This was a picture of power that seemed undeniable in its pure logic. Until now.

5.

So how should we think about power in our own age? What picture best captures its vibrant, unceasing demands?

It might be tempting now, as a first pass, to say we've left that world of purely symmetric, mass-against-mass power behind. After all, a few figures, anywhere in the system, can exert massive and even fatal, collapsing pressure. One clever hacker, one terrorist, one hedge fund manager with a bad idea, even one purely accidental mis-connection – never before has so much power accumulated in systems so vulnerable to single slips. And our massive power – the US Army or our economy – is hardly decisive despite its weight. It seems now that something can grow bigger *and* weaker. A nation may have an ever-larger GDP, but if it is miswired somehow, if its social or legal or youthful connections misfire a bit, then it may be still more vulnerable. But this "power of a pinprick" asymmetry is not the whole story. Just when the network looks like a way to tie together all sorts of small, even isolated forces and bless them with decisive power, we notice something else. Tremendous, even historic and undeniably massive concentrations of power. Platforms like Facebook, software systems like Microsoft or search centers like Google are sort of dense, impossible-to-replace gold mines. Google answers questions for more than 50% of the world every day. Is it the most powerful company in human history? Is Facebook? And is their power widely distributed? Or is it concentrated in the algorithms and cloud data of these firms? Anyhow, they are among the first of a totally new species of firm.

The leap we have to make in understanding our networked age – and by this I don't just mean the Internet, but really any connected system you'd care to consider – begins with this idea: On connected systems, power is defined by both profound *concentration* and by massive *distribution*. It can't be understood in simple either/or terms. Power and influence may yet become even more concentrated than it was in

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[98] **"Hitler's fate was sealed":** Winston Churchill, *The Second World War: The Grand Alliance*, (Boston: Houghton Mifflin, 1986) 540

[99] **Or the reverse of that coin:** Roberta Wohlstetter, *Pearl Harbor: Warning and Decision* (Stanford, CA: Stanford University Press, 1962), 349–353.

HOUSE_OVERSIGHT_018303

feudal times *and* more distributed than it was in the most vibrant democracies. Network power, we might say, exists as a sort of skin or surface that ties together billions of points to each other and to vital, centralized cores. We know our world is filling with more and better and faster connected devices distributing themselves at an unmeasureably quick pace; but we are also breeding powerful centralized knowledge and computing basins. Biological research labs now engage in complex DNA analysis with powerful desktop tools (distribution), but to work efficiently, they demand fast reference to the patterns revealed only in immense genetic datasets (concentration). You can snap high quality videos with your phone (distribution); you share them with millions on a connected central stage like Facebook or YouTube (concentration). A financial engineer can architect a new and profitable trading instrument on his tablet (distribution), but his hopes for profit depend on instant connection to busy, price-setting markets were prices are set (concentration.)

This sort of pulling, taffy-like web of ties between small (your watch) and big (connected data systems) stretches constantly. It's what you need to picture when you think of an image of network power. The wired masses in Tahrir square, for instance, emerge like magic on some once-invisible surface that forms between their phones and powerful platforms like YouTube. Or: Hyper-linked terrorist groups appear from nearly nowhere, jerking recruits from suburban London bedrooms via massively connected messaging platforms. Recall Adam Smith's line about the Enlightenment, how a commercial society was one in which every man had to become a merchant? Well, in our age of connection, every one of us is a node. We sit on that tense, stretched surface between center and periphery. When we say "connection changes the nature of an object," this is the exact balance we have to comtemplate. "Social structures," John Padgett and Walter Powell wrote in their masterful study of complex connected systems, *The Emergence of Organizations and Markets*, "should be viewed more as vortexes in the flow of social life than as buildings of stone."[100] This idea has some eerie implications: Every structure – congresses, universities, the company where you work, our minds even – is merely a temporary collection of relations. And of course those relations can change at any moment. The tension between concentration and distribution acts, in a sense, like an hydraulic jaw. It pries power out of older, once-legitimate hands.

Consider the case of my father, a cardiologist. As a doctor he stands at the head of a medical tradition run for thousands of years on the idea that the doctor is the center of your care. If you show up at a hospital on a stretcher with a flat-line on some heart monitor, my father's decades of training and practice have always been your best hope. But today, nearly every patient he sees – even the ones he brings back from their black flat-line future – second-guesses him as soon as he's out the door: Googling their disease, tapping into websites of mixed reliability, joining some online community of people with the same sickness while they still have tubes in their nose. Meanwhile, his ideas about your case are under quickening pressure: An

[100] Padgett and Powell, p. 8

HOUSE_OVERSIGHT_018304

emerging "Internet of DNA", massive collections of treatment histories, or linked databases of medical histories will be overseen by machine intelligences able to out-diagnose him.[101] Constant, automatic links between body-borne sensors we'll wear (or swallow) and data centers will sharpen the edge these systems have on my dad further still in coming years. They will notice things he could never hope to see – small but portentous changes in your heartbeat, chemical chimeras from new medications, how you're feeling in each moment until your last.

It is the nature of networks that they create both massive concentration *and* distribution. And in the process they simply rip apart many of our existing structures. Look at our worrisome global economics at the moment. Extreme concentration of wealth on one end and massive distribution of work tools to ever-cheaper sources of labor runs on this exact same logic: it is a sort of jawing network effect that is tearing up the middle class, producing an ever-richer elite. Those who have information in financial markets, for instance, possess a secret and vital and ever sharper edge over those who don't. Which makes them richer still. Which sharpens their cutting edge still finer. If we ask ourselves why the world now feels on the edge of a deflationary shock – a moment where there is more supply than there is demand, where the world waits to buy because "tomorrow it will be cheaper" and sends economies spiraling as a result – one reason is this way in which networks are pulling on our economics. On the one hand, wealth is concentrated in fewer and fewer hands by the leverage of knowledge and a head start and connection – a phenomenon known, in fact, as a "rich club" distribution by network theorists. The middle class is locked out of this group. Their wealth and power and influence declines, as a result. This slashes overall demand, since a billionaire consumes less of each additional dollar than, say, a school teacher. At the same time, massive distribution of technology and connection is reducing demand for labor while flooding the world with commodities, workers, newly linked-supply of items like bedrooms and car seats.

The network effect works its usual jawing destruction here: Connection decreases demand *and* increases supply. It concentrates capital in a few hands, even as it distributes tools of work to cheaper and more distributed people and machines. The middle is class torn inexorably apart from both ends. It's not wrong to wonder, as some economists have, if capitalism is a system best yoked to older, slower puritanical values that encouraged saving, not consumption – and to ask if wiring markets to instant networks is not, in the end like trying to warp speed a carriage. Anyhow placing an economy on a network surface produces new, ripping pressures as apparent in middle-income nations as they are in middle class households. "We are being destroyed," a South Korean friend said to me about the hollowing out of his national economy. Korean computer and television and compute manufacturers had hoped they could develop their own essential software, that their hardware manufacturing technology would be unmatchable. In fact, software triumph was

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[101] **Meanwhile, his ideas about your case:** I. Akyildiz, Pierobon, M. Balasubramaniam, S. Koucheryavy, Y., "The internet of Bio-Nano things," *Communications Magazine, IEEE* , vol.53, no.3, pp.32-40, March 2015

HOUSE_OVERSIGHT_018305

drifting to cores in Silicon Valley and Redmond – a contest between Microsoft and Apple and Google. And the prized Korean manufacturing excellence was no match for cheap Chinese and then Vietnamese labor welded to assembly-line technology.

We see this pattern of network-led shredding nearly everywhere now, the result of powerful cores of knowledge and wide distribution of connection. Newspapers – removed from relevancy by crowd-sourced newsfeeds *and* constantly-connected smart databases. Once indomintable television networks, devoured by cheap home-made videos *and* large-scale platforms that use the Internet for distribution. Bitcoin and other first-generation block-chained currencies eating at the once unquestionable authority of central banks. Drones hovering along on a skein of GPS and data links are also among the new citizens of this connected skein. They are products of a data web: They depend on centralized connection *and* the distribution of technology, data, and design. They may do to old ideas of security and power what the fusion of GPS and smart phones and databases have done to hotel chains or medicine. Massed, self-organized drone fleets can turn aircraft carriers and exposed battle groups from sources of strength into vulnerable and even dangerously self-defeating antiques. They will remake urban landscapes. Think of the way that Baron Hausman redesigned Paris in the 18th Century to manage with the Enlightement-age danger of liberated, angry citizens. The creation of the city's wide boulevards, central axes for easy movement of the police, and intersections engineered to quarantine riots was a reaction against the demands of mass liberty. Our cities are now vulnerable not simply to mass protest risk, but to the pinch of asymmetric levitating drones. The sensations of safety behind walls, up a staircase, inside a windowed room all begin to slip away. Drone risk – and all the potentially wonderful elements of constant, instant drone assistance – will command a retooling of cities, much as automobiles did a century ago.

So this is power: Cores and distribution. They way that tension pulls particularly on certain, once-essential structures and objects and people explains a lot about our age – including the failure of so many institutions. Connectivity changes the nature of an object. That's true for your doctor, your bank account, your army – and for billions of people whose lives alter irreversibly once they connect to markets, to knowledge, to the world. To connect now is to be exposed to this fresh young skin of linked power, a lively surface that transports anything at near instant speed. We have to ask just how many of the "scaffolds humans erect" that were essential for Enlightenment-era advances will be pulled down. And of course we face the exciting, uneasy task of thinking up the new scaffolds we now must build.

If you have the tools or the skill to see the world this way, as a vibrating and pulling mesh of connections, then you can look at a tanks or soldiers or years of stability and see *possibility.* A friend who controls the largest secure Bitcoin vault in the world, put it to me once this way: "Platforms mattered once; now it is protocols." His point was that the pipes and rules connecting the varied systems of our world affect, fundamentally, the distribution of power. The rules of the Bitcoin blockchain or the implications of a protocol like IPv6 or DNSSSEC reveals something about how we'll all connect in the future. Once these new rules become visible to you, then even the

HOUSE_OVERSIGHT_018306

most inarguable current sources of influence and control – the US Dollar, say – look weak. The Seventh Sense is defined first by an intuitive feeling for just how power is being re-geared now. If you look at a kid with a phone and think "Strong", you have the Seventh Sense. If you look at an angry, barely educated terrorist wannabe and think, "Junior Varsity", you don't. And as a result you may be about to have a very unpleasant surprise.

Try this: Ball up your right hand and hold it in front of you; now take your left hand and open the fingers and hold it a few inches away with your fingers pointing back towards the right. You can think of your left hand as the vibrating, living network of connection – reaching towards the concentrated power that your right hand represents. This is the heart of understanding our age. Networks live in that tension between distribution and concentration. To connect any object – my dad, a newspaper, a radio-controlled plastic drone – to this skein is to change, irrevocably, its essence. The reason the legitimacy of old leaders is failing, the reason our strategy is incoherent, the reason our age really is revolutionary, is that they are all sitting in the midst of these pulling, powerful forces. We should steel ourselves for the shredding imminence of this violence . But also – and you know this already, I think – we must prepare ourselves for the possibility of immense construction. Network power does not only pull apart. It also creates.

This paradox confused me, to be honest, for a long time. Power is, manifestly, concentrated with astonishing efficiency now. And it is more widely dispersed than ever too. We can stare at this difference, this strange polar tension and baffle ourselves as we try to figure out just how and why it moves. The best way of understanding this, I finally concluded, requires a cognitive leap, perhaps, over our usual Western way of understanding the world as either "a" or "b", as either "distributed" or "concentrated", and into a view of how opposites might ceaselessly balance into a whole. Not "a" or "b" but "a" *and* "b" at the same time.

Let me tell you what I mean: In 1132 the Song Dynasty that had ruled China for nearly 200 years collapsed in the face of an invasion by wild Manchurian soldiers from the northern plains. The Song leadership – along with its best minds and cultural figures – fled south from Beijing for a thousand miles, until they were safely on the opposite bank of the Yangtze River. They settled in a lakeside city we know today as Hangzhou. In those days Hangzhou was known as Lin'An, which might best be translated as "Gazing at Peace." The little town must have seemed to the Song leaders a perfect respite from the horror and war they had left behind. The city lay then, as it still does, along side XiHu or West Lake, a tranquil and horizon-filling stretch of water framed by rolling hills and tea plantations. The famous poet and statesman Su Dongpo later compared gazing at the lake to looking at a beautiful woman – that same fused sense of calm, peace and astonishment you might feel while considering the object of your own love. Stilled water is regarded in Chinese culture – you may recall from Lake Tai Hu where Master Nan set his campus –as a reservoir of *yin* energy. Song leaders had fled the angry *yang* energy of invasion for the *yin* peace of the south. Yin energy is associated with calm, femininity, fertility. Yang expresses action, violence, creation. Yang is the thunderstorm; Yin is the peace

HOUSE_OVERSIGHT_018307

that comes afterwards, as the crops absorb water and grow. The idea of a balance of *yin* and *yang* is among the oldest in Chinese philosophy. "When heaven and earth were formed, they divided into yin and yang," the Huainanzi, one of China's greatest political texts explains. "Yang is generated from yin and yin is generated from yang." Hangzhou became a capital of *yin*. It produced perhaps some of the greatest Chinese philosophy and poetry and art. Greatness emerged from that stillness – and, even today, to sit by West Lake and drink a cup of the Dragon Well tea produced on the nearby hillsides is to have every one of your senses flooded by tranquility.

That yin-yang balance gives us, in a sense, a way to understand that split power on a network by seeing it is not, really, split. Network power is energetic and wild at the ends, with all the creative energy of a world filled with devices, empowered human dreams, and the violent slips of old balances. *Yang.* But at the center it is dense, still, even quiet with the silently cranking algorithms of massively concentrated power. The computer science pioneer Claude Shannon saw information in 1949 as wild, uncertain, and pulsing with the instability of an entropic system. *Yang.* The machine architect Norbert Weiner, writing at nearly the same moment in 1948, saw the digital age differently – as an expression of stability and structure. *Yin.*[102] His vision for a digital order, what he called "cybernetics," emerged from the Greek concept of *kibernetes* – the orderly steering of a ship through sometimes chaotic waters.

We now know: the humming webs around us are both. They are ordered and structured.[103] Good and evil. Power in this connected age is concentrated *and* distributed. Each feeds the other. The crops need the thunderstorm; the thunderstorm feeds from the heat radiated off the land. Or: The *yang* violence of the Manchurian wars bred the conditions for the *yin* renaissance in Hangzhou. The massive distribution of connected points creates revolutions, economic disruption, crackling innovation. But it also creates a need for more centralization, more agreement on protocols or platforms. This idea of opposites balancing into a whole is not unique to Chinese civilization. You can find it too in ancient Greek or Roman tradition. Heraclitis, for instance, insisting, "All things are one." Or in the view that there can be no love without hate, no stillness without chaos, no beauty without the unbeautiful and fortunately – as we're about to see – no destruction without creation.

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[102] **The computer science pioneer:** See D. Bawden and L. Robinson, "Waiting for Carnot": *Information and Complexity*. Journal of the Association for Information Science and Technology, 66: 2177–2186; Norbert Wiener *Cybernetics, or control and communication in the animal and the machine* (New York, NY: John Wiley and Sons, 1948); Warren Weaver, "Science and complexity", *American Scientist*, 36(4), 536

[103] **They are ordered:** Carlos Gershenson, Peter Csermely, Peter Erdi, Helena Knyazeva, and Alexander Laszlo,"The Past, Present and Future of Cybernetics and Systems Research", arXiv:1308.6317v3, 23 Sept 2013

HOUSE_OVERSIGHT_018308

Chapter Five:

Fishnet

In which we learn why networks spread so quickly.

1.

In 1959 a young aeronautical engineer named Paul Baran, who had been working at Howard Hughes' aircraft design factory in Los Angeles, arrived for his first day at work at a low-slung, modern building along the Santa Monica beach in California. RAND – a stylish 1950's acronym for Research & Development – had been established by the US Air Force with an ambitious aim: How might the best minds of math and science be bent to the purpose of winning the Cold War? RAND was a dream destination for many researchers, offering a fusion of patriotism, technology and California sun. The place became known for a relaxed, intellectual atmosphere – an energy of open creativity that belied the dangerous, nuclear-tipped problems sitting inside its locked safes and eager minds. Shortly after settling in, Baran was given one of the most troubling, deeply secret of these puzzles.

The Cold War was then in its early days. The debate over how to manage an age when it was, for the first time, possible for humans to destroy the planet was colored still by fresh memories of Hiroshima and Nagasaki. It was charged too with the fear of communist expansion, not an unreasonable worry for Americans who had just fought a world war against two other, dangerously totalitarian forces. A cold fear lingered in the minds of many citizens and military planners: Given a window of vulnerability, might the USSR loose a fast nuclear attack? Avoiding such a risk became a primary concern of American diplomacy and defense thinking, particularly in the establishment of some sort of deterrent to a Soviet attack. Moscow had to know, and trust, that any attempt to strike-first would be met with a devastating reply. "The chief purpose of our military establishment has been to win wars," the nuclear strategist Bernard Brodie wrote in a 1946 memo. "From now on its chief purpose must be to avert them."[104] Deterrence rested on this hope that the USSR would be persuaded not to launch a snap-strike because of the certainty of a nation-levelling reply. This logic, this "balance of threat" depended in turn on America's ability to launch such a strike. If the Soviets could wipe out America's ability to respond, then Moscow's leaders might move first, snap of America's claws, and then pick the world apart at their leisure. If Krushchev's famous, mocking dangerous "We will bury you!" line from 1956 really meant what it said, then such a move would provide an awfully convenient first shovel.

In the late 1950s, when Baran arrived at RAND, the Cold War was at its chilliest and one of the most carefully guarded American secrets was this: If the USSR attacked,

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[104] **"The chief purpose of our military":** Bernard Brodie, "The Weapon: War in the Atomic Age and Implications for Military Policy," in Brodie Ed, *The Absolute Weapon: Atomic Power and World Order,* (New York: Harcourt Brace and Company, 1946) 76

HOUSE_OVERSIGHT_018309

there might be no response. The US, with its priceless collection of bombers and missiles and million-man army, could not strike back for the simple reason that the nation's field officers would have no way to talk to each other, or to commanders in Washington. The military radio and telephone systems America depended on for her safety would not likely endure an initial Soviet strike. This was the problem Baran had been told to solve."At the time we didn't know how to build a communication system that could survive even collateral damage by enemy weapons," he recalled later. RAND determined through computer simulations that the AT&T Long Lines telephone system, a copper web that carried essentially all the nation's military communications, would be cut apart by relatively minor physical damage.[105]

The military had spent, already, a fortune on the problem. (They had spent half a fortune, it turned out, trying to hide it.) The result was an expensively designed, gorgeously featured telephone network linking military bases to strategic command posts. But because the lines and their switching centers were laced out in a pattern with just a few big central nodes, like a bicycle wheel with spokes, it had almost no chance of surviving the very thing it was designed to help prevent, a Soviet strike. If you gazed at an inked-out map of this network, with its central hub staffed by senior commanders and then radiating lines out to bases and missile silos, it even looked, well, like a target. If the USSR could bullseye those hubs with a bomb or two, the rest of the network would fold. The Soviets could do whatever they wanted: Invade Berlin, roll into France, obliterate Los Angeles. America's military would be deaf. And as Soviet missiles became more accurate, this seemed an inevitability. "We will soon be living in an era," Baran wrote, "in which we cannot guarantee survivability of any single point."

The situation, as a carefully screened handful of scientists at RAND knew, was in fact even more perilous. Shortly before Baran arrived at RAND, scientists testing hydrogen bomb designs in the Pacific discovered that radiation from their explosions fuzzed communications for hundreds of miles. A Soviet attack, even if it

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[105] **"At the time":** There is a fair amount of debate about this question of if the Internet design was intended for survivability or if some other systemic need – such as linking research institutions – accounted for the distributed architecture that emerged. See, for instance, Barry M. Leiner, Vinton G. Cerf, et al, "A Brief History of the Internet", *ACM SIGCOMM Computer Communication Review* Volume 39 Issue 5, October 2009, 22-31. However, an examination of primary source documents shows the evolution of Baran's thinking clearly and produces documentary evidence for the origins of the problem he and various figures at RAND were aiming to solve. Others arrived at the packet switching model, but it is clear Baran's path to the design emerged from the security problems he was considering. For much of the information here see "Oral History: Paul Baran" *Interview #378 for the IEEE History Center*, The Institute of Electrical and Electronics Engineers, Inc. (Available online); Paul Baran, "On Distributed Communications I: Introduction to Distributed Communications Networks," United States Air Force Project RAND (August, 1964); Baran "On Distributed Communications XI: Summary Overview," United States Air Force Project RAND (August, 1964)

HOUSE_OVERSIGHT_018310

missed those crucial, central AT&T nodes, would still reduce American military communications to a bunch of hissing, empty phones. "Our communications were so vulnerable," Baran said, "that each missile base commander would face the dilemma of either doing nothing in the event of a physical attack, or taking action that would mean an all out irrevocable war." You could, uneasily, picture the moment of decision: Some Colonel alone in his bomb-laden plane over Europe or deep in some cornfield missile silo wondering "Launch or not?". This was a horrifying possibility. Baran began to ask: Was there some other way to send a counter-strike signal? There was a sense of life-saving preciousness in such a setting about connectivity itself. To hold it, manage it, protect and control it – in the face of the extreme pressures of a nuclear balance, such connection marked the difference between safety and catastrophe.

2.

You can, at the heart of many revolutions, find the warm hints of human psychology pressing out. This is the roiling, unscratchable instinct for change that marks a really revolutionary temperament – and that often is the only sort of personality that can imagine and then deliver a solution to impossible problems. Conservatives like things as they are, even if "as they are" is sometimes broken or dysfunctional or dangerous. Revolutionaries are different. They don't seem to choose their role. They have a vision for how the world ought to be, a vibrating and instinctive picture of power, and driven by passion or anger or faith or some wild genius, they chase that vision relentlessly, even into madness. If they are lucky, however, they live in an age where their crazy hopes catch onto some larger human hunger. Khomeini worried that the Shah would never fall. Lenin was preparing to abandon revolutionary politics in 1916. Jobs was told the iPhone could never be built as he wished. Then, in an instant, revolution.

We might ask: What set Martin Luther on his revolutionary course to demand instant access to God? Luther would tell you that his first inspiration had come to him one night in the summer of 1505, while he was walking home in a thunderstorm, when a lightning bolt landed a foot or two away.[106] Luther had been struggling for years with an inner battle, with a tension between his faith and what it demanded of him. Then, when that lightning cracked free from the storm, a sensation of total terror was replaced by a new feeling. The nearness and power of God snapped past him in that moment. It clarified everything. He dropped his law studies the next day and within a year he was an Augustinian monk, preaching – often hundreds of sermons a year, ever angrier, ever clearer – about the closeness of God, the real, tangible, bolt-from-the-blue passage of faith to faith. He was totally, completely converted.

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[106] **Luther would tell you:** Albert Beutel "Luther's Life" in Ed. Donald K. McKim, *The Cambridge Companion to Martin Luther* (Cambridge: Cambridge University Press, 2003) 4

HOUSE_OVERSIGHT_018311

Long before Paul Baran dreamed up the networks that were required to solve the "deaf, dumb and blind bomber pilot" challenge, he lived through the sort of moment that left an indelible psychological mark – one that remains visible in the revolution he made, as Luther's lightning-bolt of faith is in the unadorned churches and simple liturgy of Lutheranism. Baran was born in Grodno, Poland in 1928. His father had an uneasy sense about what was coming to Europe and he moved the family to America when Paul was six. *Pesach* Baran became *Paul* Bran in America, a model student, a prize-winning mathematician and eventually at Hughes and Rand he established himself as one of the great American engineers of his generation. And like so many refugees of that era, the sharp, irreversible exodus left him with a question. How, exactly, to stay connected – to family, to tradition, to history? As the murderous mist of Nazism swept over Europe, the problem took on a searching urgency: How to maintain a connection, *any connection*, in the face of utter catastrophe? As he neared retirement decades later, Baran recalled his life's work with this resonant line: "I was concerned," he said, "with survivability." The problem that animated his life as much as it did his networks.

Two years after arriving at RAND, Baran began to discern the outlines to a solution to the dangerous problem of American military communications. In a series of lectures for Air Force officers starting in the summer of 1961, Baran began working his way towards an answer, speech by speech and equation by equation. He didn't fully know where he was heading when he began the talks, he said, but he had an instinct that some other design must be out there, some completely fresh way to handle the "survivability problem" and by the end of his lecture tour, he had found it.

Baran's new design for a durable network had begun with an idea that *didn't* work. The Pentagon, he'd thought, might broadcast thousands of coded messages over AM radio frequencies all at once as an attack approached. "We interrupt this program to say: It's Christmas in July!" Missile silo commanders and bomber commanders would cluster by their transistor radios, collecting a "launch" code with the ease of listning to a late-night baseball game. That target-shaped, "Just Aim Here" web of phone lines would be replaced by something far more distributed, harder to wipe out with a single Semyorka-7 missile shot. But this approach had problems too. It relied fatally on broadcast towers and on insecure AM radio waves. But the idea of such a widespread, insidiously untargettable network got Baran thinking. Sending out the messages and letting them find their own way had a lot of appeal, if it could be done. There would be no central hubs. Information would sail over linked lines in the way radio signals moved in the air. Military communications, in Baran's system, would bounce from point to point on this tapestry, at each stop being re-directed towards their intended destination. The resulting network, if you drew it out, would look like a fishnet: Lots of links connected to a few knotted nodes. And because the bundles of data, Baran called them *packets*, could be moved by the network itself, you could cut or nuke or sabotage the net in a few places and still use it. The packets would would find another path. Even a badly ripped up and irradiated network could, in theory, carry a "launch" – or a recall – message safely from the White House to a bomber pilot.

HOUSE_OVERSIGHT_018312

"The early simulations," Baran recalled, "showed that after the hypothetical network was 50% instantly destroyed, the surviving pieces of the network reconstituted themselves within a half a second." That was a way of saying that his messages were finding new routes on the network even after huge parts of the system had been taken off line. And they were doing it nearly instantly. Better still, as he began to model these fishnet, "distributed" networks, Baran discovered that they were not only capable of surviving attack, they were also incredibly efficient. "If built and maintained at a cost of $60 million (1964 Dollars)," he calculated, his design would, "handle the long distance telecommunications within the Department of Defense that was costing the taxpayer about $2 billion a year."

Baran travelled the country for most of 1961 and 1962, classified presentation and slide-rules in hand, trying to persuade skeptical generals, engineers and other scientists. It was, he found, a nearly impossible task. He recalled a visit to the towering AT&T switching headquarters on Thomas Street in Lower Manhattan. It was,an implacable temple of the high-priests of hub-and-spoke network design. That one building handled more telephone and telex traffic than nearly any other single point on earth. Surely the place was very high on the USSR first-strike list for exactly that reason. So Baran expected a friendly reception. After all, he'd be telling a bunch of men with a uranium death sentence that he'd found a way to get them off the Soviet target list. His new "mesh" network would mean that bombing AT&T would be largely pointless. It wouldn't blind US commanders. If only they'd redesign their network, the AT&T engineers might save their own lives. They thought he was insane.

"I tried to explain packet switching to a senior telephone company executive. In mid-sentence he interrupted me, " Baran recalled. "The old analog engineer looked stunned. He looked at his colleagues in the room while his eyeballs rolled up, sending a signal of his utter disbelief. He paused for a while, and then said, 'Son, here's how a telephone works….'" Of course Paul Baran knew how a telephone worked. You jacked one point to a switch to another point. That was the problem. This was why AT&Ts design would be absolutely useless in the face of the catastrophe he'd been told to prevent. Baran was, nerve and blood and bone, as an analyst, and even as a refugee perhaps, alive with the imperative of survivability, of how connection might mean the difference between war and peace. Those morons in the AT&T building? What the hell could they be worrying about?

But it wasn't just that $2 billion annual check from the US Defense Department those wizened phone wizards were seeing vanish in Baran's fishnet, it was a whole way of thinking. The AT&T scientists wanted to control the addresses, the routes, the timing of messages from the center. This sort of authoritarian design appeared more efficient to them; perhaps it was even more psychologically comfortable since it matched their own experience of being commanded and controlled. Karl Wittfogel, the historian who identified the water totalitarians of ancient China or Egypt, would have recognized them: *Switch Despots!* "We had arrived at a conceptual impasse," Baran reflected with the mild confidence of a man who knows he will eventually

HOUSE_OVERSIGHT_018313

win. He moved onto the next stop. Same result. And the next. Same result. Eventually Baran's engineering colleagues back at RAND were so affronted by the routine dismissal of his logic that they spoke up. They had seen the classified briefings. They knew just how easily the nation could be hobbled – and their Santa Monica building was surely on some target list somewhere too. RAND's scientists demanded a detailed, critical study of the "distributed network model". By the time they were finished, the Air Force was preparing to begin construction.

Survivability. Plucked from that impossible looking puzzle was the first honestly distributed network. You can sense the power of this inversion: A network with no central control, survivable, uncuttable. The earliest large network built on the Baran's principles became known as ARPANET, the Advanced Research Project Agency NETwork – a mesh of connections that, even today, serves as the backbone for parts of the Internet. Even with the risk of nuclear war (hopefully) long gone, packet switching networks of one sort or another still account for most of the data moving in the world. Think of how true, how heat-hardened and useful an idea must be to endure more than fifty years of technological change. And all the efficiencies Baran first predicted 50 years ago on his slide rules are still at work. Every time you make a call, share a video or ask a machine to think for you, that whole transaction likely takes place through fishnet routed packets. If we had stayed with that old AT&T model, we'd be living in a different world. Riots would be flipped off with a single switch. Data flows would be monitored with the ease of watching a subway turnstile. The far flung, wild creativity of our plug-and-play connected world would be stilted, stifled. Each additional connection to the system would demand bureaucratic central approval by the Switch Despots, concerned more with their own power more than their survival. Instead, we have a slice-resistant mesh that has grown by a billion times over, with its original architecture largely intact.

Packet switched systems such as the Internet mean that anyone with some string and an ability to tie knots (which, in tech-speak, is anyone with some blinking fiber optics and a TCP/IP connection) can add themselves into the global web. They can connect. They can share. Practically, this is why you can so easily snap your phone or tablet on and touch, more or less instantly, a whole world of data. Every minute now an additional 10,000 devices are connected to the Internet. Medical tools, Bitcoin mines, airplane diagnostic systems – and of course wired citizens, smart-phones and laptops and tablets. This ease of connection is an implicit part of a Seventh Sense worldview. Anyone can connect. It's as fundamental as Luther's "Let anyone can speak to God." Or Kant's "Dare to know." When someone says "Why would anyone want to share photos with the world?" or "Why would you ever hand your DNA over?" they are missing the point that many objects now are only complete or useful once they're connected. When we say "connection changes the nature of an object" we're nodding towards the idea that constant connection is almost a kind of *right* for devices and programs and people. Anyhow, it is certainly a kind of yearning.

When we described network power as stretched between distribution and concentration, we should understand too that it is this design of Baran's that

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permits the easy spread and accumulation of links.Terror cells or social networks or financial markets all lay out in this fashion. Wide-open, convenience-making links are expanding, and they serve as a kind of global nervous system, more sensitive with each passing generation. These lines of connection run two ways, of course: Networks permit any of us to connect to nearly anywhere, and to unimaginable technological power. But, at the same time, the world connects back to us. Wired jihadis and currencies and bio bits – they're all tied in with us too. So yes: We're murdering the exotic with our data connections and machines and discount plane flights. Should we be surprised when, from time to time now, the exotic shows up and murders us right back?

We've seen, now, the way in which that pulling connection between center and periphery – that tension of our network – pulls apart old structures. And this is the first, urgent Seventh Sense understanding: Connection changes the nature of an object by placing it on this tense mesh. Connect a patient, a doctor, a flying machine, a currency – each is twisted and changed as a result. Some become great. Others snap, never to be rebuilt. Some adjust, painfully. The pulling network action accounts for our greatest new fortunes but also the tumbling of old ideas and institutions. This is why our age is so uneasy. This is also part of the picture of network power we have to keep in mind, the image of a stretched skein plucking apart old structures. Baran's fishnet grows, it locks everything it touches into a new structure, one that resists the "arrest the usual suspects" sort of interruption. We've said: Connection changes the nature of an object. To be connected to a Baran-style system instead of a brush-cut 1950's AT&T system makes a difference.

The connected devices themselves are constantly improving. Back in Baran's day, dozens of scientists counted themselves lucky to share a single computer. A few decades later, the PC revolution gave everyone their own machine. And now, of course, we each have many computers in our lives: phones, wired TVs, computers. Because of connection, we have access to thousands of such devices in data centers.[107] We can touch them in an instant, a fusion of software and hardware and connection that we are starting to know lean on as "everyware." This now commonplace magic was formalized back in 1965 by Gordon Moore, one of the founding engineers at Intel, who noticed the rather amazing fact that since the introduction of integrated chips in 1959, the number of transistors on each tiny chip had been doubling every two years.[108] It seemed hard to imagine this pace could endure, but then it did and does, something known as Moore's Law. Back in 1997 Andy Grove, who followed Moore as CEO of Intel, the chip giant, was named TIME's Man of the Year. I wrote that story and I remember Grove telling me, in a confessional spirit: "I never stopped thinking about the business. I worked

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[107] **And now, of course:** Richard Harper, Tom Rodden, Yvonne Rogers and Abigail Sellen Eds. *Being Human: Human-Computer Interaction in the year 2020,* (Redmond: Microsoft Research Publication 2008)

[108] **This now commonplace magic:** Chris Mack, "The Multiple Lives of Moore's Law: Why Gordon Moore's grand prediction has endured for 50 years", *IEEE Spectrum* (March 30, 2015), accessible online.

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constantly. But when Gordon Moore left the office, he left the work. Mostly he'd go fishing." Moore had the certain confidence of a man who had spotted one of the fundamental laws of our age, the compression of computing power and cost. He had the "Let's go fish" air of a man who had seen the inevitable. Grove, who as CEO had to match the wild speed Moore's Law suggested, had the total unease of a man aware of just how fast a pace the inevitable was setting. Competition was everywhere. One mistake sustained for six months could kill the entire, multi-billion dollar business. It had happened to other firms. Often. Grove's motto was best captured in the title of one of his books. *Only The Paranoid Survive.* Each man was right in his way. Moore's law makes ever cheaper and more functional devices spread. But Grove's famous anxiety was honestly earned too: So much speed. So much connection. Paranoia does seem the best reaction.

You have to wonder what that eye-rolling AT&T senior telecommunications engineer who so mindlessly lectured Baran would have made of this new world. The old New York City temple of phone switches where they met in 1961 has been remade into a luxury condominium now. The company's impregnable billions of dollars of long distance revenue were eroded and then basically destroyed by free packet-switched services running along the Internet. *Son, let me tell you how a phone works.* What must Baran have really thought? Massive, widespread connection changed everything. Including how a phone works. Baran eventually left RAND. He founded several of the most important (and lucrative) companies of the early Internet. Years later he understood with more precision what exactly had happened: The real risk to those vulnerable AT&T systems wasn't Russian missiles. It was an information bomb of sorts, a concatenating desire for constant connection that exploded many old tools of control. Yes, it took out the old structures. But, because of the very way it was architected, for survivability, it had a remarkable feature that even Baran had not quite expected: It enabled each of us to create too.

3.

We're surrounded by so many networks now where relations and ties of all sorts produce a constant, hard-to-predict, "I never thought of that before," dynamism. Of course you have to pity those AT&T wizards a bit. *Let me tell you how a stock market works.* Or *let me tell you how a biologist works.* None of these have quite the same answer as they would have two unconnected decades ago. Economies, ecosystems or our politics or immune systems are charged with this energy of expanding complexity. Innocuous looking devices or people take on peculiar, sometimes dangerous aspects when connectedLinked networks of money or people or bugs tumble into wildness over and over, in ways we can't quite anticipate or explain.. "There are systems of crucial interest that have so far defied accurate simulation," the scientist John Holland observed in a famous paper that helped establish the discipline of "Chaos Science". [110] Holland spent years considering these puzzling, hard-to-model systems and spotted at least one regularity: Whether it was webs of

[110] **"There are systems":** John Holland, "Complex Adaptive Systems", *Holland, John, Daedalus*; Winter 1992; 121, 1, p. ; Research Library pg. 17

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finance like the futures exchange or immunological networks or our own brains, highly-connected systems shared what Holland labeled an "evolving structure" – they never stayed the same. They seemed to shift, with an easy plasticity, in response to internal pressures or external changes. In the process, they took on new forms. In many cases, they became better, stronger, more adaptively fit. It wasn't simply that the unexpected appeared, it was that the systems were evolving. We talked earlier about how political and economic ideas like serfdom or divine right fade into history as new forms – a congress, a stock market – are born to replace old ones. Holland thought the world filled with such evolutions, no different than species adjusting (or not) to a hotter climate or some fast new predator. He called the networks that produce these sorts of innovations "Complex Adaptive Systems".

When Holland chose the word "complex" he was making an important distinction. C*omplicated* mechanisms can be designed, predicted and controlled. Jet engines, artificial hearts or your calculator are complicated in this sense. They may contain billions of interacting parts, but they can be laid out and repeatedly, predictably made and used. They don't change. *Complex* systems, by contrast, can't be so precisely engineered or guessed at with much real certainty. They are hard to fully control. Human immunology is complex, in this sense. The World Wide Web is complex. A rainforest is complex: It is made up of uncountable buzzing, connecting bugs and birds and trees.[112] Order, to the extent it exists in the Amazon basin, emerges moment-by-moment from countless, constant interactions. The uneven symphonic sound of *L'heure Blue*, that romantic stopping point at dawn when the night retreats bug by bug and you can hear the forest wakeing bird by bird is the sound of complexity engaging in a never-the-same-twice phase transition.

The word "complex" comes to us from the Latin world *plex*, which nods at the interwoven, layered nature of any object[113]. What looks simple – a flower, our skin, the value of a dollar bill – is in fact *plexus,* loaded with twitches and influences. In that stitching of new links, countless interactions sort of inevitably hiccup into unexpected states and ideas and objects: financial panics or disease epidemics, banks and revolutions. Traffic during rush hour is a complex system like this – the atomic, moving bits of the system, of cars and pedestrians and bicycles together determine the ultimate state of the system: jammed or no. Los Angles at 5 p.m. on a Friday isn't designed centrally; it's honking and confused and aggravated rush hour logic appears – slightly different every day – from interaction. . As any system fills out with more actors and more types of connection, it becomes more complex and harder to predict. Complicated systems don't produce uncertainty in this same way; appealingly, they just run. Strapping a complicated object to the wing of a passenger plane makes sense, even if it takes decades of refinement to real reliability. A complex object? Not so wise.

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[112] **A rainforest:** Simon A. Levin, *Fragile Dominion: Complexity and the Commons*, (Reading, Mass.: Perseus Books, 1999)
[113] **The word:** Carlos Gershenson, "The Implications of Interactions for Science and Philosophy", arXiv:1105.2827v1, May 13, 2011

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Most of our networked world is a pool of buzzing, fresh interaction – not only hard to predict, but constantly on the sharp edge of making something new. Scientists like Holland call this "emergence", the way that bottom-up interactions – between cells or chips or traders or cars – create a larger order, often something that was not there before. The fundamental uncertainty of this process means it's often excluded from the way we look at the world. It's easier to assume a predictable, linear, complicated logic is at work. An "a leads to b and c" sort of logic: revolution leads to freedom which leads to democracy, for instance. That such predictions are often wrong – and that we're so often surprised by events in economics or politics – is a reminder that compicated systems are often complex, lit with mechanisms that almost gleefully snap off the fingers of meddling, confident planners. Too often we look at some puzzle – Iraq, income inequality – and think it is merely "complicated." We should know better. "Macro models failed to predict the crisis and seemed incapable of explaining what was happening to the economy in a convincing manner," the European Central Banker Jean-Claude Trichet lamented in the aftermath of 2008s cascading, complex financial crises, when markets and officials discovered that the problem with their system was not merely that it was "too big to fail" but also "too connected to manage" – and possibly "too complex to comprehend." Trichet sounded a little shell-shocked. "As a policy maker during the crisis I found the available models of little help. In fact, I would go further: In the face of the crisis, we felt abandoned by the conventional tools."[114]

This sense of abandonment comes from an attempt to use a mechanical way of thinking in age of complexity.[115] When you think an air force can simply pound an insurgency to sand or that some old reliable business should survive because it rests upon billions of dollars of infrastructure, you miss the energetic creative and destructive power of complex connection. It's not fully right to say: Networks always beat hierarchies, because of course networks have layers and structures of their own. But it's not wrong to consider that complex systems tear easily at stiff, competitive and overly-ordered ones, even the most carefully engineered complicated ones. Think of the mafnicently ornamented dictatorships pushed to collapse in recent years. Or, can you really look at the firm where you work and feel a sense of living, flexible adaption in the face of connection?

In our age, the pressure of emerging change is particularly heightened by the very nature of the digital devices themselves. The connected and algorithmic tools all around us now lend themselves to the easy and cooperative interaction. In fact, that

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[114] **Macro models:** Jean-Claude Trichet "Reflections on the nature of monetary policy non-standard measures and finance theory", Speech at ECB Central Banking Conference, Frankfurt, 18 November 2010

[115] **This sense of abandonment:** Michele Catanzaro and Mark Buchanan, "Network Opportunity." Nature Physics Vol 9, March 2013 p. 121-122 or Cesar A. Hidalgo, "Disconnected! The parallel streams of network literature in the natural and social sciences", (2015) arXiv:1511.03981

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ability to plug into and share with one another is the essence of their power.[116] Your data-enabled phone or camera or database or stock-trading program is easy and powerful to use because so much of the world's data – your Sigur Ros songs, your home movies, your skin temprature – can be reduced to ones and zeros, freed for fast transmission, endless storage and quick analysis.[117] A machine that can blithely handle digital inputs of one sort, whether it is trading orders or music files, has the capacity, in theory, to work with any data. Such adjustability is what forces app companies, gaming businesses, or phone companies onto an exhausting treadmill of constant upgrade. Interaction between the pieces of a system, every bit as much as design or mechanical manipulation, is the reason why change happens.[118] Entrepreneurs mix GPS and phones to create a new business of tracking everything from our cars to our children. Algorithmic trading programs engineer completely virtual portfolios – you can buy the S&P Index but as your manager to strip out any performance from tobacco and gun companies, for instance. Or: Terrorists meet online and swap data. Some of the most astonishing systems of our new world have grown up this way. Google's back-end search systems, for instance, were not "top-down" designed so much as they emerged, competed and evolved to deliver once-unimaginable loads of data. No one at Google is "The Architect." There is no central approval for technology systems. Complexity and unpredictability and emergence are regarded as the best way to grow. [119]

Long before the idea of a smart phone or 3D goggles, the British mathematician Alan Turing anticipated their arrival when he dreamed of what he called a "universal device"[120]: A notional box that, starting from the ones and zeros of digitized data, could be constructed to do anything. Since everything can ultimately be reduced to a binary encoding, nearly any sort of data can be shared, studied, combined or remixed. This easy programmability of so many objects around us now is why our world now is more complex than, say, a world of interconnected rail cars or ships might have been. Rail cars and ships don't change much, and certainly not instantly. In the digital world, however, many of the most essential objects and nodes can be flipped around like digital Lego, connected in different ways. And because they are increasingly "always on", they are also always changing and adjusting to what happens elsewhere on the network. This is true for some new operating system dumped onto your phone that makes it more intelligent as it is for an algorithm placed into a commodity market that causes unexpected chaos.

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[116] **In fact;** Paul Phister, "Cyberspace: The Ultimate Complex Adaptive System", *The International C2 Journal*, Vol 4, No. 2 2010-2011
[117] **Your data-enabled phone:** Gershenson, p4
[118] **Interaction between:** Paul Dourish, *Where the Action Is: The Foundations of Embodied Interaction*, (Cambridge, Mass.: MIT Press, 2001) 4
[119] **Complexity and unpredictability:** Randy Shoup speech "Service architectures at scale: Lessons from Google and Ebay", on *infoq.com,* July 14, 2015
[120] **Long before:** S. B. Cooper and J. Van Leeuwen, *Alan Turing: His Work and Impact.* (Waltham, MA: Elsevier, 2013)

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We said earlier that the Seventh Sense is tuned to spot the unsettling ripples that come from this fact: Connection changes the nature of an object. Doctors and voters and machines now sit, we've seen, on that stretched skin that links central and distributed power. This changes the nature of these nodes. A connected doctor is different than an unconnected one. Well, here is another insight we should know: The simple, benign looking act of connection makes *complicated* objects into *complex* ones. The moment an object clicks into a network, it is subject to all the wildness of complexity that may lie there: cascades, whipping external forces, unexpected internal faults revealed only under the pressure of connection. Cargo packages. Shares of stock. Linked to a whole system of constant evolution, even the most innocent looking point is subject to distant twitches, infections or liberating innovations. They become, as a result, complex. That old lemma of parenting – *You're only as happy as your least happy child* – can be laid upon our devices. You're as complex as the most complex device you're linked to.

Linkage to a complex network is like the difference between a boxed and a plugged-in, turned-on blender: one is dormant, one is spinning with a wild and dangerous energy. Connection can change the essence of a whole system if it is designed in certain ways, as complex forces work on what looks stable. It can, for instance, take once pliant, cooperative systems, people and tools and make them competitive.[121] Jack an aspiring college graduate into a world where complex systems rip at his finances, his data and his beliefs and you can end up with a crack in his values, a move from aspiring middle class member to who knows what: nationalist, inventor, communist, bitcoin banker. "I had no idea my doctor/aircraft carrier/phone/hedge fund could do that!" is our common sort of surprise. Contagions, avalanches, tipping points, feedback loops, infections – connectivity exposes us all to these forces. "Everthing depends on everything else," the mathemarical theorist Eugene Stanley has observed of highly connected systems[122]. On networks that hover apart, isolated from each other, small failures in one spot trigger limited damage[123]. But on highly connected systems, tiny failures tumble around, breaking things.

Networks turn everything they touch from complicated to complex. Once a mesh of connection is really flowing, it *creates*. Networks cause things to happen, in this sense. New businesses, new fortunes, new ideas. Castell's social protests emerged in this way, appearing like condensate in the cooling jar of the post-2008 economic crisis and then spreading, improving, evolving in scale and ambition faster than most traditional politicians could track. Researchers following in his wake studied the Spanish 15M demonstrations of 2011 and found it was composed largely of new,

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[121] **It can, for instance:** Martin Nowak, *Evolutionary Dynamics: Exploring the Equations of Life* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2006)

[122] **"Everything depends on":**"Treading Softly in a Connected World", *Quanta Magazine*, Mar 18, 2013 by Natalie Wolchover

[123] **On networks:** Sergey V. Buldyrev, et al. "Catastrophic cascade of failures in interdependent networks", *Nature* 464, 1025-1028 (15 April 2010)

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young organizations that blossomed from connectivity. Other Spanish protest groups, such as labor, anti-abortion activists or regional separatists, relied on decades-old organizations. 15M – like Occupy Wall Street or pieces of the Arab Spring or Al-Qaeda – relied on groups fresh-born into a hollow, worried political vacuum. A survey of 15M members looked like a review of new Internet companies: Young, wired, vividly unplugged from history and impossible to understand without their constant connection. They were built by leaching people away from traditional parties, the appeal was both the potential of the new and the chance to get away from the rotting smell of old politics, surely an instinct many of us feel now.[124] This is one reason it's wrong to look at the world and consider it filled merely with random events, with Black Swans. In fact, regularities and patterns appear many places on the mesh of connection that surrounds us. They can be searched and mapped and studied with the tools of data science, but of course they can also be felt. They may surprise you if you don't know how to look for them. But the regularities are there. Human history is not only made of earthquakes.

4.

Even if it can't be predicted, complexity in any system, whether it is an Indonesian coral reef or a Russian computer network, can at least be measured. How many points are connected? How quickly and deeply do they interact? It is the multiplication of connection that produces a complex landscape. There won't be much emergence in a desert, for instance. You alone, unconnected: one point. You online: Several billion. The essential benefit of many points connected in real time is that they are an extremely fast feedback loop. This fine-tuning of action-reaction forces them to adapt and adjust quickly, as if they were runners with a coach constantly at their side. Compare the feedback loop of a marching Cairo street protest to, say, the feedback loop of the old men around Mubarak. One was capable of grabbing a new techniques and ideas in real time. The other stuck in a molasses haze of old, sweet, slowing ideas. Faced with rapid change, a fast-adapting system will nearly always perform a slow one.

When we say that networks can and will devour hierarchies this is one reason. All the businesses that have been devoured by technology firms in recent years failed to adjust fast enough. Network systems are more complex, their "org charts" are an unnerving mess as a result of their speed. But under the mess is efficiency, growth, innovation. Such systems can tip into failure easily, of course. But they also can adjust their fitness before it is too late. The design of such systems becomes, then, a matter of decisive power. And most of our essential systems now are designed for a slower age. Refiguring the global financial system for an age of instant linkage was one of the crucial conceptual puzzles of the 2008 crisis. Have we done that yet for our taxes? Our voting? Our biological security? The chaos of those few weeks in the markets in 2008 revealed new geographies of finance and speed, a mechanism that had been wired to produce fortune for a few and to inspire, as a result, regulatory

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[124] **They were built:** See Bennett and Segerberg, "The Logic of Connective Action," 759

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desperation in men like Trichet. I'm pretty sure we'll see versions of this same sort of crisis in many other areas.

More complexity produces more interaction, as you would expect. More pieces of a system rushing and touching and changing each other in a perpetual and accelerating dance. That process pushes, in turn, still more emergence. The easier it is to combine things the more creativity is tickled into life.[125] You hear an amazing mashup of the Bee Gees and Michael Jackson; you download the tools to make your own. In every aspect of the connected world, growing complexity breeds emergence. This is true in finance, in terrorism, in bio-development. Some intellectuals and businessmen worry that we've arrived at the "End of Innovation" now. But this is unlikely. Connected systems, almost as if they have a mind of their own, create and surprise. The complex meshes of connection growing around us now, in a sense, are like a rainforest. They hold and breed and support a range of species native to the connected climate – things that couldn't survive elsewhere, that were unimaginable in an age without connection. Smart medical prediction devices. Apps on your phone. Autonomous military robots. Self-driving cars. And we know that, lingering ahead of us now, as well, are a series of technological leaps that will breed still faster interaction and creation: Quantum computing, for instance, may yet push computer to speeds to 100 billion times faster than what is achievable with older technology. Self-taught, reasoning artificial intelltigence will spot patterns invisible to human minds, they will offer everythying from computer-assisted explanation to whole new theories of physics and math[126]. And autonomous robotic systems will press into realms where our soft human frame cannot survive – deep underwater biological cracks, for instance, or hot molecular material mixes. More data will flow back at us from each of these pipes.[127] And as it arrives it will give us an even more granular sense of our links to the world – and how they might be manipulated for still more invention. "Many biological and social theories were impossible to test because of lack of data," one team of cyber-systems researchers noted. "Now we have not only the data, but the methods to analyze it." The result, they add with a fast breath of relief that could be laid upon many sciences or theories we've squeezed from limited data: "We are recovering from extreme reductionism in science."[128]

When we say the network "wants" something, it's a useful anthropomorphism: A billion connected users want to be linked, so Facebook emerges. A trillon web pages demand to be searched, so Google appears. Making such ties produces, first, that

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[125] **The easier it is to combine things:** See Eric Schmidt, "Conversation with Eric Schmidt hosted by Danny Sullivan" at *Search Engine Strategies Conference*, August 9, 2006.p.1-2 2013 Nathaniel W. Husted

[126] **Self-taught:** Michael Nielsen, "The Rise of Computer-Aided Explanation", *Quanta Magazine*, June 23 2015

[127] **More data:** Caitríona H. Heinl, "Artificial (Intelligence) Agents and Active Cyber Defence: Policy Implications" in *6th International Conference on Cyber Conflict*, P.Brangetto, M.Maybaum, J.Stinissen (Eds.) 2014 p, 60

[128] **"We are recovering":**Gershonesen, et al. p 2-4

HOUSE_OVERSIGHT_018322

merciless clawing action we saw at the start of this chapter, which explains the unique power (and value) of the essential firms of our age. Once that's done, however, once the mesh of distribution and connection is in place and growing, then emergence begins. The completely new appears. This is why the most successful investors or leaders of our era have a near pathological desire to push and break old systems. They do this because they have a faith, an instinct, that if they shove hard enough to snap an equilibrium, then something else will emerge. They are right. They have all the laws of physics and history behind them. In commerce, the destruction of old business models breeds new ones. In terrorism, brutal violence is more useful than bottled anger; it's a tool to speed the viral emergence of chaos (and, some hope, a new politics). What emerges from change? Fresh structures, gates that connect us and bind us .If the Seventh Sense features a nearly wild desire to smash old equilibriums it is because of the total confidence that something else will emerge.

Later in life, turning to a philosophical view, Paul Baran said that his webs, distributing themselves around the world with such smooth and relentless energy, were reflecting a kind of inevitable progress, a propensity of linked things to keep linking. Even if he did not see and name our world exactly, he likely could have predicted it. "Every object in the universe," he once wrote, "is connected (by gravity/radiation vectors) to every other object." We know now just how much truth is buried in Baran's almost philosophical words. Objects and people and places now feed data constantly into the network and to each other. This presses them to evolve, to change, to connect again. It is simply a matter of time before those connections bubble up into our real lives to change our economy, our security and our leaders. That kludgey, parenthetically weird phrase of Baran's – wired together "(by gravity/radiation vectors)" – tells us a lot. The spread of links is like gravity now. It is like radiation. Irresistible. All–penetrating and revealing the deep human truth in Baran's Holocaust-bred instincts: To survive and to connect are really the same thing.

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Chapter Six:
Warez Dudes

In which the Seventh Sense reveals a secret, dangerous architecture of connection.

1.

It was my second overseas trip. I blinked my eyes as dawn broke over Europe and seeped inside the airplane. We began our descent into Amsterdam. I changed the tapes inside my Walkman. Something a bit more upbeat seemed right. Peter Gabriel. It was 1993. August.

Earlier that spring I'd heard about a plan for a giant summer computer hacking conference that would be held outside Amsterdam. "Hacking at the End of the Universe" it was to be called. I can't recall now where I had picked up news of the gathering, but it appealed to me immediately. I'd just moved to New York and had been dipping into the city's hacking scene. The "scene" was less a boiling, hip hive of action than a group of computer amateurs, curious hangers on and early IT system engineers who would gather in the grubby basement of the Citicorp Building on 53rd Street and Lexington some days after work to discuss various techniques for tricking digital systems of all types. Hacking didn't have a deeply nefarious connotation in those days; it was seen by most of us as a natural, even a healthy extension of an interest in computers. The Internet had about 10 million users at the time. The idea that, two decades later, it would connect more than three billion people or that it would put millions of dollars into the pockets of some of the people gathering in that basement was honestly unthinkable.

The bible of the group was a thin, irregularly stapled, photocopied magazine published out on Long Island by a guy who used the nom-de-hack of Emmanuel Goldstein, the hero of George Orwell's novel *1984*. The magazine was called "2600: The Hacker Quarterly" and it offered a compilation of ideas about how to fool around with systems of all sorts, from Atari gaming consoles to door locks. The name "2600" came from one of the earliest hacks any of us at those little meetings knew about, a famous 1970's trick that involved using an audio tone at exactly 2600 hertz (about the pitch of a truck's backup warning) to force the backbone routing switches of the AT&T phone system to give up access to an "operator mode" which would let the phone hacker – they were called phreakers – make any sort of call for free. The hack didn't really offer much practical pleasure except a chance to make free phone calls anywhere in the world. Once you'd mastered the trick you pretty quickly discovered there wasn't really anyone in Bombay you wanted to call anyhow.

The real appeal, the deeper joy of the game, was different: It was the sense of secret, ecstatic access. A feeling of control in the largest network on earth. At one point a phreaker named John Draper figured out that the little plastic whistles stuffed as children's toys inside boxes of sugary Cap'n Crunch cereal produced the 2600 Hz tone nearly perfectly. The hack made him a legend. He became known, inevitably, as

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Cap'n Crunch. An article about Draper in Esquire in 1972 had, for instance, inspired two teenagers named Steve Jobs and Steve Wozniak to start their first company to build and sell little phreaking boxes. Woz later recalled nervously meeting the Cap'n one day in California. He was a strange, slightly smelly, and extremely intense nomadic engineer. "I do it for one reason and one reason only," the Cap'n huffed to the writer of that Esquire article, who was a bit baffled why a grown man would find whistling into phones so appealing. "I'm learning about a system. The phone company is a System. A computer is a System. Do you understand? If I do what I do, it is only to explore a System. Computers. Systems. That's my bag," he said. "The phone company is nothing but a computer."[130]

I'd heard about the Amsterdam conference in the 2600 hacking circles, somewhere between the debates about circuit boards and which company was best for the relatively new service of email. The gathering was organized by group of Dutch computer geeks who published their own magazine, Hack-Tic. I sent an email to the founders. One of them, a man with the improbably exotic name Rop Gonggrijp, sent back an irresistible reply. "On August 4th, 5th and 6th we're organizing a three-day summer congress for hackers, phone phreaks, programmers, computer haters, data travelers, electro-wizards, networkers, hardware freaks, techno-anarchists, communications junkies, cyberpunks, system managers, stupid users, paranoid androids, Unix gurus, whizz kids, warez dudes, law enforcement officers (appropriate undercover dress required), guerilla heating engineers and other assorted bald, long-haired and/or unshaven scum," the invitation began. Data travelers? Electro-wizards? *Warez dudes?* I had to go. "Also included," the note continued, "are inspiration, transpiration, a shortage of showers (but a lake to swim in), good weather (guaranteed by god), campfires and plenty of wide open space and fresh air."

In those early days of the Internet, there was only the barest tickle of a commercial instinct at work. If anything, most of the people at places like 2600 or Hack-Tic were profoundly *anti*-commercial. They were hobbyists, as entranced by role-playing games like Dungeons and Dragons as by their clapped-together, often unreliable digital machines. It was no accident that firms like Apple had emerged from groups with names like The Homebrew Computer Club, names that suggested a rooty, self-defining hippy ethos. Everyone you met in that world fell pretty squarely into one of those weird-by-weirder categories Rop Gonggrijp had listed in his email. Their relaxed, nerdish temperament was reflected in the design of the Internet itself – open, generous, easy to manipulate, emotional at times in debates over protocols, freedom loving. The net design was, as well, a reaction against the systems that troubled all of us most. Like AT&T, say, which was closed, stingy, and tough (therefore enjoyable) to manipulate.

Jon Postel, the American engineering and programming genius who had helped write some of the essential original protocols of the Internet, summed up this point

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[130] "**The phone company**": *Secrets of the Little Blue Box*, Ron Rosenbaum, *Esquire Magazine* (October 1971)

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of view in 1980 as an idea that he thought should characterize the architecture of the Internet. "Be conservative in what you do, be liberal in what you accept."[131] Postel's idea became known as the "robustness principle" and it was meant to determine how switches and nodes on the net should behave. They should, Postel felt, be good at handling lots of different types of communications – they should be "robust" – but they should also be careful not to spread too much non-standard garbage out into the networks. This was an essential advance over the old ARPANET Paul Baran had helped inspire. That system worked wonderfully by itself, in isolation, as it sent humming nuclear launch codes zipping around, but it struggled when it needed to interoperate with other networks. It wasn't *generous*. The Internet that Postel and others were designing was intended to be much, much larger than ARPANET, so an ability to speak to others and be understood was essential. It was like planning an airport: You wanted to be able to land lots of different types of planes. But if someone started throw golf balls, jello and gasoline on the runway you'd have a problem. It would slow down the system for everyone. Postel was telling engineers: Be careful what you do and what you put onto the system. Take responsibility on your end. Build something that's generous in what it will handle from others.

Be liberal in what you accept. From the first moments on the grass in Lelystad, the small town just outside Amsterdam where the Hacking At the End of the Universe conference gathered, the mad diversity that this idea suggested was an astonishing, delightful fact. As broad and strange a group as Rop's email had hinted might come was in fact there, under the trees, happily running cables from tent to RV, powering their connected routers with gas-fired generators, marveling at data transmission speeds that today, your phone might manage from an underground garage with the barest connectivity. The two-day outdoor festival was an example of human interoperability. Postel's Principle brought to life. Few of us knew most of the group. Nearly everyone was, well, not the most social. But there was instant connection, discussion, board gaming, and a degree of frank interoperating I'd never quite seen before. It was a harbinger of two decades of digital cross connection yet to come.

Of all the people at the Hacktic conference, however, among the system managers and Unix gurus and heating system guerillas (hey, everyone should have a hobby), it was the Warez Dudes who were of the most interest – both to the participants in the conference and to the white vans cruising nearby, allegedly filled with curious Dutch police. The nickname came from the "wares" they had access to, which were largely cracked open versions of commercial software that could be shared and distributed and manipulated on private bulletin board systems. The Warez Dudes were pirates. And like most pirates they had an early sense of the very edges of the law and of the smell of money drifting along new and essential routes. If hacker culture was, in those early days, a frontier society – and it was, even down to the sad shortage of single women – these were the people living on the very furthest edges of the

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[131] **"Be conservative":** Jon Postel "DOD Standard Transmission Control Protocol" (1980) RFC 761, IED 129

HOUSE_OVERSIGHT_018326

wilderness. They fused often fantastic technical skill with the hacker's instinct for control – admixed with a criminal's hunger for profit.

The first computer viruses and worms were part of what they sold. These had appeared in the 1980s, mostly as curious intellectual exercises. There was a desire among computer engineers, a scientific sort of craving, to see what might be done on the systems they had built. It was not unlike those whistling telephone tones that had so fascinated Cap'n Crunch and Steve Jobs and Woz. Could you make the big room-sized machines twitch in ways no one had imagined? Absolute, undeniable thrill ran through this sort of activity. I can still recall returning to my office one day in the mid-1990s with a Ziploc-bag that contained a floppy disk marked "Viruses" which I used to promptly break my computer so completely it had to be reformatted. Twice. Such adventures, however, were also producing some of the best programmers of my generation. Managing tricks inside those early systems required then, as it does now, a profound intimacy with the code defining their electrical operations. (Computer programs are called "code"; people who write and test them are "coders".)

But the secret moves behind those early cracks and exploits were rarely secret for long. The informal culture of stapled together magazines like 2600 told you what you needed to know about this band: It was a group that liked to share, to brag, to indulge each other in stories about systems they had cracked open, to play with a bit of light paranoia about who might be watching you and who might care. *Computers. Systems. That's my bag.* You might as well spread some of the adrenaline rush of your adventure with others. The sense of a "shared alternate reality" most of us had first experienced in games like Dungeons and Dragons or the pages of *Dune* fit nicely into the digital world. This open, friendly temperament animated most of the people spread across that Amsterdam field, jumping into the lake instead of showers, talking math, buzzing at each other like a fridge. We had the programmer's raw fascination about what a machine might be made to do, even in ways that were deeply unintended. We were harmless. The Warez Dudes, however, were different. Their fascination was a greedy, nasty obsession.

2.

The business of playing with and inside of connected computer systems was, even as we sat on that Amsterdam summer lawn, shifting. It was slipping from earnest hobbyists and system managers to something a bit more sinister. We had just begun using a new phrase, "malware," to describe the malicious software that took advantage of Postel's "be liberal" instinct in order to devastate connected systems that were filled with too many trusting, unlocked doors. It wasn't merely the relaxed system design of the early 'net or computer systems that made exploitation easy. It was also that the networks and machines themselves were slipping with a kind of frictionless momentum towards increasing complexity. This meant, invariably, that popular programs often shipped to users with mistakes or programming oversights that invited hijack. The year before the Amsterdam conference, for instance, a cruel program known as "Michelangelo", which would overwrite the data on hard disk

HOUSE_OVERSIGHT_018327

drives with meaningless ones and zeros, spread onto millions of computers. Once a machine was infected the overwrite command would activate every year on March 6th – a twisted celebration of the birthday of the great Renaissance artist. But because the program operated at the BIOS level – the basic input/output heart of those early machines – it was nearly impossible to eradicate. Computer security companies, soon to be known as computer "insecurity" companies because they were (and are) constantly *behinder*, responded with the following rather unconvincing advice: Turn your machine off on March 5th. Turn it back on March 7th.[132]

Even the biggest, most powerful companies were shipping programs packed with potential problems, cracks that were often baked into the design of a system, invisible even to their makers. A couple of years after the Hac-Tic conference, for example, a popular word processing program included a feature that could permit a surreptitious hacker to make a computer to execute all sorts of nefarious commands once a user had opened a harmless-looking document. This was sort of like shipping hundreds of millions of door locks that would pop easily open for criminals who knew to ask. Did you use a word processor in the 1990s? Likely your machine faced this danger: You'd open a note from a friend or a memo from your boss and you'd then instantly, unstoppably forfeit control of your computer, even if you didn't know or see or feel the impact for years. That problem was fixed – companies learned to issue what became known as "patches" to plug the inadvertent leaks in their systems – but that such a danger existed and could be profitably used was a sign of a ruthless evolution. There were billions of dollars, even then, at stake.

As technology advanced, so did the malware, which was adapting and evolving to new opportunities. Think of how hugely different our experience of machines is today as opposed to just a few years ago. Hacking has matured as fast – maybe faster. Early attacks were aimed at machines that had, essentially, no defenses. Programs like "Michelangelo" were designed to act much like the viruses of a common cold or food poisoning. They sickened and then controlled individual machines, devices with no immune systems. Hackers faced a challenge in finding ways to sneak these digital diseases onto computers, but of course they finally found holes. They hid viruses on floppy disks or inside documents or spread-sheets that appeared otherwise safe. Intelligence agencies became infamous for passing out "free disks" at conferences or littering defense contractor parking lots with infected USB sticks, waiting for some unsuspecting employee to pop them into a computer and invisibly activate some bit of carefully installed, hidden malware. Or, in a clever case of "know your target", sneaking malware into the code of some particularly violent video game, sure to be played by an adrenaline-addled system administrator in a fit of afterhours boredom.

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[132] **Turn it back on:** For a discussion of Michaelangelo see entry for *virus* in *Encyclopedia of Computer Science* 4th Ed. (Chichester, UK: John Wiley and Sons Ltd.), 1839-1841,

HOUSE_OVERSIGHT_018328

Like so much about our world, rapid, widespread connectivity of the last decade has sharpened these dangers. Connection changes the nature of an object; it can make it much more vulnerable. It can make the harmless dangerous. Generally, once a machine was jacked into a network, all sorts of fresh possibilities for mischief flowed right along with the data. The move from a lone PC on your desk to a really connected machine represented the difference between living in a small town and walking the streets of New York City. In one place you'd have few encounters, mostly familiar and harmless. In the other, you'd face an endless stream of the strange, the new and the unexpected. This is what life is like every day for your phone or your bank or military – a world of ceaseless assault, often from never-seen weapons. Robert Morris Sr., a cryptographic and security genius who towered over NSA code breaking programs for decades in the last century, compressed his lifetime of experience cracking machines into "Three Golden Rules of Computer Security":[133]

Rule One: Do not own a computer.
Rule Two: Do not power it on.
Rule Three: Do not use it.

He could have added a Fourth Rule: Do not connect it to anything.

Of course, as we look around today, we're furiously, enthusiastically violating all four of these rules pretty much every moment. In fact, our whole economic and social dreamscape depends on breaking them. We want the best device, we want it always on, we want to use it all the time. Utility and connection are almost synonyms now. That the Warez Dudes, or their 21st century brethren, are hungry to exploit these systems offers us a chance to understand even more deeply just how power works in this network age. Why are they so desperate to get inside? How exactly do they do it? We've seen so far two important properties of life in the network age. First, the way in which network power exists on a sort of new surface of connected devices and cores, tied by strong data links that are slowly ripping power out of old institutions. Think of my Dad's role as a doctor or the sharing economy shocks delivered by connected cars and bedrooms and labor, for instance. Second, we've seen how networks are complex adaptive systems, where emergent features –billion dollar businesses, terror organizations, drones – appear with an easy, destructive frequency that is wiping out old leaders and replacing them with new ones that better fit the demands of a connected age. Looking at the network world and seeing that mesh, seeing the emergence of fit new species and the impending extinction of others is the initial, essential part of the Seventh Sense.

Lingering deep inside the systems themselves, there is another lesson, however. And, not surprisingly, it is most alive in the hackers. "Exploit engineers," a team led by researcher Sergei Bratus has argued, "show you the unintended limits of your

[133] Bob Morris cite to come

HOUSE_OVERSIGHT_018329

system's functionality."[134] Hackers, they mean, reveal the dangerous holes of our new world. The bad news is that the worst of them (and often the best of them skill wise) did this at times by swiping your data, your money and finally your peace of mind. Their fortunes and safety and curiosity – all of these are woven together in their hot hunger to touch and pull and break the roots of the network. In a world of expanding connection, they are both more powerful and more dangerous than ever.

3.

Networked systems of our age are confronted, constantly, with diverse, dangerous challenges, each informed by that Gordian paradox so familiar to us by now: The more connected we are, the greater the risks. And as bank balances, secret jet engine designs, and other priceless digital data are developed and then slipped safely away on connected machines, the rewards for cracking into the systems grow – far faster than the (near zero) costs of trying to break in. "It is increasingly obvious," security researchers F.X. Lindner and Sandro Gaycken have said, "that the state of the art in Computer Network Defense is over a decade behind its counterpart in Computer Network Offense. Even intelligence and military organizations, considered to be the best positioned to defend their own infrastructures, struggle to keep the constant onslaught of attackers with varying motives, skills and resources at bay."[135] The long list of failed US government security attempts express a strange digital logic: The more essential it is that an organization keep a secret, the less it seems able to do so. A *decade* behind? That is the gap between a flip phone and an iPhone. In the hyperspeed world of technology it is like confronting a laser weapon with a hoplite. The losing race slips easily enough into Donald Rumsfeld's *aheader-behinder* dynamic, the one that haunts the paradoxes of national power we face now. *Are we killing more terrorists than the madrassas are producing?* Rumsfeld wondered. We can ask: Are we plugging more machines with more layers, software and applications than we can protect? Are we making more bugs than we're patching? (Yes and yes.) "Attackers are not like natural catastrophes," Lindner and Gaycken write. "They can analyze their targets."

Bratus, a math genius who turned to computer science out of curiosity and now teaches at Dartmouth, has spent a fair amount of time trying to understand just what happens when a computer or a network is exploited by a hacker, or "pwned" in the funny idiom of Warez Dudes language. (The phrase means to take control, or to "own" a system. The spelling is an artifact of an overenthusiastic video-game death match gloat, in which one player killed another and in his rush to celebrate typed something along the lines of "I pwned you!" The mis-typing lives today: The highest award in hacking is known as The Pwnie.) Bratus calls the resulting, pwned device a

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[134] **"Exploit engineers":**Sergei Bratus, et al. "Chapter 13: 'Weird Machine' Patterns" in C. Blackwell and H. Zhu (eds.), Cyberpatterns, Springer International Publishing Switzerland 2014, p. 13

[135] **Even intelligence:** Felix "F.X" Lidner and Sandro Gaycken, "Back to Basics: Beyond Network Hygiene", in *Best Practices in Computer Network Defense: Incident Detection and Response*, M.E. Hathaway (Ed.) IOS Press, 2014

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"Weird Machine": Computers or sensors or network webs silently made to do what is not intended. Made *weird.* Hacking is, after all, a kind of perverse programming. It involves slipping inside a target machine, and then driving it to do things it wasn't intended to do, by giving it instructions its designers never knew it might receive.[136] The process of developing and using computer bugs, Bratus found, is not unlike the most sophisticated software research. Hacker follow careful patterns. The best of them really conceive of whole systems in the way the finest data architects might. They look for particular designs, weaponize their code with a delicate elegance and aim relentlessly at total control. A normal machine does what you tell it. A weird machine does what someone else commands it to do.

How is such a system born? Well, a potential software hole of the sort that produces a "Weird Machine" might be as simple as a failure to secure computer code after it is compiled – sort of like not locking the door on your house after you leave – or a programming oversight that means a machine can't handle unexpected inputs. Take the technique of "fuzzing", for example, a famously effective way to turn a normal machine into a weird one. The process involves confusing a digital security system by throwing unexpected data into normal, apparently safe-looking procedures like logging into a mail system or transferring money by wire. Think of all the "username" and "password" forms you see when you're on the Internet. In a fuzzing attack, instead of placing a legitimate user name or email address in a registration field, hackers might add some unexpected characters known to cause a system to cough up a confused response. If you type in, *joe@user.com!'* instead of *joe@user.com* as the machine expects, the *!'* at the end of the address can baffle and stall a mis-programmed device. In some cases, that hiccup opens a vulnerability. A proficient programmer can then order the dazed computer, for instance, to open a door to the root of the system. It's as if you could walk up to the teller at your local bank and shout "Xhsuhgnnsh!!" at her when she asks how you are doing – and in her confusion she lets you into the safe. You've made a weird machine of your bank.

System designers in later generations have become much more sophisticated in trying to avoid such problems, not least because they've so often fingered the embarrassing or costly aftermath of these kinds of holes in their own code. "You do not understand how your program *really* works until it has been exploited," Bratus has said, a sentiment that hints at the stomach-lurching moment many coders and their suddenly victimized users have now had.[137] *You don't understand yourself until you've been pwned.* The odds that the endless possible glitches can ever be completely patched is honestly zero. Hackers continue to use classic exploits like

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[136] **It involves:** Julian Bangert, Bratus et al. p2 "The Page-Fault Weird Machine: Lessons in Instruction-less Computing", Presented as part of the *7th USENIX Workshop on Offensive Technologies*, (Washington, D.C., 2013) available on www.usenix.org

[137] **"You do not really understand":** Rebecca Shapiro, Sergey Bratus, Sean W. Smith, "'Weird Machines' in ELF: A Spotlight on the Underappreciated Metadata" paper delivered *7th USENIX Workshop on Offensive Technologies*, (Washington, D.C., 2013) available on www.usenix.org

HOUSE_OVERSIGHT_018331

fuzzing, back-doors, or rootkits – and to develop new, more intricate ways to steal a machine's mind. This race for mastery is a sprint, one that heads ever deeper into the depths of a vulnerable system. The closer you are to the very core of a computer program or a network, the more control you have. Real mastery of the heart of a system would be like having a spy win the Presidency, turning the whole US government into a "Weird Machine". That prize of immediate, high-level and totally "trusted" access remains the Warez Dude gold standard. [138]

The most dangerous – and therefore the most alluringly valuable – of these sorts of attacks, are known as "zero-day" exploits. The danger they represent only becomes apparent at some awful instant, "Day Zero", when they are revealed to have been running wild inside some hapless network or machine. That first moment in the knowledge of the bug is like day zero in a cancer diagnosis, and it begins an immediate race to find and deliver a cure. Such completely unknown, secret vulnerabilities are fissures in the walls of computers that their manufacturers, system engineers, and security experts usually don't realize are there. The dream of hackers and spies and greedy Warez Dudes is a version of this trick called an "Advanced Persistent Threat" – hidden, back-door access to a machine that endures even for years, through upgrades and security checks and system cleanups, all the while forcing the now-weird computer to do things its user won't even be aware of: Send a copy of every keystroke to another machine, for instance, or serve as a robotic launching pad for attacks on other machines. All while acting like a perfectly normal machine.

The best of the zero day exploits are based not on the idea of sneaking malicious software onto machines so much as on taking existing, trusted code and finding tiny holes that can be blasted into giant, insecure data tunnels. These tools for manipulation are digital opiates, in a sense, for connected nervous systems. Such attacks often rely on errors already knit into computer systems, or innocent seeming features that can be made dangerous. Every computer and software designer knows their systems are vulnerable. Mathematicians have proven you can never be absolutely sure a connected machine is safe. A mobile phone, for instance, contains nearly 30 million lines of code. The systems that run massive cloud computing basins like those at Google or Amazon are even larger, updated every day, and have to cope with unprecedented flows of data at very high speeds. Even expert programmers will leave four or five errors in every million lines of code.[139]

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[138] **That prize:** Sergey Bratus, Julian Bangert, Alexandar Gabrovsky, Anna Shubina, Daniel Bilar, and Michael E. Locasto, "Composition Patterns of Hacking", *Proceedings of Cyberpatterns* (2012)

[139] **Even expert progammers:** For a good explanation of how a machine's code can be turned against itself, see Sergey Bratus, Michael E. Locasto, Meredith l. Patterson, Len Sassaman, and Anna Shubina, "Exploit Programming: From Buffer Overflows to 'Weird Machines' and Theory of Computation." *;login* December 2011, p. 13-21. The piece is co-authored by and in honor of Len Sassman, one of the leading thinkers of the Language Security or LangSec movement who died in 2011. Many of his talks, still available online, reflect an unusually powerful mix of philosophical and

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Software and hardware manufacturers usually struggle to keep such exploits secret until they can deliver a fix, but this doesn't always work. Secrets get out. And, anyhow, even once a patch is developed, it can take weeks or months before it's widely installed. It's not uncommon, therefore, that within hours of the announcement of a newly found zero day, attacks using that method explode around the net. Thousands of hackers try to take advantage of the vulnerability, to kick at the defensive corners of systems while they are down for repair or restart – or simply left vulnerable by slower-witted system administrators who don't yet know that it is now open hunting season on a particular bit of code. Heartbleed, a "zero day" that permitted hackers to slip into your computer via holes in website and browser security, was disclosed to the world on April 7, 2014 – more than two years after it had apparently been put in place because of a programming error. Accidentally? By an overworked engineer? Deliberately? By some state security agency? In any event, two days after it was announced and long before it had been fully patched, attacks using the method grew from a few dozen per hour to millions as hackers tried to suck data from unsecured networks.[140] The exponential power of a connected system is as apparent in sickness as in health.

4.

In recent years, hacking has moved deeper still, beyond the level of software and USB drives and into the very atomic level of computers, the places where the electrons that make up bits and bytes float. The technical elegance of these micro-level hacks has been, often, breathtaking – exploits that look like Wagnerian operas compared to the Cap'n Crunch's thin, reedy weird-machine whistle. As companies like Intel and AMD began packing more memory cells on silicon wafers, for example, they noticed magnetic interference flowing across the surface of their chips like waves. Electrical signals, recall, have a magnetic element, so more tiny digital cells, closer together, is like a bowl of interacting magnets. Physics would have predicted such a result. In 2014 security researchers Mark Seaborn and Thomas Dullien, who worked at Google, discovered that they could use the magnetic vibrations on two parallel rows of memory chips to flip the electrical state of a third row – sort of like using a magnet under a table to move a paperclip around – in a way that the system might never notice[141]. This permitted them to reach "off limits", super secure areas of the machine's memory where they could do what they wanted. They called the break, "Rowhammer" and it represented an ideal and essentially unfixable hole that affected nearly every small chipset made for a half a decade. They published the

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technical consideration about modern computing systems. See also Rebecca Shapiro, Sergey Bratus and Sean W. Smith, ""Weird Machines" in ELF: A Spotlight on the Underappreciated Metadata", paper published online by Bratus.

[140] **In any event:** Leyla Bilge, Tudor Dumitras, "Before We Knew It: An Empirical Study of Zero-Day Attacks In the Real World," Paper presented at *ACM CCS '12,* Oct 16-18, 2012, p 10

[141] **In 2014:** Mark Seaborn and Thomas Dullien, "Exploiting the DRAM rowhammer bug to gain kernel privileges", March 18. 2015, Google Project Zero blog

HOUSE_OVERSIGHT_018333

result immediately as a warning to possibly affected victims, but the exploit hummed at such a basic level of the system that it proved impossible to fully patch. It was like trying to patch physics.

Connection changes the nature of an object. This has a particular impact on the security of our systems, and by extension, our own safety. Computer researcher Nathaniel Husted has described a world of "emergent vulnerabilities" – wormholes in software and hardware, communications or finance, that pop up in the connected universe unbidden and unplanned. "The fundamental aspect of emergent vulnerabilities and attacks," Husted writes, "are that they appear benign until certain criticality conditions are met, at which point they become malignant." [142] These risks we don't want sit right alongside all the things we do want from connectivity. In fact – and this is Hulsted's point – they *are* the things we want from connectivity, perverted into danger.

Paul Baran would have been impressed to see just how right he was, how connections between us now are like irresistible gravity waves – and how gravity always wins. In 2015, for instance, Israeli security developed an astonishing hack that proved that nearly spiritual claim that all objects were linked by connection– and demonstrated the way that slippery, hungry attacks can breach even the safest-looking arrangements. "It has been assumed that the physical separation of computers provides a reliable level of security," Mordechai Guri and his team wrote in a paper describing how they had used one isolated machine to infect another. Physical separation is, in fact, one of the cardinal rules of safe computing, a kind of lemma to join Robert Morris Sr,'s "don't connect" rule of network safety: Two machines, unconnected by a network, should not be able to affect each other. Imagine I put one kid with a flu in one classroom and a schoolmate of his in another building. The second kid should remain healthy. The Tel Aviv research team wanted to challenge this. They first placed two computers side by side on a desk, unconnected to each other by any wire or network. One machine was connected to the Internet. The other was completely isolated – it was "air gapped", like the healthy kid in the distant building, a sort of digital "boy in the bubble," in touch with only the air around it. Then, the researchers began their Houdini trick: *Look! Watch us corrupt this completely unconnected machine!* Running a set of programs on the network-connected machine, the Israeli team was able to warm the processor board of that computer like a revving car engine, eventually making it hot enough that the temperature changes were detected by sensors inside the secure, allegedly impregnable "boy in the bubble" machine sitting nearby. The heat wave triggered a fan system inside the clean machine, which in turn activated a piece of pre-installed malware that let the hot machine pwn the bubble machine through temperature variations. In a video demonstration of the exploit, you can watch the infecting machine glow ever hotter, issuing "thermal pings" as it sweats and then infects its

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[142] **"The fundamental aspect":** Nathaniel Husted "Analysis techniques for exploring emergent vulnerabilities and attacks on mobile devices" *PhD. Thesis* (available online from Indiana University, 2013) p. v

HOUSE_OVERSIGHT_018334

safe, "unconnected" neighbor.[143] The heat transfer had a simple message: Nothing is safe.

Why put such effort, worthy of the deepest physics problems, into the challenge of sneaking into a cellphone undetected? Well, for Seaborn and Dullien, the drive was part of a "discover and publish" effort to keep the overall system clean. It is better to hack, discover and patch than to be hacked, and remain undiscovered. But these "good guy" engineers are racing against different, equivalently sophisticated, less-decently inspired teams. The development and sale of zero-day bugs is, after all, a business. Modern versions of Cap'n Crunch whistles crack access to some of the most essential financial, political and security data stores on the planet. As the power and value of hacking targets has increased, so has the price of the exploits. Public "zero day markets" sponsored by companies like Google and Microsoft pay hundreds of thousands of dollars to researchers who discover holes in their systems. "Better to find them ourselves," the thinking goes. Though that does not always make the embarrassment less acute when holes are spotted. At one of the most carefully watched public hacking competitions in early 2015, for instance, a skinny, smiling South Korean named Jung Hoon Lee took home $225,000 in prize money by pwning a series of some of the most important, common programs on the planet, Apple's web browser Safari and Google's Chrome among them. These systems had been constructed at the cost of hundreds of millions of dollars. They'd been assembled under the gaze of some of the best PhD-led computer scientists in the world. Jung Hoon Lee's exploits ran through their complete defenses in less than a minute. [144]

As good and fast as someone like Lee might be, he's nothing compared to what the best hackers do. They don't work in public or compete in hotel ballrooms. They don't brag. And they develop ideas that make $225,000 look like a bargain. These successors to the Warez Dudes work for cybercriminal billionaires, for intelligence agencies, and even (often) just for themselves. They help find and deploy the sorts of really deep system exploits that enable brazen cyber thefts of millions of pieces of personal data or attacks like the Stuxnet virus, which caused thousands of Iranian nuclear centrifuges to vibrate themselves apart. And they do still more: Most of the attacks we've talked about so far occur in installed, running boxes. But the companies that make those boxes oversee a whole, vulnerable process of building and testing and designing and installing them. And it's here, with billion dollar budgets at work, that some exploit teams make and leave vulnerabilities that they can later, ruthlessly exploit. Every step of that gestation – from sneaking secrets into early code bases to intercepting and rewiring routers as they ship overseas – is now an opportunity for secret control. Or for unanticipated risk, for "emergent

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[143] **In a video:** For a description of this exploit see Mordechai Guri, Matan Monitz, Yisroel Mirski, Yuval Elovici, "BitWhisper: Covert Signaling Channel between Air-Gapped Computers using Thermal Manipulations" (2015) available on arXiv:1503.07919 [cs.CR]

[144] **Jung Hoon Lee's exploits:** "Chrome, Firefox, Explorer, Safari Were All hacked at Pwn2Own Contest", *PC World via IDG News Service* Mar 20, 2015

HOUSE_OVERSIGHT_018335

misbehavior" that defies simple analysis. You can't predict where you might be attacked by merely looking at the possible holes in each piece. Rather, it's the whole system that breeds risks. It acts in ways that the designer could not have predicted in advance. "Clearly the system itself is misbehaving," the researcher Jeffrey Mogul writes of his study of various cases where networks are cracked in this fashion. "However, none of the components have failed per-se."[145]

The complexity of the systems themselves has been, not surprisingly, mimicked in the design of hacking attacks. What was once done by a single Warez Dude is now handled with division of labor, technical specialization and intensive pre-attack research. Every innovation in "righteous malware" is quickly copied and used in dangerous attack tools. The clever modular design of Stuxnet, for instance, was studied by criminals and was found years later still echoing in weapons aimed at banks, credit card companies and health insurance firms. "We are not experts in military history, doctrine, or philosophy," cybersecurity researchers Stephen Cobb and Andrew Lee have written, "so we are unaware of the correct word for the following category of weapons: the ones you deliver to your enemies in re-usable form." Cyberattack systems can be dangerous not least because they boomerang. They are delivered intact, primed for re-use to enemies who may choose to bounce them back at your banks, hospitals and electrical grids. "Righteous malware is unique," Cobb and Lee conclude. "You are giving away your weapons, tactics and designs simply by using them." [146]

It's not only American services hunting and using such backdoor keys and battering rams, of course; not only the NSA that sees its viruses retooled and reused. Computer security researchers describe opening up the laptops of unwary business travelers and finding the machines blasted inside by malware and other technical cancers, carefully planted by a half-dozen intelligence agencies and criminal organizations. It's like discovering a closet full of spies in your house, each being careful not to step on the other's toes as they watch and listen to your life. *Why is my computer so slow,* a government official in a Eurasian capital might ask. It is because it has been simultaneously pwned by Americans, Russians, Israelis, Chinese, and maybe a local Mafioso or two – and their code is not running smoothly.

A couple of years ago I had a naïve moment when I thought, perhaps, it would be possible and in everyone's interest to go back to those simpler, innocent Hacktic days, when information about vulnerabilities was widely shared and easily discussed – and holes were quickly patched as a result. I was thinking about the problem of cybertension between the US and China and suggested applying an

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[145] **"However":** Jeffrey C. Mogul, "Emergent (Mis)behavior vs. Complex Software Systems", *HP Labs Research Papers*, 2006, HPL-2006-2

[146] **"We are not experts":** Stephen Cobb and Andrew Lee, "Malware is Called Malicious for a Reason: The Risks of Weaponizing Code" in P. Brangetto, M. Maybaum, J. Stinissen eds., *6th Annual Conference on Cyber Conflict* (NATO Publications, 2014) 71-82

HOUSE_OVERSIGHT_018336

important idea of the scientist Dan Geer to the ever more fraught relations.[147] Perhaps the US and China could work together to buy up and then publish all the zero days as they emerged, I thought.[148] Instead of the dangerous code falling into the hands of cybercriminals, Mafiosi and terrorists, the two countries could lead an effort to jointly buy any new exploit for five times what anyone else would pay – and then immediately publish what they had bought and the necessary patch. This would make the network safer for everyone. I should have known better.

The US and China and other nations were (and are) buying world-class zero days. But they were never going to publish them. They were buying them *to use*. Sometimes against each other. Sometimes, unnervingly, against their own citizens. And they needed to keep on buying and developing and hiding such tools on an exhausting, never-ending security treadmill because, unlike traditional weapons, which could be stockpiled to use whenever they were needed in the future, the holes of the most valuable zero-days might be patched at any moment, making a once devastating bit of malware instantly useless. And, as the systems matured and accelerated, this meant that they had to run ever faster to keep up. Which further reduced their incentive to "buy and publish" what they did have. Little surprise then that all around the IT universe in recent years, the incidence of reporting dangerous bugs has been declining, even as we know the number of known security holes is certainly growing. [149]

Grab the five nearest electronic devices near you and you can be pretty sure each is vulnerable; which of course means you are vulnerable too. Not merely to the loss of your secrets, but also to perversion and control. This is the cold truth: that old hacker ethos, the one spread out so warmly on Amsterdam grass 20 years ago, the *be liberal in what you accept* frontier society instinct, is dead. Weird machines and normal machines, weird networks and normal ones, people made weird by technological manipulation and those who have note – they will all, inevitably, live side by side. The more essential machines become to our connected lives, the more avidly weird and hacked the networks will become. The incentive to whistle up control of the systems, and control of those of enmeshed in them, is the only thing that seems to grow faster than the system itself.

5.

This vulnerability of connected systems is an important mile marker in our route towards understanding some principles of power in a connected age. "Read over and over again the campaigns of Alexander, Hannibal, Caesar, Gustavus, Turenne, Eugene and Frederick," Napoleon wrote once. "Make them your models. This is the

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[147] **I was thinking:** Dan Geer, "Cybersecurity as Realpolitik", speech delivered at BlackHat, August 6,2014
[148] **Perhaps:** Joshua Cooper Ramo "Talking Cyberthreat with China", *International Herald Tribune*, July 10, 2013
[149] **Little surprise:** Linder Gayten Back to Basics p. 58

HOUSE_OVERSIGHT_018337

only way to become a great general and master the secrets of war."[150] I sometimes feel the same reading over stories of zero-day attacks, clever hacks like "rowhammer" or the Tel Aviv heat hack. You can distill from each tale of a broken, once-secure systems an essential principle: The hackers rush always, relentlessly at the central core of a system. They aim to make it weird, to manipulate it madly from the inside out. Network power doesn't merely come from that 10 million device-per-day spread of global connectivity, after all, it also comes from incredible *concentration* of power inside certain systems we all rely on: Chips, data bases, centralized and gatekept platforms. Control of such hubs and roots of our world can influence everything; little wonder they are such an appealing target. "The conventional belief that all nuclear systems are 'air gapped' is a myth," the Russian security researcher Eugene Kaspersky has warned. The result: "There are three types of people: Scared to death. Opportunists. Don't care."[151]

This sense that the systems are so vulnerable if you can get to their hearts is what lures hackers ever deeper, into the code kernels where the most basic instructions are decided. That they can often make machines weird by using the device's own code against them, like some sort of autoimmune disease, is only a marker of the particular perversity of the problem here. Security researchers call such holes "vulnerabilities" in a system, but of course they are much more than weak spots. They are potentially fatal. In a way, the hot rush to touch and tickle and maliciously use these already waiting cancers reveals to us the essential Seventh Sense secret of the Warez Dudes: Connection makes an object vulnerable, yes; but it can also reveal the possibility of total control, of the fundamental root mastery of a connected system. Such a hole, when it is exposed by connection and then corruption, can be complete in the scope of its damage, devastating. Lord Acton's famous line that "Absolute power corrupts absolutely," twists in this age to something like "Absolute access corrupts absolutely." Connection makes total exploitation, total control, possible.

Every new generation of connected technologies is breeding essential black boxes, complex (not merely complicated!) containers filled with algorithmic levers and code tools for digital work that can be understood by only a few people, and exploited and used effectively – for good or ill – by a still smaller group. "The greater the dependence on a technology the greater the need to study and expose its inner workings," one group of radical digital activists has argued in *The Critical Engineering Manifesto*. [152] They mean that as we turn our safety, freedom, and health over to a world of devices and their makers, we must know what goes on inside the very heart of such systems. It's not merely that everything is connected now; it's

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[150] **"Read over and over":** Napoleon, "Maxims" from Thomas Raphael Phillip, ed., *Roots of Strategy: The 5 Greatest Military Classics of All Time*, (Stackpole Books 1985) p 432

[151] **"There are three types:"** Eugene Kaspersky Talk at the Press Club in Canberra, Australia (2013)

[152] **"The greater the dependence":** "The Critical Engineering Manifesto," The Critical Engineering Working Group, Berlin, October 2011-2014. Available online

HOUSE_OVERSIGHT_018338

also that everything is monitored. Remebered. Studied. The Warez Dudes' drive to get ever closer to the core, to perform even that atomic level hacking, tells us something about just how much power is locked up in those central cores where this information accumulates. The 2600 hz whistle was, it seems, only the first of an endless series of battles for control of the roots and trunklines of modern power.

All around us today, huge power accumulates to certain irreplaceable cores. We know this is a problem of connected age design: Giant search engines, certain algorithms, database or communications protocols overmaster us because they can gather so much data, so fast, and process it with unique fidelity. *What makes a city?* urban scholars often ask. We might wonder: *What makes a platform for network power?* The answer to both questions is the same: Density.[153] If the first cities of Aztecs or Mesopotamiaman civilization differed from early tribal clusters because of their density, the same is true for our first platforms of instant connection. Facebook is *denser* than AOL ever was. More people, more data, thicker connections. Future platforms will be denser still. And if cities and density were once sadly unanticipated accelerants to plague, poverty and revolution, we should be aware of the risks of our own tight-clustered centers of dense connection. The security of these cores that link us to each other and our essential data – when jacked by hackers, by companies, or even by fast algorithms we don't understand – is important not merely because of the possibility of total control a breach might represent, but because they show us the very fact of such totalizing control exists. To infect, surprise, sicken – all this is alluringly possible and dreamable for anyone with a hunger for mastery. Imagine if you knew your government could be switched instantly and invisibly to malice. (Or, to effectiveness!) Or picture a nation of connected citizens wired for flash-started nationalism and hate. Such a possibility exists on linked systems. This potential for total, weird control of the cores – and thus total control of anyone connected to them – should force us to wonder a bit. Every evil thing beats in those central nodes: The power to manipulate, to master, to destroy even. With such access I can change what you know about the world, how you vote, where your money sits, what you remember, how soon we spot (or don't) a slipped knot in your DNA.

"Just like every drinking binge ends at vodka, so every hacking session ends at kernel.org" Thomas Dullien, the mathematician and good-guy hacker who won a Pwnie in 2015 for lifetime security achievement, observed once[154]. So much power in a connected system lies at its root: Kernel.org, for instance, is the reference copy for LINUX computer code that powers most digital machines on earth, sort of like the original DNA of the net. To manipulate Kernel.org would be to reach into the very spine of the Internet. If the aim is control, if it is to find and exploit the most fundamental of cracks in the surface of the black boxes, to get even deeper inside,

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[153] **What makes a city?:** Colin McFarlane, "The geographies of urban density: topology, politics and the city." *Progress in Human Geography* (2015) p. 2

[154] **"Just like every drinking binge":** Halvar Flake/Thomas Dullien, "Why Johnny Can't Tell If He Is Compromised," speech delievered at *Area41 Conference*, (Zurich, June 2014)

HOUSE_OVERSIGHT_018339

then inevitably kernel.org or it's equivalent in any system is the ultimate target. Hackers might start with beer (your phone), a few glasses of wine (your office email system), but what they really want is full blotto (kernel.org). Such central black boxes exist in any linked system and they represent, at once, both the greatest accomplishments of our most masterful systems designers and the point at which other, as masterful digital machinists direct their most relentless attacks.

Dullien saw something else too as he considered the work of hackers. Comparing system cracking to drinking wasn't an accidental, funny aside for him. Hacking *was* almost a kind of addiction. It became a chase after a bigger and bigger high, which in computing terms meant a race to compromise as many machines as possible. Rapid escalation, a loss of self-control, the need for more and more – all these are the hallmarks of the best widespread attacks, which aim to expand the "compromise boundary" until every machine has been made sick. This is why stealing source code, the original instructions that lay behind any computer program, are such a prize for Warez Dudes. Source code is the DNA of the black box, in a sense, it can be used break into other machines to, well, steal still more source code. This looked, to Dullien, an awful lot like addiction. And it's not just lone teen hackers looking for a dopamine jump who were chasing machines with a blind addicts urgency. It infects governments too. "Surprising realization (at least for me) after the Snowden leaks," Dullien observed. "Hacking is so addictive that entire organizations can become addicts and show addict-style behavior."[155] This was the NSA or GHSQ or who knew what other intelligence service, for instance, in a feral hunger for more and more and eventually all data. And the ultimate high? Imagine if you could crack the CA, the Certificate Authority that provides proof that anyone working on a network is trustworthy. CA "trustworthiness guarantees" are keys that permit access to any computer, phone and network. The whole connected world depends on CAs to know if software is safe. To control the CA would be a dream for an addicted organization, like a set of keys to the local pharmacy. No lock would really serve much of a purpose. You could touch the beating heart of any machine on earth. The ultimate black box. We should all hope the CA, at least, always remains pristine in this dangerous world.

It was hacked in the summer of 2011.

6.

Dullien's observation that "every hacking binge ends at Kernel.org" touches something far deeper than just the world of hackers. Sure, that urgent drive to get to the very core of systems is a very specific, unquenchable digital thirst. It's where the most power is, as we've seen. There's a rush in getting there: When brain researchers found a spike in dopamine levels of university students engaged in password hacking, that was hardly a surprise to anyone who's ever written or used

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[155] **"Surprising realization":** Thomas Dullien, "Offensive Work and Addiction", keynote presentation delivered at *ISACA Nordic Conference* (2014)

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an exploit.[156] But the real drive to get inside is about more than an adrenaline rush. Remember that network power, the power that we're trying to figure out how to bend and shape for our own security, exists in a kind of dynamic tension. It's like a stretched, taut fabric spread between concentrated cores and billions of connected users or devices. The logic of spreading and distributed power, the force that makes the network bigger, is driven by Baran's principle of open design, and by our own hunger for communications and connection and cool new devices. But there is another side to this tension.

In a sense, over the years, a whole set of hot, infectious pressures descended on the network of values and friendships and easy cooperation of the Hack-Tic days. "Be generous in what you receive," had let the networks of our age grow at an incredible pace, but at the price of vulnerability, of commercial ambition, and of an eerie technological lemma that what made the systems faster and stronger might also kill them. A change in culture of the digital elite, naturally, followed. The brutal, inarguable, profitable demands of power and politics had cracked apart the unique social webs of the HacTic era. I did not like watching this sad evolution; none of us did, but anyhow it has produced the world in which our new sensibility will have to operate. The openness that we loved and craved in so many areas of life, from our minds to our markets, had now become a liability. "I remember what the Internet was like before it was being watched and there had never been anything in the history of man that is like it," Edward Snowden once observed, nostalgic for the datascape he saw melt away during his time at the NSA. [157] I realize now that there is a whole new generation of young programmers that won't ever know that original generous ethos of a place like Hacktic, a fresh cohort of the digital age that operates at levels of technical mastery far beyond anything we might have imagined in the Citicorp Tower basement 20 years ago. They will confront endless battles to get inside and exploit and make "weird" the cores of network power. They will know and design and manage instead a world of gates, built for protection. Their instincts will be for opacity and control, not openness and generosity. Invariably this shift will affect the design of the systems this new generation builds which will, in turn, affect all of us.

The black boxes and the crackers are in a dance, now, a sort of dangerous evolutionary waltz that offers a foretaste of what you and I will face as we consider the problems of attack and defense and strategy in a networked age[158]. It reminds

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[156] **There's a rush:** Wael Khalifa, Kenneth Revett and Abdel-Badeeh Salem "In the Hacker's Eye: The Neurophysiology of a Computer Hacker", in *Global Security, Safety and Sustainability & e-Democracy Volume 99 of the series Lecture Notes of the Institute for Computer Sciences, Social Informatics and Telecommunications Engineering*, (Berlin: Springer), 112-119

[157] **"I remember what the Internet was like":** Snowden interview in *CITIZENFOUR,* Laura Poitras (2015)

[158] **The black boxes:** Nikos Virvilis, Dimitris Gritzalis, Theodoros Apostolopoulos, "Trusted Computing vs. Advanced Persistent Threats: Can a defender win this game?" 2013 IEEE 10th International Conference on Ubiquitous Intelligence &

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me of an old puzzle of Chinese history: Why were the very strongest dynasties – the Han, the Ming, the Tang – always confronted by the best organized, most deadly rebels? The answer was rooted in a violent, greedy tango of the development of each side. The better a dynasty defended its farmers or its trade or its annual rice harvest, the more the rebels from the steppe had to become strategic and unified and powerful. When it was easy to pick off single farmers, then the rebels had no need to be well organized. They could be a bit lazy. Could snatch a year's undefended harvest in an afternoon. But the stronger the empire, the stronger the rebels had to become[159]. Amsterdam in 1994 was a bunch of lone, weak, unprepared farmers. Twenty years later we have a digital empire, and the attackers it deserves are appearing, refined and evolved by this same competitive logic. They are better organized, smart, intent on getting to the heart of the black boxes of power. And the more we defend against them? The better they will become.

That our most essential systems are vulnerable to loss of control is a chilly feeling. It is a reminder of the power of the people who know how to crash and manipulate – or build and operate – parts of our world most of us barely understand. It's like discovering someone could take over your lungs or your heart. We don't understand those devices either, most of us. But we depend on them entirely. Some of these hackers are moved to mischief by technical beauty. Some by the giddy smashing rush of breaking in, of touching the core. Others by greed or patriotism or by secret, zealous, unlawful obsessions. What the technically best of this group share, however, is a pressing desire to get as close as possible to the kernels where inarguable and even invisible code decisions are made, where digital DNA is printed in a sense, and where a total mastery of the binary guts of the system is possible. That Cap'n Crunch thrill, the dream of whistling up control over the thick, helpless trunk of a network, *that* remains the dream. Remember Conway's Law: The design and activity and control of a network redounds on, even determines the real world. If the whole network is, in a sense, filled with holes, if it contains inherently the possibility of being turned into a "weird machine" – what does that mean for the real world?

The Seventh Sense insight of this chapter, the key feeling, is that all the systems we rely on, that we think we control – financial or political or digital – can all be made weird and pwned by forces we cannot see and struggle to stop. Our markets, our elections, our knowledge – all of these, dependent on linked systems themselves, can become weird. We can no longer regard them as certain and harmless. The hacker's drive to get to the kernels is not merely an information technology problem. It's a larger statement about networks, about the way that power and danger are still and always one and the same. The desire to hack the cores of our world is a marker of just how profoundly, even secretly influential the kernels have become – in ways we're just now beginning to understand. Bratus was right, that we don't really understand any system until it's been exploited, *pwned.* This is as true

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Computing and 2013 IEEE 10th International Conference on Autonomic & Trusted Computing

[159] **But the stronger the empire:** See Turchin, p. 3

HOUSE_OVERSIGHT_018342

for our minds as it is for our markets. The Seventh Sense feeds a bit on the trail of hackers; it is a way to tune our protective instincts. The cracks they find and use do tell us an awful lot. But not everything. For that we need to look beyond the people attacking. What we really need is a feel for the temprament of the fresh group of innovators and investors and technologists who run and own the dark cores of power now – and who, before long, may also run and pwn each of us as a result.

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Chapter Seven:

The New Caste

In which we meet a powerful group defined, enabled and enriched by their mastery of the Seventh Sense.

1.

Looking back over several hundred years of European history, the Oxford professor David Priestland found that the movement of power might be scored by reviewing the alliances and hatreds and hopes of three distinct, interacting groups. He called them "castes": merchants, soldiers and sages. By merchants, Priestland meant the bankers, traders and industrialists whose capital, goods and political power bent Europe's once-feudal economy into something modern and industrial.[160] The Medici, Dutch coffee traders, Scottish cotton barons. By sages, he had in mind the churchmen and later the technocrats of various empires, the men who helped birth and then manage the problems of an Enlightened, urban social order: Locke, Bismarck, Disraeli. And by soldiers he had in mind both the great aristocratic warrior classes of Europe and upstart, genius figures like Napoleon or Wellington – men who handled martial force with the fresh, surpasssing brilliance of a paintbrush or chisel, not an instrument of mass murder.

The aligned, shifting interests of these three castes, Priestland wrote, were like gears of sorts, each offering special leverage, meshing together to drive nations to great power. Mix the influence of France's sage-bureaucrats with her artful soldiers and you get the French Imperial period. Marry the interests of Britain's shrewd 17th Century trading bankers with her martially inclined sailors and globe-spanning Victorian dominance results. Today, of course, the merchants and soldiers and sages of our era are also at work. They sit in sovereign wealth funds, wired situation rooms and madrasas, churches and research labs. The force of America's merchants and financiers, bolstered by Washington's security caste, defines much of American power. No other nation could, at the moment, comprehensively replace what the country does with such breadth, intensity and speed. And now, all around the globe, we're seeing the emergence of what we might think of as a New Caste joining the merchants, soldiers and sages. This is the infotech caste.

What was going on in that field in Amsterdam back in the summer of 1993 was nothing less than the birth of the first figures of a connected technological era, of a new elite. This caste I have in mind is defined by their personal proximity and fingertip feel for the linked machines that drive so much of our world. They represent a tiny fraction of our population, but operate with non-linear, massive levels of influence. This New Caste clusters, in ever tighter circles of intimacy, around the systems and networks we depend on. They are building new connected

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[160] **Looking back:** David Priestland, *Merchant, Soldier, Sage: A New History of Power*, (New York: Penguin, 2013)

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financial systems. Fresh AI designs. Protocols and platforms for secure communication. Maybe one million people can write object-oriented code at a high level. A hundred thousand of them can shape that code into some sort of innovative data structure. A few thousand might be able to use it to access and manage a large data center. But get down to the couple of dozen who know how Google or Intel or bitcoin really work, the group who can make machines seem to think, who know and use backdoors at that atomic level of hacking – well, then you have a tight, powerful elite. They are called system designers, algorithmic traders, growth hackers or any of a dozen hazy and somewhat unnamable lines of work that fuse network mastery with economic, political or social power. If connection changes the nature of an object it also elevates, to a level of rare power and influence, those who control that connection.

Through the networks and black boxes they control, the group of transcendent talents working on search algorithms, data management and machine learning touch, at any one instant, more parts of our lives than any group of elites ever has. That many of them are billionaires as a result should hardly be a surprise. This is a caste marked by constant one upsmanship, by endless and compulsive innovation, by a cold and ceaseless fear of obsolescence. They are marked, of course, by a full expression of the Seventh Sense. Their every instinct for starting, financing, growing and using new firms or technologies or data-spinning biological tools reflects complete confidence in network power. If the leading figures of the Enlightenment shared a certainty near to faith that reason would unlock nearly any puzzle of mind or politics, the New Caste shares a certainty too, that connection can produce a new, better order. This caste battles with each other. They struggle for dominance over markets and – more profoundly – for control of the lucrative systems they have built.

My point in this chapter is simple. It is to introduce this new and powerful caste and see what their successes and failures might tell us about the world we now all share. Even now, however, I think we can make this sobering judgment: Whatever nation cultivates and trains legions of this New Caste best will rule the future. Think of the legendary Xerox PARC research lab, which in the 1970s produced not just some of the best early members of the New Caste – like Alan Kay or John Seeley Brown– but also a series of fundamental inventions that generated trillions of dollars of value[161]. The mouse. Laser printing. A graphical user interface. PARC was arguably the most economically significant small group in human history, an entire Renaissance packed into a couple of dozen offices. Just as the nations that produced the finest mariners once dominated global commerce and decided political questions, so countries (or really any group – even terrorists or criminals or bankers) that can breed, train and equip and deploy members of this New Caste will possess a really unusual power. Calling them a "caste" is not accidental: There's a way in which we are all now tied to the virtual spaces they control, much as serfs were once bound to the land by feudal lords. The Italian historian Giambattista Vico, in developing his

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[161] **Think of the legendary Xerox PARC:** Chunka Mui, "The Lesson that Market Leaders are Failing to Learn from Xerox PARC"; Forbes Leadership Blog / Alan Kay

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new, scientific view of history in the 18th Century, once observed approvingly, "The Egyptians reduced all preceding world time to three ages, namely, the age of the gods, the age of the heroes and the age of men," he wrote. "During these three ages, three languages had been spoken….Namely the hieroglyphic language, the symbolic language and the vulgar language of men."[162] It's hard not to feel the new age now arrives with its own baffling and incomprehensible modes of communication. A whole freshly demanded language.

In all of human history only a few languages ever evolve to become honestly global in reach and influence – English now, French in the European centuries or Chinese in the Asian imperial era. But why English? Why not more decades of French? German? "Why a language becomes a global language has little to do with the number of people who speak it," the British linguist and historian David Crystal has written. "It is much more to do with who those speakers are." What made Latin a global influential language wasn't that millions of people spoke it, rather it was *who* did: The elites at the very peak of 1,000 years of European power. What Latin *had*, in a sense, was the ears and tongues of some of history's most influential men.[163] The private, technical language that connects the New Caste to their machines, to each other and to us is one of the sources of their power. Their code marks, like a trail, the path to the cores of a vast and modern power apparatus.

You could, if you wanted, compare the New Caste a bit to an earlier generation of empire-deciding figures: Ocean explorers. Columbus, de Gama, Magellan. Backed by a primitive version of venture capital, the "risk finance" of trading houses, these discovery captains had a hunger to test their certain masteries – navigation, sailing, trade – against the uncertanties of geography, weather and luck. There was as much sheer nerve in these adventures as there was real knowledge. What lay five weeks' sailing time away from Cadiz? If you were willing to endure the difficulties, to believe in what might be out there – and your own ability to handle it – then fortune awaited. "Early intercontinental travelers not infrequently had to pay for access to distant shores by enduring bitter asceticism," the German philosopher Peter Sloterdijk has written.[164] Months at sea, risks of ocean turmoil, starvation, endless boredom – all these sacrifices marked sailing adventure. But they knew the rewards for a real mastery of the sea: Fame, riches, knowledge, adventure. Sloterdijk cites Goethe, who reflecting on the power of nautical life in 1787, defined the edgy advantage of that ocean-mapping caste in his age: They had *perspective*. "No one who has never seen himself surrounded on all sides by nothing but sea," he wrote, "can have a true conception of the world and his own relation to it."

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[162] **"The Egyptians":** Giambattista Vico, *The New Science,* (Cornell Press, 1948) 69
[163] **What Latin had:** David Crystal, *English as a Global Language*. (2nd ed. Cambridge, UK: Cambridge University Press, 2003), 7 also Shahar Ronen, Bruno Gonçalves, Kevin Z. Hu, Alessandro Vespignani, Steven Pinker, and César A. Hidalgo. 2014. "Links That Speak: The Global Language Network and Its Association with Global Fame." *Proc Natl Acad Sci* USA 111 (52) (December 15): E5616–E5622
[164] **"Early intercontinental travelers":** Peter Sloterdijk, *In The World of Interior Capital*, Polity 2013, Ch. 13

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We might say the same about our New Caste, of their sense of the massive datascape on which we all sail and operate. They too head off to test their skills at coding, encryption, system design. They are almost all auto-didact – self taught as programmers or hackers or AI designers or investors. There is no established path to power for them, no route that has been marked before. No wonder the greatest figures of the era are college dropouts. This is a group that looks largely ahead: Their work demands constant upgrade. Every device is shipped imperfect. It's not to say they are completely denuded of the Sixth Sense. That their feeling for history has been stripped. But if to be honestly in love with version 1.0 of your product and then to shred it for version 2,0 does demand a certain ahistoric distance. The New Caste explorers have a hunger for fresh worlds and landscapes. To get there they endure privations of long isolation – not so extreme as a long ship journey – but they burrow deeper and deeper into systems, construct new links and new gates, in closed rooms. "When building machine learning systems, making good decisions is a strategic skill," the computer scientist Andrew Ng has said. "Every day you wake up and you are in some totally unique situation that no one in the planet has been in before. It's not a fact, there's no procedure."[165]

This is our world now. No fact, yet. No procedure. A totally unique situation that demands a fresh instinct. We can follow Goethe into our own age: No one who has not seen and felt himself surrounded on all sides by *networks* can honestly understand. If that motto of the last great epochal shift was *Dare to Know*, it was certainly enacted by the sea captains. Discovery and risk were nothing but a nervy kind of scientific experiment, where the laboratory was the Earth's surface and the tools of calculation were ships. And in our age? If we're right that our historic mandate is *Dare to Connect*, well the New Caste is certainly doing that, furiously. They are working away at much that is hidden in our world, just like those old explorers. The billions of phones or sensors or AI-rooted sensor engines spilling out around our world are stripping away layer after layer of opacity. Pictures of far away places, traffic lessons learned from movement patterns recorded by GPS-enabled phones, medical treatments refined by constant measurement – these are all knotted, one after another, into the fishnet.

If the ocean voyages of that older explorer caste mapped our world, the voyages of the New Caste are as much inward as out. They move inside the world of connected systems. Remember: Network power is defined by *dynamic tension* – the pull between center and periphery. The same dynamism is at work with the New Caste. While they are, firmly, in the business of going out and opening our eyes to the world with wider, faster connection, they are also draping huge, essential parts of our lives with an impenetrable fustian: The essential algorithms of search engines, the code of machine learning tools, the design of micro-targetted political influence campaign. The sources of New Caste power are wrapped inside layers of complex computer code, machine learning and data security protocols that few people can

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[165] **"When building":** Andrew Ng, speech at *GPU Technology* Conference (March, 2015)

HOUSE_OVERSIGHT_018347

completely understand. The French philosopher Bruno Latour, the father of "Actor Network Theory" has called this process "Black Boxing". The better your phone works, the less you notice it. The more precisely some machine feeds you your news, the less you wonder *what might I be missing?* "Scientific and technical work," he says, "is made invisible by its own success."[166]

The operating system and network protocols of your tablet device are opaque to you now in a way they never would have been two decades ago (when even the casual user computer had to type to a C: prompt or wildly rage at a crashed "Blue Screen of Death" from time to time). But, in fact, the system is incalculably more complex. "Each of the parts inside a black box," Latour remind us, "is a black box full of parts." And it is in the winding and linking of all these pieces that action in a connected world is made possible. "It is by mistake or unfairness that our headlines read 'Man Flies'", Latour says. "B-52s do not fly," he writes. "The US Air Force flies." Every plane that ever makes it into the air does so because of the clicking coordination of thousands of linked, black boxed systems. Your stock portfolio or your computer or your bio-sensored heart is not a lone object; it's a feature of a connected landscape.

We're surrounded now, connected to, essential black boxes we've no way of understanding and whose development and operation we've left to the New Caste. Look around you, how many screens do you see? Each is a billboard: New Caste at Work. It's not only the hardware in our lives that I mean, but the bits of knitted programming that decide how we search, when we communicate, and if we can exchange information or money. The virtual and the real are in constant contact and it's the New Caste that does the stapling. In fact, one of the magic tricks of power in the connected age is an ability to flop easily back and forth between network and reality. It suggests other dangers too. As legendary machine systems designer Leslie Lamport warns: *Computer scientists collectively suffer from the confusion of language with reality.*[167]Anyone who's ever written a computer program knows this sense: You write some code. You compile and run the program to see what happens. You go back and work on the code some more to refine what you've done. You run it again. You touch the virtual; the real reacts. This seems in a way like the most trivial thing, the writing of a computer program or an AI bot or a trading order, but in fact

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[166] **The French philosopher:** Bruno Latour, "On Technical Mediation – Philosophy, Sociology, Geneaology" in *Common Knowledge*, Fall 1994 Vol 3 No 2. p. 23

[167] **It suggests other dangers:** Leslie Lamport, "Computer Science and State Machines", *Contribution to a Festschrift honoring Willem-Paul de Roever on his retirement*" (Redmond: Microsoft Research, 2008). In its entirety it runs: "Computer scientists collectively suffer from what I call the Whorfian syndrome—the confusion of language with reality. Since these devices are described in different languages, they must all be different. In fact, they are all naturally described as state machines." The Whorfian problem is a linguistics observation about the way in which our thinking is limited by whatever language we have to describe what we see or contemplate.

HOUSE_OVERSIGHT_018348

something incredible is underway in this easy movement from machine to reality.[168] The New Caste takes these moves, this easy slip from their keyboards and programs to our lives, for granted. They adjust code and networks and formulas; they watch the effects on us. They do it again. The idea that such a move is natural, comfortable even, reveals a new and important temprament. It draws a line betweent the people writing the code and those who are snapped about in the world they are coding.

Do you know who decided what you see when you search? Do you understand what the data on your phone reveals about you? Who will snip at and work on your DNA? Your children? Are you trading stocks against some invisible high-velocity connected master who will always be one profitable nanosecond ahead of you? In this sense, network power involves something very much like the intentional creation of concealment. Your Internet search results, for instance, contain a sharp tension. Yes, data from all over the planet, from all of history sits rather amazingly in front of you. But that bit of computer code deciding what you see is engaged in a kind of digital book burning: It's making whole sections of knowledge invisible even as it is unearthing an ever more precise answer for whatever question you have. What *don't* you see? – is a question that hints not only at what is left out of your search horizon, but generally at the way in which connected systems establish necessary gates. Part of a Seventh Sense, then, is the ability not merely to look at the virtual world and know how it becomes insidiously real, but also to feel that all the connected points of the real world – markets, weapons, social movements – must be pulled upon by code and links and networks. "Any technology depended upon," as *The Critical Engineering Manifesto*, says is "both a challenge and a threat."[169] Human experience is, we know, unboxable, uncontainable – our joy, hopes, sense of freedom, these all defy boxing. Yet here, all around us, are containers that affect our every choice. Who knows what happens inside all the difficult boxes?

The creeping, essential opacity of power now reveals a twisted puzzle, a really fresh aspect of this New Caste and the revolution they are making: As much as they are in the business of making knowledge widely and instantly available, they are also madly black boxing our world. This breeds a sly, unintended (I think) tension with Kant's Enlightenment admonition to "*Dare to Know*." Would you like to *Dare to know* why your computer is secure? How your genetic information will be studied and used? How encryption works? Mostly the answer to is: You can't know. It's too complex – and, anyhow, if we told you it would make the whole system less secure. There is nothing disingenuous here: You likely *wouldn't* understand. It *is* too complex. You'd be lost at the first turn into strange technical language, where simple words like "object" or "edge" have specific, essential, different meanings. And telling you would, in fact, expose you and everyone else to all sorts of risks. It's as if we've returned to that famous debate of millennia past, the one lingering between Athens and Jerusalem: Could the world be known and atomized and understood as the Greeks would have it? Or was mystery, inscrutability and opacity the nature of truth,

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[168] **This seems in a way:** See, for instance, Bret Victor in his speech, "Inventing on Principle" at *CUSEC 2012 Turing Complete Conference* available online.
[169] " **Any technology depended upon":***The Critical Engineering Manifesto,* as above.

HOUSE_OVERSIGHT_018349

apprehensible, the Rabbis said, only by its movements. Are we back at the first chapter of Genesis and its absolute prohibition against eating from the tree of knowledge. Or, from the Talmud, "For him who reflects about four things – what is above, what is below, what is before and what is behind – it would be better not to have come into the world."[170] We want to reflect about what goes on inside the machines. Can we? Should we? How does *Dare to know* face off against these impenetrable systems.

It is little surprise that places like Silicon Valley often leave a visitor with the feeling of a town where work is done in rooms within rooms within rooms. To drive along the dulled, anodyne asphalt stretch of road that runs in front of Sand Hill Road in Menlo Park almost hurts your head: Inside the offices on revolutions are dreamed, debated and funded. And it looks, for the most part, like a row of mildly prosperous dental practices. The real import of the work is, on the outside at least, nearly totally muted. The corporate structure of the most powerful tech companies are padded with this sort of deadening fustian too. Founders control the majority of voting stock; shareholders are more like lucky "users" than owners. Control, security and speed in decision-making are secured from the inside, free of exploit risk or interference. The companies are like computers. Of course the founders know where real powers sits. But this shouldn't distract us from the human energy breathing in the code itself. The programs are "permeated by all the forms of contestation, feeling, identification, intensity, contextualization and decontextualization, signification, power relations, imaginings and embodiments that comprise any cultural object," the computer science historian Adrian Mackenzie has written.[171]

Each of the parts of a black box is a black box. The famous billionaires of our technology age operate for the most part as their systems do. Their tight, well-engineered clusters of machines produce fortunes from connectivity, even as they obscure some of the deeper nature of the connections that are essential to their success. They are themselves at times obscured, human black boxes in a sense. "Linux is just an enabler," the genius programmer Linus Torvalds once observed about the code language that undergirds much of the connected world. "It's a solid base, but like all good, solid bases, it really is something that should be almost entirely hidden and out of people's minds."[172] It is a hard paradox for us. The work of the black boxes, of connected systems or protocols such Linux is miraculous. It is wonderful in so many ways. And the roots of it are, and seem like they have to be, obscure. But this cuts very fast into the arteries of a healthy democracy. "Democracy," Arthur Schlesinger wrote in his famous post-war book *The Vital Center*, "has no defense-in-depth against the neuroses of industrialism." It's easy to see how the system might also have a weakened immunity to the subversive forces

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[170] **Or from the Talmud:** See Leo Strauss, *Persecution and the Art of Writing*, (Glencoe, Ill.: Free Press, 1952), 21

[171] **The programs:** Adrian Mackenzie, *Cutting code: Software and sociality*, (New York: Peter Lang 2006) 5

[172] **"Linux":** Andy Meek, "Linux creator explains why a truly secure computing platform will never exist" on bgr.com Sep. 25, 2015

HOUSE_OVERSIGHT_018350

of network power: Contagions of fear, manipulation of data, the subtle and invisible influence of the boxes we depend upon but don't understand.[173] Recall Francis Bacon's Enlightenment line? That human knowledge is human power? Well, what is computer knowledge? It is human power? Or something else, in its entire, hidden immensity? You have to wonder if this packing of insight and vision and control into black boxes, or the hands of a small New Caste will bleed us of our liberty as a result. "Our constitution is called a democracy because the power to make decisions is not in the hands of a minority but of the whole people," Pericles reminded Athens in his Funeral Oration 2500 years ago. "We regard a man who takes no interest in politics not as harmless, but as useless."[174] Vital engagement is the food of democratic life. To be baffled to the outside of the essential boxes of power then, seems an instant sort of cancer on liberty. What do we make of a man who takes no interest in the networks of networks that control the power to make decisions?

Perhaps you've heard of the famous manufacturing trilema: You can get something made any two of good, fast and cheap. If you want that custom table made quickly and well, it won't be cheap. If you want it good and cheap, you had best be prepared to wait. In networks a similar puzzle emerges in my mind. Systems can be any two of fast, open or secure. A computer system that is really secure can be open, but it will be *very* slow, inspecting each packet and instruction like a bank security guard watching customers in a bad neighborhood. Think of the like an airport. Want it to be fast? Secure too? Then it won't be very fast. Mostly what we want today are fast, secure arrangements for our markets, our nations, our data. So these will become, I think, ever less open.

It used to be that history was made in public: Big visible wars and social shifts and revolutions. Pericles in the Athenian square; the churning protests of Jefferson's Paris or the massing of armies. Now, however, subtle manipulations of technology, invisible to most of us and maybe even accidental, maybe weird, will produce historic-scale external effects. Changes to the network design will become political and social exploits in a sense, living versions of that atomic-level "rowhammer" hack that work on the connective energy of our world. Already social network analysis can be used to manipulate voting patterns. Soon, it will be possibly to precisely target any potential voter with a message engineered like a custom-made drug, designed to bind right to the DNA of your habits and beliefs. It represents the possibility for the complete technical perversion of politics.

As the New Caste operates on the systems that are at the core of connected politics and economics, on how we vote or think or shop, they will vibrate the system in invisible ways even when they don't mean to be nefarious. Improvements may be as dangerously unpredictable as bugs. Small changes to algorithms or links or protocols mean our whole system may be pwned before we're quite aware. Such

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[173] **"Democracy":** Arthur M. Schlesinger, Jr., *The Vital Center: The Politics of Freedom* (Boston: Houghton Mifflin, 1949), 246

[174] **"Our constitution":** Thucydides, *A History of the Peloponnesian War,* (Oxford: Oxford University Clarendon Press, 1881),119

HOUSE_OVERSIGHT_018351

adjustments will be started and managed and mined for fortunes, of course. The Seventh Sense feels the way in which power has shifted, is shifting, from public to private in this way, masked by coded language, hardware design, corporate structure and the demands for speed and safety we all agree on. Huge shifts in power will occur before we are even aware if we don't have a sensibility to feel them out before they occur. Decisions about code, search, machine intelligence, DNA alteration rules in labs – all occurring in black box machines or corporations or governments. Several years ago it occurred to me in an unsettling flash: "The most important things that will happen in my life will happen in secret."

I'm not sure I've quite recovered from this insight yet.

2.

This same unnerving worry has troubled many people who think about connected machines, and for some time. It's not only those among us who are pointlessly nostalgic for a different era of devices, when the default setting of our instincts was *open*, who now worry about this strange tension between function and opacity. And remember – I'm running through all this here so we can all understand how to really grab and use this new source of power in the service of what we desire, and to protect the things we care about. But: What are we to make of systems that work better when they are obscured from us? That we could never understand even if we could see inside? Documents such as *The Critical Engineering Manifesto*, pulled together by a collection of uneasy designers and engineers, reflect anxieties that stir even inside the hearts of many in the New Caste. "The Critical Engineer considers engineering to be the most transformative language of our time," the Manifesto begins. "Each work of engineering engineers its user, proportional to that user's dependency on it." That is Conway's or Wittfogel's unsettling truth. The technical layout of a social network, a medical diagnostic tool or a financial market affects how we or our markets or our government (or our enemies) behave. We are, in a sense, being engineered by the damn opaque systems we are using.

In 1965 the MIT computer scientist Joseph Weizenbaum found himself, somewhat unexpectedly, considering this same problem. [175] Weizenbaum had written a primitive computer program to perform what is now known as natural language processing, essentially a bit of code designed to translate what a user tells a computer into clear instructions. This is the work that converts your request to a machine for weather updates into a query that can be turned into an answer. Teaching a computer to answer a question such as "it is it raining?" demands layers of logic and calculation.

In 1965, long before our era of simply talking to our phones or computers, Weizenbaum's program was a revolutionary breakthrough. So after developing his algorithms, he wanted to find an intuitive demonstration. He decided to build a

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[175] **In 1965:** Joseph Weizenbaum, *Computer Power and Human Reason*, W.H. Freeman and Company, 1976 p. 7

HOUSE_OVERSIGHT_018352

system that could, in a very limited sense, converse. The computer would take typed input from a user and then, based on what it understood, ask a question back to continue the conversation. The approach was borrowed from the psychological theories of Carl Rogers, an American therapist who believed the best way to talk to patients was with open ended, careful questions. Weizenbaum developed two programs. The first was called DOCTOR, a script that determined what the computer might say. The natural language processor responsible for carrying on the human side of the conversation he called ELIZA, after the heroine from Pygmalion, a poor cockney girl who is trained by a phonetics professor to pass as a duchess.

Here is a discussion between ELIZA and a user that Weizenbaum recorded in 1965:

Patient: "Men are all alike."

ELIZA: "IN WHAT WAY?"

Patient: "They're always bugging us about something or other."

ELIZA: "CAN YOU THINK OF A SPECIFIC EXAMPLE?"

Patient: "Well, my boyfriend made me come here."

ELIZA: "YOUR BOYFRIEND MADE YOU COME HERE?"

Patient: "He says I am depressed most of the time."

ELIZA: "I AM SORRY TO HEAR YOU ARE DEPRESSED."

Patient: "It's true, I'm depressed most of the time."

ELIZA: "DO YOU THINK COMING HERE WILL HELP YOU TO NOT BE UNHAPPY?"

Patient: "I need some help, that much seems certain."

Weizenbaum's program quickly became famous around MIT. (The joke was that it was a better conversationalist than most of the awkward shoegazers studying at the Cambridge campus.) ELIZA gave users a chance to have a taste of a machine with something like a mind of its own. The program spread to other campuses, to different research institutions, and with every step of its success, Weizenbaum found himself more distressed. He summarized his worries in his 1972 masterpiece *Computer Science and Human Reason*. What troubled him was not ELIZA, but her users, the humans. Even when they were professional psychologists, many of them quickly considered it reasonable to think that one day the work of diagnosis and counseling might be turned over to machines. This felt like a natural next step in the ceaseless progress they were used to in their lives. Better refrigerators, stronger seat belts, faster jet planes, more plastic – why not a computer doing therapy? It

HOUSE_OVERSIGHT_018353

sounded kind of wonderful. "A number of practicing psychiatrists seriously believed the DOCTOR computer program could grow into a nearly completely automatic form of therapy," Weizenbaum wrote. "I had thought it essential, as a prerequisite to the very possibility that one person might help another cope with his emotional problems, that the helper himself participate in the other's experience." To use a machine for such a task? He was horrified. Weizenbaum knew the empathy ELIZA was exuding was faked. *It was just code*. "Science," he concluded, "has been gradually converted into a slow-acting poison."

"Would you mind leaving the room," Weizenbaum's secretary said to him once, lost in a particularly personal discussion with ELIZA. "The reaction," he wrote, "showed me more clearly than anything I had seen hitherto the enormously exaggerated attributions even a well-educated audience is capable of making, even strives to make, to a technology it does not understand." This was black boxing at its worst: "I have no idea how this thing works. And it's wonderful!"

What makes the New Caste so particularly powerful is that their essential work is to build and operate the cores that control these systems. And the more people they lure onto them, the more powerful the platforms – and the people who run them – become. "The computer programmer," Weizenbaum wrote, summing up his lessons from ELIZA, "is a creator of universes for which he alone is the lawgiver." Each of these cores represents a fusion of power and politics and technology like nothing the world has ever seen. They are assembled mostly from scratch, they represent the concentration of billions of connections, and their direction is determined by technological and market factors as much as by any democratic twitch.

The strategic power of societies that train the best of the New Caste is probably self-evident by now. To educate and deploy masses of people capable of such transcendent design genius will mark a difference, an electric gating line between the nations that succeed and those that fail. But such training brings a real tension, if this group is allowed to really rip away at their work. What won't they attack? Control over the protocols that answer questions, move money, protect data, analyze your DNA – it's hard to think of any single locus of power that will ever be greater than the tight, gravitationally inevitable platforms emerging around us now. These essential webs are filled, as we've seen, with complex bugs and errors and loopholes. They depend on design decisions whose implications resonate for decades – both inside the black boxes and the external world that vibrates to their quiet demands. "If builders built buildings the same way programmers write programs," one famous coding lemma runs, "then the first woodpecker who came along would destroy civilization." Who would know if rot is spreading in these systems? Who would stop it? Recall Paul Virilo's line that trains produced train accidents, planes produced airplane accidents. So: Black Boxes?

As much as the work of the New Caste looks tactical in nature – what protocols to use, how to engineer networks or design machine boards – the reality is that most of what they do would be blind without a strategic urge. Behind even the smallest

HOUSE_OVERSIGHT_018354

advance, whether it is fingerprint recognition on your phone or some new auto-translation app, a set of careful, deterministic values and calculations linger. One feature that defines the New Caste is unadulterated, unquestioned faith in the continued network revolution, and that the values that underlie the best programs may be the values that should gird the world that depends on that same code. The danger here is clear enough. "Respect, understanding and love," Weizenbaum wrote as he considered ELIZA's effects, "are not technical problems."

The biggest of the platforms controlled by the New Caste herd together, remember, billions of people, bind them with ever thickening cords. The revealing tics of every movement in the virtual and every step or drive in the real world are marked down, remembered and scored. To operate the strategic levers of such a force is, in all reality, no less significant than leading a nation. The distinction between a CEO of a major connected firm and a head of state lies less in the depth and efficacy of their influence than in the questions of how they got such power, and how they might use it. The New Caste has an admirable conviction near to faith that their products are truly universal. They are absolute technological determinists. Watching their services and influence expand often has that strange aura of the irresistible force taking on an immovable object. They believe that their black boxes will bulldoze concerns of politics or history. And soon.

Historical ambition of this scale, the sort that touches really countless lives, has always blended a commercial and technical mastery -- the moves of the East India Company turned as much on better ship design, maps and navigation as on imperial objectives. But the aim of the New Caste is the same as it was for those three older castes – the merchants, soldiers and sages: To put the tools they've mastered and built in the service of still more dominance. The commercial calculations of the most powerful figures of the New Caste carry a sense of seeing many moves ahead, a very real kind of chess. Their billion dollar acquisitions, investment in moon-shot R&D ideas, the hundred million dollar payouts for great engineers – all of these mark the astonishing scale of what they have in mind: To have and control ever more essential cores of power. Are they seduced by having a billion users? Sure, but not because of the billion users, but rather because of the seductive allure of the black box, of what it means to control such a central point of connection.

4.

I remember sitting with a member of the New Caste the week the first batch of mimeographed and laser-scanned Snowden papers were released, as we both discovered that *everyone* we knew was devouring the documents. Like a novel. People were texting one another – "Have you seen this?!" – and you couldn't get through a dinner without a debate over the technical merits of what was on display. The Snowden files were fascinating to the New Caste in a way few others might understand, in the way a room of ballplayers might examine Ted Williams's swing mechanics. Let me try to explain it this way: When I was younger, people called our generation – those of us born between 1965 and 1980 more or less – a generation of slackers. Generation X. Generation Nothing. There was an argument to be had about

HOUSE_OVERSIGHT_018355

the Baby Boomers. Had they been the most destructive, selfish generation in American history? A reaction against the selflessness of their parents? Retired to leave the rest of us to pay their future medical bills and oggle their underfunded pensions, to cope with the manipulated political system they'd sued into existence. Or had they left a legacy of tolerance, an echo of 1968's optimisitic energy, a firming of American confidence. But, anyhow, Generation X? By comparison irrelevant: A collection of sad, passive slackers.

But the great Internet companies were largely built by Generation X. The foundational experience of 1989 – the fall of the Berlin Wall – bred optimism. It created, in fact, the possibility for a new exploration. When we were told "Be generous in what you accept," this seemed reasonable and, eventually, lucrative. The logic and power of networks became apparent by itself, the moment we began connecting the world. So linkage in trade and finance and friendship was pressed out into a new era of globalization, pushed as much by the smashing, enthusiastic removal of so many historical limits as it was by the technology itself. Yes WiFi and TCP/IP and other advances made wiring the world possible, but I wonder if they would have developed so quickly if the context for using them hadn't provided a feedback loop of such quick profit and reward and, frankly, amazement. So, in this fashion, we laid the groundwork for a world of billion-plus user platforms. For a new concept of power.

But the Snowden papers were a shock. We knew him, in a sense. His mannerisms and thinking and technical instincts harmonized with our own. It was as if the NSA had enrolled most of the digitally visible world into a twisted panopticon of a social network, one where your "membership" began the moment one of your data packets was sniffed or chased along fiber optic lines. Here was a secret three billion-user platform, in a sense, that had enmeshed, without their knowledge or permission, a tremendous chunk of humanity. *People of interest*. The one or two or three billion people swept into systems like the NSA's Aurora fell victim to the powerful leverage of scaled systems: The more people monitored by the NSA, the more leads to follow, which meant still more people needed to be followed and knitted unwittingly into the web.

No one in my generation who had been around tech for long was naïve. We knew that like soldiers coming back from a war there were things done on the network – the spreading of danger, of inequality, of pollution – that would have to be paid for in balance by the benefits the system promised to bring. The immensity of what had been built already in networks was clear enough; the even greater power yet to come as trillions of more connections piled together was implicit, obvious even. The perverse, sneaky side of this growth was known to anyone who'd spent time working a connected machine. But that people of our generation could on the one hand listen to "Karma Police" and on the other enact the sick *OK Computer* logic of surveillance, even name a British GCHQ monitoring program after the Radiohead song? The aim: Provide "either (a) a web browsing profile for every visible user on

HOUSE_OVERSIGHT_018356

the Internet, or (b) a user profile for every visible website on the Internet."[177] We'd not honestly thought the end of this would be a need to so deeply question or defend freedom or liberty.

The whole idea of connectivity had begun with liberty, after all. The Fall of the Wall. We'd not known or expected to lose it through the very systems we'd constructed in the open space a 20-year peace had presented. So: We'd been naïve after all. We'd been united in a tacit claim that there was nothing bad about connectivity. We believed it for the most part and convinced others. *We didn't mean it that way*, I felt the New Caste readers of the Snowden Papers were saying to each other, paging through the sick, ineffably banal logic of those NSA Power Point presentations. They were brochures for totalitarianism. If you have not read them, it is worth looking them over. They have, you'll see, all the anodyne banality of insurance company pitches, even if the dull language was expressing something vivid, nothing less than the potential murder of some very basic rights. We were reading and discussing and debating the documents so avidly because, it seems to me, each of us had a kind of horror of what we might have done.

Here was a massive technological and insidious web, a totalizing virtual machine of collection and analysis and instant observation and reaction. It relied, for its safe operation, on the humans in the loop of that sensing and seeing and machine thinking. And what was it, exactly, that the humans had appeared to do in the face of such urgent responsibility? Almost like that silly secretary chatting with the ELIZA machine, they had suspended their sense of warm humanity in the face of the magical charm of electrical promise. They had let the machine run. The whole system had been built and operated by members of the New Caste who were, in turn, beguiled and charmed out of a sense of certain essential limits as they stared at the beautiful face of machine power.

Looking back on his formative years, before Europe was ground up in the First World War, the powerfully brilliant and sensitive economist John Maynard Keynes bitterly recalled the iron certainty of his set of friends and their confident, diffident arrogance: "We were not aware that civilization was a thin and precarious crust erected by the personality and the will of a very few, and only maintained by rules and conventions skillfully put across and guilefuly preserved. We had no respect for traditional wisdom or the restaints of custom."[178] It was the war, then the depression, then a war which taught them this expensive lesson. What is fracturing around us now, with our own willful and diffident support, is that very thin and precarious crust, cracked and assembled as Keynes said by "the will of a very few". What if those very few are the New Caste?

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[177] **The aim:** GHCQ "Pullthrough Steering Group Meeting #16" available from theintercept.com

[178] **"We were not aware":** John Maynard Keynes, "My Early Beliefs" in *Two Memoirs: Dr. Melchior, a Defeated Enemy, and My Early Beliefs* (New York: A.M. Kelley, 1949) 99

HOUSE_OVERSIGHT_018357

The essence of the Seventh Sense will be not merely to be beguiled by our technology, by the way it smashes old systems, not to ask "Could you please leave the room while I use bend these electrons to even more omnipotent control," but rather – in the same instant as the networks snaps into its full power– to grasp the full nature of the connected age. To see how it might be used to further, not erode, the things we care most about. To ensure that if we are not among the *very few*, at least we can guarantee that their will bends towards justice. We will see, in a moment, just what that means in practice. How our best technology and our most avid hopes for what a technological, connected future could look like might just be yoked together. But before we can do that, there is one final question we need to answer about the networks all around us now: What, in the end, are they really for?

HOUSE_OVERSIGHT_018358

Chapter Eight:
"MapReduce": The Compression of Space and Time

In which we learn what networks are really, rather wonderfully, meant for.

1.

Starting in the springtime of 1997, the American scientist and inventor Danny Hillis began what has since become an every-few-months sort of ritual. He packed up from his home in Encino, a short drive over the Hollywood Hills from Los Angeles, and headed off for rural Texas for a few days that would largely defined by rock and dynamite. Hillis, who was born in 1956, has spent most of his life working at the electron level of the world, crafting some of the most significant computer processing systems of our age. So the sort of paleolithinc earth moving he was heading off to manage in Texas was a departure from his usual scale. His aim was to work on blasting and then refining a space in an isolated mountainside for the construction of a towering clock that he had designed, one intended to run for 10,000 years. That ten-millennia span was not accidentally chosen. Humans, when Hillis began his work on the clock, had been around about that long already. We were, as he pictured it, at a midpoint on that 20,000 year stretch of time. Hillis and the group of tinkerers, thinkers, and engineers who had backed and designed the clock – people such as Amazon's Jeff Bezos, spreadsheet inventor Mitch Kapor or investor Esther Dyson – were planning on a project that would stretch as close to eternity as they felt reasonable. "The Clock of the Long Now" they called it. I remember pulling into Danny's driveway in Encino one afternoon as he prepared to depart for Texas and being struck by the contrast between the lovely, innofensive suburban blandness of Southern California and the tools he was taking with him to make an assault not merely on a mountain, but on a whole conception of time.

I had met Hillis in an unusual fashion. I'd been asked to chair a committee that would award a million dollars to a figure who had made an essential contribution in the world of technology. The directors of the foundation behind the then-new prize had been, from the start, slyly dropping big names – Bill Gates! Steve Jobs! They hoped such a laureate would cast a bit of glamour on the first year of their award for "Contributions to Man's Present Condition." But when our committee sat down to talk it over, we knew that the boldfaced names didn't want or need a prize. They certainly didn't need a million dollars. As we considered people we all knew who'd made fundamental, essential contributions but had not been as boldfaced as they might have been, Danny Hillis's name came up immediately.

Hillis had developed a revolutionary "massively parallel" computer in the 1980s. The machine had helped create an entire discipline of high-speed computing by tying together tens of thousands of processors to tackle a problem at once. Traditional computers worked problems the way you or I might, step by step. Hillis' design was the equivalent of millions of minds, all moving at once. Coordinated, connected and awesomely fast. In the years since, he'd played a key role in a dozen

HOUSE_OVERSIGHT_018359

other breakthroughs, from designing artificial intelligences to fine-tuning classified military aircraft systems that depended on mathematics for their stability. When you wander into a deep part of Google's technical database systems, you're touching his work. When you talk to your phone, the interface bubbles with some of his patents. How did Baran's 1960s idea of a survivable, packet-based system at ARPAnet become the Internet in the 1970s and 80s? Danny was part of a cluster of dirty-fingernail engineers – along with engineers such as Vint Cerf and Jon Postel – who'd done the work to make it possible. His centrality in that project was memorialized in a famous speech he once delivered in which he described having one of the very first email addresses in history – and then whipped out a sheaf of bound pages that represented the entire Internet address list at the time. It ran about 50 pages. To the extent there were membership cards in the New Caste, Danny's would have had a very low number. It was an easy decision for our prize committee. No Bill Gates. No Steve Jobs. So, here's how I met Danny Hillis: I called to tell him he had won a million dollars. (I recommend this as a way to start a friendship.)

Hillis had been a tinkerer since he was a child and never seemed to have lost the pleasure of a wild intermingling of joy and practice. You couldn't tell with him where passion ended and work started. He was so technically adept that he could inject even the coldest digital projects with a bit of hot emotion, like Bernini breathing life into a block of carved marble with one, "just so" grace note of his chisel. One of Hillis's most famous projects, for instance, was a 15-foot high tic-tac-toe playing tinkertoy robot he'd built when he was 20 years old, in his second year as an undergraduate at MIT in 1975. Made from 10,000 wooden spindles and poles, it was an early attempt of his to show how machines, even simple ones, might seduce us with both brains and looks. The effect of a giant tinkertoy pile sitting there at The Massachusets Institute of Technology had to make you giggle, even as your mind boggled at the fact that this heap of sticks, strings and dials was beating you again and again at a child's game. Hillis was an artist as much as an inventor – one reason he'd not become Bill Gates or Steve Jobs. (And why Gates and Jobs maintained a consistent, admiring respect for him.) He'd once spent a decade at Disney designing rides or thinking up new dreams as a kind of real-world mayor of Tomorrowland. He liked to joke that he knew he was at the right place when, on his first day, he asked where he might find a parachute harness for an experiment and heard, in response, "What size?"

Hillis was an avid reader, and he has the habit to think of his bleeding-edge work in the context of long historical gulps. Conversations with him often tie back to Paleocene era biology or some other deep root. That long-term view, married to his unmatched hands-on feel for complicated systems, made him the ideal designer for the clock, a machine intended to last millennia. The problems associated with such an undertaking were, honestly, as unreal as you might expect. How to power the clock? (Hand winding, the better to ensure it was not forgotten.) How to protect it? (Put in the middle of nowhere.) Did you need to plan for global climate change? (Yes. The design was adjusted to accommodate shifts in the earth's spin when the planet's icecaps melt off.) Do you write a users' manual for people 10,000 years from now?

HOUSE_OVERSIGHT_018360

(Yes.) Do you write it in English? (To be determined!) Working with composer Brian Eno on the sound of the clock chime, and with a team of geologists and physicists, Hillis had made the clock into a natural extension of his tinkertoy computer, a device that both served a purpose and sent a message. If there was an emotion it conveyed, a feeling that it tickled in the way Bernini's *Apollo and Daphne* might inspire terror or joy or faith, it was meant to be awe.

Stewart Brand, one of the supporters of the clock and an early member of the New Caste too, would tell you that the idea for the clock had emerged from a desire to emphasize, to *physicalize* in a way no one could forget, the importance of longer-term thinking. We'd all arrived now, Brand and the other clock masters worried, at a moment in history when no one had a view that extended much past their own lives – or sometimes past the next election, or year, or the next financial quarter. Our modern "on to the next thing" economics and politics were eroding every slow, patient instinct. "Civilization is revving itself into a pathetically short attention span," one manifesto for the clock began. "What we propose is both a mechanism and a myth."[179] With its steady 10,000 year ticking, the Clock of the Long Now was meant to make us think in longer jumps. The human winding mechanism, for instance: Generations of clock-winders had to share in the work, and they would be connected in a long thread over the 10,000 years. A sacred priesthood of time. Moving slowly. As I spent time thinking, dreaming about the clock, I found myself too craving the solidity and patient isolation it promised. Who among us these days doesn't want a break from the instant nowness of our age?

Yet, the more I understood the clock, the more I realized something else was at work. Stop for a moment to consider who was backing and building the device. It was a cluster of people who had, as a common link, the fact that they had their hands honestly *sunk* into the guts of the Internet. Hillis, after all, had been waving more than that slim book of email addresses when he talked about the early days of the Internet. He was waving the credentials of a man who had been living in the virtual cyber neighborhood of Web connections from its very first days. He was as close to a native of the connected, fiber optic, light-speed world as you could find.

All the names supporting the clock smelled similarly of burning electrons: Jeff Bezos had built Amazon into a high-speed marketplace whose backbone was the Web itself. Another backer, Mitch Kapor, had cracked apart several centuries of slow accounting habits when he created Lotus 1-2-3, the first successful computer spreadsheet program in 1983, software that permitted you to see and change your whole business one keystroke at a time. Kapor's software helped move finance from quarter-by-quarter calculations to a really instant-by-instant sort of business – more or less the opposite of the "long time frame" the clock team was aiming to preserve. Esther Dyson was one of the earliest, best investors in network companies. This was a collection of men and women unified by a genius for connected change, sure, but also by a desire for ever faster clock speeds, ever speedier delivery, ever faster

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[179] **"Civilization is revving itself":** Stewart Brand, *The Clock of the Long Now: Time and Responsibility*. (New York: Basic Books, 1999) 2

HOUSE_OVERSIGHT_018361

processing. They had lived this. Enabled it. Profited from it. If there was ever a group you might hope to take aside, pull into a quiet room and ask gently *What are the really networks for, anyway?* this would be it.

The act of keeping time, of marking it, is embedded in the nature of any age. Our lives are, after all, dictated by timetables: School schedules, the seasons, rush hour, the burning candle of birth-love-marriage-death. Time, in the days before industry, was measured by nature's schedule. How long it took a crop to mature. The solstices. A beehive filling with honey. It was marked by moving tides and shifting seasons, and it demanded a slowness, a personal presence on the shores, in the oceans, atop the fields over generations. "Summer afternoon," the novelist Henry James remarked in a précis of a slower age he felt passing away in 1895. "To me those have always been the two most beautiful words in the English language."[180]

Then, in the industrial revolution, time became money. Electric lights, for instance, undid the restful distinction between night and day – and made 24-hour life and manufacturing and economics possible and then, of course, inevitable. Movement from countryside to city established a really new sense of what the German critic Georg Simmel, writing in 1903, called *tempo*. "With each crossing of the street, with the tempo and multiplicity of economic, occupational and social life, the city sets up a deep contrast with small town and rural life," he explained. "The technique of metropolitan life is unimaginable without the most punctual integration of all activities and mutual relations into a stable and impersonal time schedule."[181] Punch cards. Bus schedules. The forty hour work week. Our education, our manufacturing, our markets and our lives all began to run on timetables. They had to, or the whole project of industry would collapse. "Summer Afternoon" became a time to work. Simmel worried, for instance, over the diffusion of pocket watches. To carry one was like looking at a constantly draining bank account.

This sense of humans reduced to cogs – churned, run, disposed of on a schedule not their own – unnerved the residents of that first mechanical age. Cities had been the very first sorts of tight-packed networks; *industrial* cities ratcheted this further still. They succeeded and failed by the degree to which they geared themselves and their citizens to machine speed. When the Austrian novelist Robert Musil began *The Man Without Qualities*, his classic story of the era, with the flattening of a Viennese citizen by a speeding delivery truck, he meant to point out how urban speed and urban life (and urban death) had become inseparable. And also the mismatch between the weak breaks of the age and it's acceleration. The book is alive with that pre-accident slipping sensation you may have had: You are pressing hard on the brakes of the car; you are going to hit something anyhow. "Cities can be recognized by their pace just as people can by their walk," Musil wrote in a line that any modern New Yorker or

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[180] **"Summer afternoon":** Edith Wharton, *A Backwards Glance,* (New York: D. Appleton-Century, 1934) See chapter 10 for her tale of an afternoon with James.
[181] **"With each crossing":** Georg Simmel, "The Metropolis and Mental Life" (1903) in Gary Bridge and Sophie Watson, eds. The Blackwell City Reader. Oxford and Malden, MA: Wiley-Blackwell, 2002, p. 11

HOUSE_OVERSIGHT_018362

Parisian would endorse.[182] "A man returning after years of absence would have known, with his eyes shut, that he was in that ancient capital and imperial city, Vienna." To really get a feel for that age, watch just a few frames of Russian director Dizga Vertov's jittery 1929 black and white film *Man with a Movie Camera*[183]. Each moment of the movie is alive with the tension of a new, rushing and industrial age. You won't be surprised Vertov's list of requirements as he prepared to start filming began: "1. A rapid means of transportation." His aim was to immortalize urban speed on the new medium film; he knew he needed to be fast.[184]

To know a city by it's pace. Musil was touching something deep here, an instinct that beats in each of us and runs from this fact: The speed of an event affects how we perceive it. The difference between what you will notice when walking up a hill – chirping bugs, tiny rocks, changes in color and gradient – and driving up that hill is so complete as to be almost different experiences entirely.[185] When the whole world tumbles upon us at fiber-optic speed, when invasions and revelations and accidents all spread at the rate of WiFi or cell phone radiation, our sense of time blurs. You have to wonder what Simmel would have made of a smart phone. "It is not merely that the medium is the message, but the velocity of the medium," Paul Virlio observed once in one of his many studies on speed and mind.[186]

Life in our connected age is both instant and always on, what Simmel might have called "the technique of network life." This demolishes an older, easier sense of pace. Computers were once switched on at 9 and off at 5 – just like their human masters. But digital activity is constant now. The networks are paying attention all the time. They have to. Our machines – tractors and trains and cars – used to echo our pace of life. Now we echo theirs. The machines, the New Caste, the black boxes – they tick along constantly, ever faster. We rely on them, as we've seen, for our safety. We want them to be fast. To be instant. But what is this doing to us? Is completely unhooking us from any sense of time really a good idea?

It was certainly true, as Brand insisted, that the Clock of the Long Now was meant as a reminder, as a kind of constant totem to the fact that we're all just a small tick on

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[182] "**Cities can be recognized":** Robert Musil, *The Man Without Qualities* Vintage (1996) 3

[183] **To really get a feel:** Vertov's movie is shot in Moscow, Kiev, Odessa and Krakow. In 2003 The Cinematic Orchestra produced a modern soundtrack to accompany it.

[184] **"A rapid means":** Jonathan Dawson, "Dziga Vertov" *Great Directors* March 2003 Issue 25

[185] Ajahn Brahm of the Buddhist Society of Western Australia tells a wonderful story in his Dharma talks about a day in which he decided not to be driven up the road to his monastery in Perth, but instead walked the road. He was flooded by the sensations of nature, all invisible from the inside of a car. One way to change your perspective, he means, is to change the speed at which you are moving through life. See the Buddhist Society of Western Australia website for a catalog of his talks.

[186] **"It is not merely that the medium":** Paul Virilio, *Information Bomb* trans. Chris Turner (London: Verso, 2000), 141

HOUSE_OVERSIGHT_018363

the endless long continuum. We do think in too short a time frame. But the clock also, I began to suspect as I considered it, had another role. Those 10,000 years of marked time were an attempt to scratch an itch bothering these pioneers of cyberspace. It might even have been a sort of guilty sensation. After all, there was something that they had demolished in their ceaseless fast connecting of the world – maybe accidentally, but anyhow it could never be put back to where it was. If the great industrial titans before them had, over several hundred years, vanquished distance, lacing the world with trading networks, the men and women behind the clock were fracturing something else, something that for all of human history had seemed the only reliable, safe, sad constant of our condition: Time. For most of history, time and space were seen as facts, immutable forces that could not be overcome or adjusted or fought. Time particularly. The quintessential, tragically non-negotiable condition of life. The backers of the clock were, in their "day jobs", in the business of overcoming, adjusting, fighting and even destroying an older sense of time. What might once have taken years, they were committed to making happen in an instant.

The Long Now project, then, was like one of those carefully isolated arctic freezers, where samples of essential grains and DNA from Beethoven's hair and Einstein's brain are sunk and iced against the godforbid day in which our basic feedstock or a chunk of humanity has been wiped out by accident or disaster. Blasted into a mountain hole, designed to last thousands of years, the clock is a repository for time itself. It is a defensive museum, built against the moment when instant networks finally devour the off switch and kill an older, essential feeling of time. The clock-makers knew, I think, that they had helped to demolish a particular sense of pace with their fast, instant networks. They wanted, with the knowledgeable keening of the guilty, a new device, one carefully gated away from the very revolution they were encouraging with their business and technical obsessions. This hunger for speed had built their fortunes. Their revolution (and its IPOs) had paid for the clock, frankly. And the hope for "instant world" had inspired their dreams long before deep, fast connections were possible. Bezos's first name for Amazon, *Cadabara*, captured just this sense of waving wands and the eye-blink "Now you don't see it, now you do!" appearance of just what you want or need. Murdering time. You could ask: *What are the really networks for anyway?* Would they feel guilty when they confessed?

2.

Danny Hillis's father was an epidemiologist. His mother was a bio-statistician. And his childhood was a blur of infection-led family migrations. "Anywhere in the world there was an epidemic, we would go," he recalled. As the family bounced from Dehli to Cairo to Dakha to Nairobi, racing diseases one after another, Danny developed a vivid, energetic autodidactisism. He would collect knowledge from his parents, from the streets around him, his new friends, anywhere. In a library in Calcutta, for instance, he once found a copy of George Boole's 1854 book "An Investigation Into the Laws of Thought". Boole invented symbolic logic on those pages and though his instincts were grounded in an age of steam and machines, his vision still echoes in

HOUSE_OVERSIGHT_018364

modern computer design. "Language," Boole wrote, "is an instrument of human reason, and not merely a medium for the expression of thought."[187]

Hillis has a magnetic intellectual charisma, as you might have guessed by now. An afternoon with him resembles nothing so much as a lingering mental theme park: Roller coasters of big ideas (a 10,000 year clock!) mixed with smaller sugary treats (how to design a better fencepost). No wonder he fit in so well at Disney. Critics accused Steve Jobs of having a "reality distortion field", in which the Apple founder's charisma bludgeoned the boundaries of the practical. Hillis, by contrast, has a sort of "reality enhancement field" in which much of the world as seen through his eyes or heard in his light-hearted voice is sharper, filled with possibility.

From an early age Hillis had been interested in the dream of a thinking robot. Maybe it was that the constant uprooting of his childhood left him with a giddy sense that it was easier to *assemble your own friends* than to try to make them new at each stop. But somehow this led him to the idea of an artificial brain, which was Danny's main idea when he arrived at MIT in the fall of 1972. The tinker-toy tic-tac-toe computer he built was a nod to this hope, but it's jerry-rig aesthetic masked deeper ambitions. "Someday, perhaps soon, we will build a machine that will be able to perform the functions of a human mind," Hillis wrote at the start of his PhD thesis a few years later. "A thinking machine."[188]

What Hillis and others like his mentor Marvin Minsky, realized was that the human brain works differently than machine logic. Life, after all, is not a series of linear math problems. (Much as we might wish it was at times.) You look outside. It occurs to you to say to your wife, "What a lovely day." This is not a result of some "a then b then c" calculation, but rather the product of thousands of simultaneous inputs and twitches dancing through the space of your consciousness. If you were to process that same thought in a linear fashion, it might look like this: First, look at the sky, examine the cloud-to-blue ratio, check for too much wind, sense the temperature, open mouth. Your wife would be out the door before you'd even begun to speak. The ability to operate on many different pieces of data all at once is one of the most striking, enviable features of the human mind. But of course, you've probably, recognized: That is fundamentally a *network* problem. How do you act instantly, everywhere? Connection. So it was that, a dozen years after his tic-tac-toe machine, Hillis began work on a device designed to think super fast. Faster than any computer ever had. He called it The Connection Machine. "The ability to configure the topology of the machine to match the topology of the problem will turn out to be one of the most important features of the Connection Machine," he wrote. Adding, in case the

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[187] **"Language":** George Boole, *An Investigation of the Laws of Thought: On Which Are Founded the Mathematical Theories of Logic and Probabilities*. (New York, N.Y.: Dover Publications, 1951)
[188] **"Someday":** William Daniel Hillis, *The Connection Machine*, PhD. Thesis Submission, MIT (1985) p. 2

HOUSE_OVERSIGHT_018365

academic panel at MIT missed the point: "(That is why it is called the Connection Machine.)"[189]

Hillis's ambition to build this device boiled in him while he was at MIT, and it finally outstripped what MIT could support, so he gathered a group of students and started a small company. The Thinking Machines Corporation, blessed by some combination of Hillis's charisma and the fantastic promise of the project, became a magnetic field for talent, ideas and money. In the early days of the firm, for instance, the hunt for investors led Danny to the luxurious New York City apartment of William Paley, the founder of CBS. Hillis lived then in a ramshackle house close to campus at MIT. He drove a surplus fire truck to work most days.[190] Faced with the urbane, powerful 81-year old founder of the largest radio and TV network in America, Danny jumped right into a passionate introduction of *his* ideas about connection and networks. Paley, cooly: "I didn't understand a word you said." Then: A check for $5 million.

Or there was the time that Hillis asked Nobel-prize winning physicist Richard Feynman to tip him off about any smart scientists Thinking Machines might hire. Feynman, pushing 60, volunteered himself and spent his summer vacations for the next ten years with Hillis and his team.[191] When it came time to test the first Connection Machine, it was Feynman's data that revealed how well the black box was doing its job. The architecture they had designed cranked through what would have been a month's worth of complex chromodynamics problems in hours. As the machine got better, these already fast processing times improved by another factor of 1,000. Such a machine, for scientists who were desperate for computed answers, was like adding years to their life. If they could solve a problem in a week instead of years? The whole texture of their careers would be altered.

"At times," one fellow computer developer remarked, "the Connection Machine seems so different from current computers that it seems more akin to science fiction than high technology."[192] Thinking Machines Corporation sold Danny's computers to Lockheed to model stealth fighters. Chevron used one to model oil fields. The US government bought several to help to predict the weather. Puzzles long resistant to mere power melted in the face of parallel consideration. Nothing was more exciting about Hillis's machines than this intimiate, unprecedented link between intelligence and speed. If you have twice as many processors as I do, you can perhaps crack a puzzle of genomics or cryptography a year faster. But say you have figured out how to have 275,000 machines linked together and I have 1,000? You can solve a

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[189] **Adding:** Hillis thesis, p. 19
[190] **He drove:** Po Bronson, "The Long Now: Time Traveling with Danny Hillis", *Wired* (May, 1998)
[191] **Feynman:** W. Daniel Hillis, "Richard Feynman and the Connection Machine" *Physics Today* February 1989, p. 78
[192] **"At times":** Michael J. Black "Book Reviews: The Connection Machine", AI Magazine Volume 7 Number 3 (1986) p 169

HOUSE_OVERSIGHT_018366

problem *eight years* sooner[193]. Between 2007 and 2015 the number of connections a Hillis-style neural computer could handle grew from 1 million to 100 billion. This speed did produce things very like science fiction: Accurate voice recognition. Real-time genetics. And it also began to mark out, clearly, the powerful network territory where our future will be decided.

3.

Of all the things that mark a change between our modern lives and the days of those who came before us, few are as sensationally obvious as the sheer acceleration of life, the reduction of delay and the emerging *instantness* of experience. Faster. What is going on inside the machines, as Mel Conway's old law would have told us, is happening too on the surface of our lives. A feeling of breathlessness in the face of speed isn't new, of course. When Anna Karenina folds herself under an oncoming train at the end of Tolstoy's novel, for instance, her suicide is as much metaphor as personal tragedy, a comment on the disorienting steam, engine, and rail pace of modernity. Speed kills, old habits and ideas particularly. Between 1840 and 1940 travel times between Anna's St. Petersburg and Vronsky's Moscow shrunk by 10 minutes every year on average, loosing deep cracks in Russian economics and politics, tearing apart Anna's slow-moving world of glittering balls and hereditary estates with the fast force of industry, modernity and then the awful pliers of communism. Tolstoy's own death in 1910 held a bit of this acute tension between old and new velocities: At 82, hoping to live out his final days in the peace of a small hut, he left his family for the rural Russian town of Sharmardino. By train. He died at a station on the way, stopped quite literally, like an absurd figure in a Gogol novel, as he was enacting the tragedy of trying to use the modern to get to the past.

At the same time in the late 19th Century, the American rail system was working its own transformation, but with almost no ambivalence. America was using the modern to get to the future – as fast as possible. This was a decisive difference in temperament. "The American frontier," Frederick Jackson Turner wrote in his famous 1894 essay about borders and American life, "is sharply distinguished from the European frontier—a fortified boundary line running through dense populations."[195] American rails and roads (and trade) encountered no substantial fortifications. They ran nearly unchecked into the wilderness. The only apparent limit to expansion, that generation thought, was technology itself. The trains had, from the start, an unusual purchase in American life. During the three decades after 1840, the refinement of small but important details – faster train engines, stiffer carriage design, tracks that were straighter, an ability to move and re-load boxcars at night, better time-table management – eased America into the steam engine age

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[193] **You can solve:** Adam Beberg lecture "Distributed Systems: Computation with a million friends", speech at *Stanford University Computer Systems Colloquium* (April 30, 2008) available online

[195] **"The American frontier":** Frederick Jackson Turner, "The Significance of the Frontier in American History", *The Annual Report of the American Historical Association, 1894*, pp. 119-227

HOUSE_OVERSIGHT_018367

at faster a pace than any nation. "The most significant thing about the American frontier," Turner explained, "is that it lies at the hither edge of free land."

This brisk acceleration of rail transit revealed an axiom of speed that matters to us still: The faster your speed, the less distance matters. Accelerate from five to fifty to five hundred miles an hour and the mileage becomes less significant with each notch on the speedometer. It all takes the same amount of time. Marx called the process "the annihilation of space by time". He was right. Speed kills distance. The simple algebra linking increased speed and reduced distance had been apparent already in the shift from rowed galleys to sailing ships, but the age of industrial transport by rail or air meant that rapid changes, changes that affected the very quality of movement, took place within the time frame of a single lifetime. The acceleration from horseback to train to plane happened over a period of 150 years or so. Each new acceleration *diminished* the impact of distance.

There's a phrase for this process – "Space-Time Compression" – first identified by the American sociologist Donald Janelle in 1965[196]. Janelle saw that the technologies of transportation, trains and planes and boats, and all the little innovations that made them move ever-faster, were disrupting old spatial habits. They helped move goods more quickly, sure, but in the process they were also making the old, geographic maps less useful. When you could fly over a mountain, its importance diminished. In a wagon train you might have contemplated the desert with fear, by car you'd merely consider it with care. In a plane it was irrelevant. Janelle concluded that raw economics drove this compression as much as science. Centuries of constantly collapsing space and time had been driven not least by the hunger to poke into distant markets, to latch onto cheap labor, and to pull natural resources to wherever they were needed. This was "civilization" as a verb.

The demands for ever more commerce, ever faster, ever more profitably suggested that the horses-to-trains-to-cars-to jets acceleration was an inevitable feature of modern markets. We should expect it to continue, Janelle figured. Great fortunes would accumulate to those who mastered speed. To be fast is a competitive advantage; to be *faster!* decisive. *Absolute speed is absolute power*, as the philosopher Paul Virilio has framed it.[197] That idea of "Space Time Compression" sounded felicitous enough, like the name of a clever magic trick. Space *compressed*? Time *reduced*? But that felicity hid the violent, revolutionary nature of the mechanism so powerfully at work. It meant that the battlefields of power, which for most of human history had been over the control of space, would now become – rather incredibly – about the control of time.

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[196] **There's a phrase:** Janelle identified what he called "Space-Time Convergence;" Later geographer David Harvey renamed it as "Space Time Compression," which is more commonly used today.
[197] **Absolute speed:** See Armitage, John, Ed. *The Virilio Dictionary* (Edinburgh: Edinburgh University Press, 2013)

HOUSE_OVERSIGHT_018368

Janelle published his first paper on space-time compression in 1965 in the pages of the reference journal of mapmakers, *The Professional Geographer*. But he was, of course, blowing up nearly everything professional geography thought it was about. "Geographers, as physicists, have traditionally been concerned with the positions of points (places) in space," he wrote. "However, geographers have not employed the concept of 'velocity' in studying spatial relationships. Yet it might be of value and not too far-fetched for the geographer to ask 'at what 'velocities' are settlements approaching one another?'" We should ask ourselves the same question. At what velocity are you and I getting closer to other points on the planet? Janelle was writing in 1965. He was concerned then about the sound barrier as the practical limit to speed. But imagine his insights applied to an age where networks are switched always on, constantly packing the world ever tighter? Where a mistake or an innovation or an attack in one place can happen instantly and everywhere, because the speed limit is the speed of light?

4.

At first glance, of course, geography seems the least dynamic of sciences. It is rooted in the glacial-paced realities of geology, a discipline where speed is usually measured in the creaking, inches-a-century advance of tectonic plates. The faster links of transportation, whether they are trains or planes or data connections, lay blanket-like atop that slower-moving geological layer. These high-velocity networks are, in a way, a new geography. Mathematicians and data architects call the landscape they represent a "topology". The word refers to maps that can be re-arranged as a result of connection, the way in which speed and distance between two points does affect how "far apart" they are. You can think of it this way: Geographies are pretty much constant; topologies can change in an instant. In geographic terms, Moscow and St. Petersburg are always 450 miles apart.

When you hear a network engineer talk about designing for a certain "topology" you should think of hearing an architect describe the natural geography where a bridge or a sky-scraper will one day sit. When you use an app, link to a finance market, or wire yourself with sensors you're connecting to a topology that has been designed and mapped – and where what you can do is determined by that landscape. An appreciation for tone and movement on a topology is a sign the new sensibility we have called the Seventh Sense. Napoleon saw the battlefields of his age differently than his enemies. They saw flat surfaces for the collision of soldiers, he saw a third dimension, saw air filled with artillery and decisive top-down dominance. Our Seventh Sense masters, those who can perceive a new order emerging, see wired topologies in this same fresh way. Even though these landscapses are often invisible or made up only of narrow fiber strings, it's important that we try to picture network topologies as real, as alive and buzzing and rich with connection and data, places where fortunes will be made and lost, wars fought – and every bit as influential as physical geography.

Topologies represent the landscape where real-world edifices like the Web or the NYSE or Hizballah are built. They can change shape, instantly, depending on who is

HOUSE_OVERSIGHT_018369

connected, and by the speed and thickness of that connection. The topology of Wall Street in the 1920s, for instance, was largely defined by who happened to come to the trading floor on a given day; today it is a global landscape, influenced by news, rumors and real-time profit twitches anywhere on the planet. Just like moving a river from one place to another would radically change the utility of a bridge, a change in topology changes the shape of systems that depend on it. That Seventh Sense instinct – the powerful can become useless because of connection, the useless can become powerful – is earned first through a fluency and even faith in these sorts of rapid, fate-changing topological shifts.

In recent years the topologies of our network world have changed at the pace of technology, which is very fast indeed. Every new piece of a network, every new platform or protocol, alters how we connect. This process works on our sense of distance like an efficient, strange sewing machine: Something very far away can be, suddenly, with one stitch of innovation, right on top of you. The speed and the quality of a connection is what determines how honestly "near" or "far" something is. Location is, in a sense, as changeable as velocity.[198]

Distance, on any living, networked web, is an endlessly pliable sheet. Just as you can bring two distant points on a piece of paper right next to each other by folding the sheet, so you can glue points in networks together by bending the space on which they are connected. A map of the networked world or of nations or even of our city is not some given, settled graph. One small twist and we are, like it or not, right on top of each other. This makes it particularly murderous to hold onto the old idea that you and I are unconnected points. Do countries like America or China have legitimate interests thousands of miles away from their coastlines? Of course.[199] In this way, the entire premise of Enlightenment life, the atomic focus on the power of the individual, becomes dangerous.

It is now essential to use virtual topologies to operate in the real world, to bend these ethereal elements of connection to influence and even total control. Thomas Dullien, one of the researchers who discovered that "rowhammer" chip hack captured this in a new law of network security that echoes, in fact, through all of connected life: You don't have to possess an object in order to control it. "Being hacked," he explained in a 2011 speech called *Why Johnny Can't Tell If He's Compromised*, "is loss of control without change of ownership or possession."[200] Your phone, resting constantly in your pocket, may in fact be pwned at every keystroke by someone thousands of miles away. This is an extremely important idea, an expression again of how connection changes the nature of an object: It makes it controllable without possession. An army might be able to master an

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[198] **Location:** John May and Nigel Thrift eds. Timespace: Geographies of Temporality (London: Routledge, 2001) 2

[199] **Of course:** Distributed Lethality in Proceedings (U.S. Naval Institute) Jan 2015 p. 343

[200] **"Being hacked":** Halvar Flake, *Why Johnny Can't Tell If He Is Compromised*, keynote Area41 Conference, June 2014, Zurich

HOUSE_OVERSIGHT_018370

enemy's territory without ever possessing it, for instance, if it can manage to own the crucial topological infrastructures: banks, databases, communications systems. One nation might be able to pwn another in this bloodless fashion. Networks, you recall we said, will break nations in the future. This is just how such smashing control will be achieved, from the linked mesh running silently and irreplaceably under every element of national life. Today billion-dollar firms control cars, tools, or hotel rooms without possessing them. The links draw out value. Michaelangelo's famous urging resonates here: *Every block of stone has a sculpture inside of it, and it is the task of the sculptor to discover it.* Every network has a topology. It is the task of each of us to discover it.

Topologies linger everywhere there is connection. Networks can be designed in countless ways: The fishnets of Baran, the hub and spoke of a data center, the ever-changing mesh of a trading system. But what they all share is connective topologies of one sort or another and – as a result – the fact that risk that lingers any one place in the system also exists nearly any other linked place. Constant connection produces, as an unsettling result, constant threat. Connection spreads, distant parts of the world are superglued via that topological folding. Topology is not marked out merely by a description of how we connect. Rather it is scored on what is called a "trust graph", a kind of map of who you or a machine or a network trusts – and how much. An older generation still thinks a network is something made of wires and switches and plugs. But their real power comes from something far more ethereal. When you connect to a person or an object, you connect as well to its whole history of decisions about who to trust. Every EU country connects to the choices of a single border guard, for instance. Who does he trust? Is he right? Financial systems and technology webs are the same. If you are what you are connected to, you are also – rather unnervingly – the sum of every trusting (or untrusting) choice someone or some machine has made. This creates a worrying result: "In the systems we've built now," Dullien has explained, "there is no way to establish who is in control." If you or anyone you're linked to has made a trust mistake, you may be pwned, vulnerable, and one hacked slice from loss of control.

Any object – your tablet computer, a digital currency, a hacked drone – can become dangerous now in this sense, hacked by Warez Dudes into lethality. And nearly any place can be attacked in some fashion or another, as long as it is connected. The old chestnut of military strategy, that a clever or desperate army can always "trade space for time" –make a gradual retreat in order to buy time, is nearly gone now. Space is a wall that can be breached by time manipulation tools; there's no place to retreat to. Markets in Mongolia, airports in Europe, Chinese urban landscapes – all of these now can be struck, more or less at any time, because they are all connected. Unlike traditional conflict, where the location of your most terrifying dangers might be exactly pinpointed and watched, where military zones and civilian zones were carefully divided by front lines, a connected world is one of potential universal peril.[201] The distinction between battlefield and everyday streets disappears and it

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[201] **Unlike traditional conflict:** Derek Gregory, "The Everywhere War" *The Geographical Journal,* Vol. 177, No. 3, September 2011, pp. 238–250

HOUSE_OVERSIGHT_018371

takes with it – if we don't handle this properly – something even more precious: The division between periods of peace and of war.

That the knotting together of distance, speed and power changes the nature of an object was something Janelle, the father of "Space Time Compression," anticipated. He labeled it "Locational Utility", the way in which something becomes more useful or powerful or relevant as it is drawn closer to us by increased connection and speed, even if it stays the same "distance" away[202]. A nuclear weapon three hours from landing and one that is three months away are, nearly, a different object entirely. Adam Smiths's famous remark in his *Theory of Moral Sentiments* that most people would be more perturbed by the loss of half a finger than the news that a million Chinese had perished, begins to take on a different color in an age when a billion and a half Chinese are nanoseconds away.[203] When we say that connection changes the nature of an object, we mean this; Networks change the "locational utility" of anything they touch. When connection makes an object instantly, clearly visible, it revolutionizes its potential. Little wonder so many great fortunes are being made in applying this trick of plugging goods into compression engines like apps or matching services. It's hard to know if firms like Airbnb or Uber will be around in a decade, but the economic energy they release emerges right out of Janelle's theories: Connect a car seat or an empty room and you change its nature. You give it value. Part of our unease now – and part of the problem we have in strategizing about the world or our businesses – is that stability on our topological maps is some time off yet. There is so much yet to be connected. So many new topologies to be built.

"Time *is* a ride," Danny Hillis once remarked in an early meditation about his rock-sunk clock, "and you are on it."[204] He was right. That ride takes place, in a connected age, on topological rails. And just how "instant" you are will be a mark of what sort of ride you're on. In the same way that rivers and oceans and mountains define different landscapes in real geographies, topological neighborhoods too will each bounce with funny quirks. Some will be super fast. Others yoked by politics. Citizens of Santa Fe or Mumbai may choose to compress time in different ways. But they will all share a common desire. To do more with less. The German philosopher Peter Sloterdjik, writing about the way in which some people breeze through airports and borders (with first class tickets and pre-approved immigration) while others struggle to move at all out of refugee camps or poverty traps, has labeled the winners of this new order as a kind of "kinetic elite"[205]. They are a kind of temporal elite, in possession of golden keys to a special, frictionless topology. The technology to eliminate space and capture time.

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[202] **He labeled it:** Donald G. Janelle, "Spatial Reorganization: A Model and Concept", *Annals of the Association of American Geographers* (Volume 59, Issue 2, 1969)
[203] **Adam Smith's: famous remark:** Adam Smith and Knud Haakonssen. *The Theory of Moral Sentiments* (Cambridge, U.K.: Cambridge University Press, 2002) 198
[204] **"Time is a ride"** Stewart Brand, *The Clock of the Long Now: Time and Responsibility*. (New York: Basic Books, 1999), 67
[205] **The German philosopher:** Sloterdjik, TK

HOUSE_OVERSIGHT_018372

The computing programming technology that lingers inside most data centers now and that makes sense of the ceaselessly arriving bits – *Here is information on a billion people. How many are named Bob?* – is known as MapReduce. The name combines two well-know computer fuctions, Map and Reduce, and it is just the sort of program Janelle and Hillis would have dreamed up, had they ever met. MapReduce divides computation work among thousands of machines, just the sort of massive parallelism Hilli had in mind. What it *implicitly* does, however, is crunch what might have taken years into microseconds. If the charmed phrase of James' stately Victorian elites more than a century ago was "Summer Afternoon," ours might be "MapReduce", a kind of magic two word code for a whole way of living and thinking.

5.

The most successful political and economic systems of the past, the ones that marked the winning "convergence" club of humanity's last great leap, let people liberate themselves into a life of their dreams. Liberty meant tearing down old barriers to influence and security and knowledge; tipping over the Bastille, escaping colonialism. And it meant, too, providing a scaffolding of education, of social support, of laws and stability for citizens. The industrial, urban and rich countries that populate our world now evolved that way because their citizens made them so. They escaped the tyranny of the pre-modern, of a world where the small town you were born in and the pattern of your parents' life were a kind of prision for your hopes. This was the whole trick of the Enlightenment, after all: What do you want to be? You decide! What do you want your nation to be? Decide that too. *Dare to know!*

Look ahead now. The very best future political and economic arrangements will need to do something more than simply liberate us. They will have to enable and permit citizens to compress time. Just as the idea of a democracy was shocking once, this concept of a system tuned not merely for liberty but for compression of time should rattle us a bit. Certainly the attempt to achieve such an aim, to build the scaffolds and rails a time compressed world demands, will jostle much of what existst now. But to be modern means, in essence, the right, the ability to engage in compression. Nations or corporations or ideologies that can deliver this liberty of velocity – and that can construct and manage the flat-out fast, networked, artificially topologies such a life demands – will grow, thrive, accelerate even faster. The others, slowed by history or blocked by social or ideological designs, will miss the turn. They will be the new divergence club. Fast networks will elude them. Self-defense will be impossible; their time will be as vulnerable to easy manipulation and attack as the resources of China and Africa and Latin America were in the face of greedy colonialist plunder several hundred years ago.

There is no equality of justice between the weak and the strong, the Italian historian Giambattista Vico once noted.[206] So in our age. Between the fast and the slow? No

[206] Vico, New Science

HOUSE_OVERSIGHT_018373

equality either. Partly this is because of something Janelle spotted: The remarkable advantage, the wealth and opportunity, that accrues to the people and nations and businesses that can compress space and time. *Die Ware liebt das Geld*, Marx famously wrote: Commodities love money. Speed is now the decisive commodity – and it *loves* money. (The feeling is mutual.) Velocity lets us achieve that ancient goal of doing more with less. The race for speed lights something competitive: The faster I go, the faster you feel you need to go, the more powerfully you feel your slowness.

The centripetal charm of acceleration, the way that speed attracts us, and then makes us demand even more speed, honestly surprised the earliest architects of steamships and rail and airlines and roads. They under-guessed how popular their tools of space-time compression would be. Surely the maximum number of people who would ever want to zip from LA to New York would be about 1,000 per week, jet airline pioneers assumed. Would more than a few hundred engineers really want their own computers, Gordon Moore asked at a dinner party shortly after Intel proposed putting his chips in the first PCs. Yes, it turned out. Billions more. Highway designers call this surprise "induced traffic": The faster a highway, the more people pile onto it. Urban planners in Los Angeles in the 1950s looked at their packed, congested roads and thought they could fix them by adding lanes. They embarked on construction programs, tore up the transportation network that girded the city and built a new one featuring optimistic 20-lane highways as wide as a football field and flat as a plate. Traffic got worse.

Say's famous economic law that "supply creates its own demand" seems especially fulfilled in an age where velocity is so valuable. Speed too creates its own demand. The faster any one piece of the network starts to rattle and move, the more profoundly we notice how slow the leftover bits are. We want them accelerated too. Total network bandwidth grew by an heroic factor of 1000 times between 2005 and 2010. Speed? It increased by just 20 times. *Induced traffic.*

What is it, exactly, that we're so hungry for? The extreme end of fast connectivity is what computer systems designers call "statefulness" – a word that has nothing to do with states like nations, but rather with the condition of a connection, the "state" it is in. Early electrical circuits were either in a charged or uncharged "state", switched on or off. Today when we talk about a "stateful" connection, we mean a link that we maintain, always on. It's the difference between a video call and a letter, between looking at your wife here and now (a "stateful connection") and a photograph of her ("stateless"). Real-time everywhere connection doesn't merely kill distance; it attacks delay too. Older generations would "break state" when they left family at home or friends at school with a "see you later." Our generation? "See you always". We never quite leave. Technology permits us to remain in constant touch this way, to neve break state. "We don't have a word for the opposite of loneliness, but if we did, that's what I'd want in life," the milenial writer Marina Keegan wrote in a famous essay that captured more than a little of this zeitgeist. "More than finding the right job or city or spouse – I'm scared of losing this web that we're in. This elusive,

HOUSE_OVERSIGHT_018374

indefinable, opposite of loneliness."[207] The early interface of Snapchat, where you had to leave your finger resting on the screen in order for the video to unspool, was a kind of metaphor for this unbreakable relationship between touch and connection. (As was, in a different way, the diffident "out of my life" left swipe of Tinder.)

"Good theories of the mind," Hillis' mentory Marvin Minksy once observed, "must span at least three different scales of time: slow, for the billion years in which our brains have evolved; fast, for the fleeting weeks and months of infancy and childhood; and in between, the centuries of growth of our ideas through history."[208] What we face now is a new time scale to add to Minksy's list: The instant. Super-fast networks are different than slower ones – even ones as "slow" as what we have today. The ideal network is one that hovers near zero latency, where the time between what you want (or what the machines want) and the effect is as short as possible. You click a button to watch a movie and it starts instantly. You want to shut down an enemy air force, you do it with a single switch. The fantasy of a really "zero latency" system is impossible of course because even electrons moving through copper are not instant, but near-zero? Light-speed? You've probably heard stories of high-frequency stock traders who move next door to exchanges so they can capture and profit on an extra sliver of a millisecond. That's the quest for low latency. (And more proof of the profitable link between speed and money.) Our challenge will not be about being faster – the technology will make that inevitable – it will be about managing the insane, still unknown demands of a world of suddenness. "In a distributed system, it is sometimes impossible to say that one of two events occurred first," computer engineer Leslie Lamport wrote at the start of his famous essay "Time, Clocks and the Ordering of Events in a Distributed System" – a sort of technological parallel to Simmel's "The Metropolis and Mental Life" written a century earlier. The problem, Lamport explains, is that what happens in one place can happen nearly instantly everywhere. There's no time to react; so your entire worldview has to be capable of update at an instant's notice. When the time between a Warez Dude finding an exploit and your own systems being compromised is zero, then the discovery of the hole and the creation of your vulnerability happen effectively at the same time. "The relation 'happened before'", Lamport explains, "is therefore only a partial ordering of the events in the system. We have found that problems often arise because people are not fully aware of this fact and its implications." [209]

Networks, we are discovering, don't only compress space and time, they are compressing in the process the path to knowledge. We might call this "skill-time compression": Techniques that once took a decade of training or that demanded access to million-dollar machines, can now be understood, applied, and then evolved

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[207] **"More than finding":** Marina Keegan, The Opposite of Lonelinenss", Yale Daily News, May 27, 2012 (accessed online).
[208] **"Good theories":** Marvin Minsky, *The Society of Mind* (New York: Simon & Schuster, 1986)
[209] **"In a distributed system":** Leslie Lamport, "Time, Clocks, and the Ordering of Events in a Distributed System", *Communications of the ACM, July 1978,* 558

HOUSE_OVERSIGHT_018375

unimaginably fast. No one had ever heard of the Syrian Electronic Army a year before they were hijacking famous websites, injecting world-class malicious code into opposition computers and demonstrating a digital attack fluency. [210] Of course the charming side of such a shift is evident too: Walk the Vatican with an historian in your ear, master sourdough in a weekend. There's something not a little miraculous in the way the networked tools to recombine DNA or hack computer code or design viral software are getting both more sophisticated *and* simpler. If earlier eras put epoch-making implements into human hands – the knife! the train! – our age is now placing new, mind-shaping forces within instant reach.

In a networked world, economic or military power doesn't come just from controlling territory or information alone. It comes, more and more, from this matery of the temporal. Securing territory today does not, alone, solve many problems of safety. Control of information, of topologies and finally of time – this is what matters most. Such temporal security will be elusive; always in need of defense. The arrival of airpower in World War Two, for instance, shifted battles from two to three dimensions. "Only large states are able to resist three-dimensional envelopment," the historian Nicholas Spykman wrote in 1942.[211] Even today, "Air Superiority" is the precondition of nearly any American war. If we can dominate you from above, nearly anything seems possible. But networks add a fourth dimension. "Time Superiority." Can you move faster than your enemy? Can you bog them down? Or are you a victim of fourth-dimensional envelopment. Control of time – yours, your enemies – this will decide your strength.

6.

Back in the fall of 1988, at about the same moment that Danny Hillis and his team were busy peddling their amazing Connection Machine – and trying to smash every world computing speed record they could find – another device appeared in the world of massively parallel super computers. It was, everyone who saw it agreed, an extremely strange machine. It's appearance was completely unexpected. It's designer was not a famous thinker about parallelism, cavorting with TV network founders and physics Nobelists. In fact, its very success emerged from this strange face: The creator knew basically nothing about the sort of parallel design that informed Hillis' thinking. Which was strange, because it was far more "parallel" than the Connection Machine could ever be. It was also cheaper. Simpler. And: It was faster. In fact, it was the fastest parallel machine in history.

The machine began, quietly enough, in the mind of a 28-year old Cornell graduate student named Robert Tappan Morris. Morris came by his computer chops honestly enough: He was the son of Robert Morris Sr., the legendary NSA scientist we encountered several chapters ago, the man who penned those partly amusing, partly

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[210] **No one had heard:** Edwin Grohe, "The Cyber Dimensions of the Syrian Civil War: Implications for Future Conflict", *Comparative Strategy* (2015), 34:2,
[211] **The arrival of airpower:** Nicholas John Spykman, "Frontiers, Security and International Organization," *Geographical Review*, Vol 32, No 3 (July 1942) p. 439

HOUSE_OVERSIGHT_018376

terrifying *Golden Rules of Computer Security*."Rule One: Don't Own A Computer." The machine that Morris Jr. created was madeentirely of software. It took the form of a compact, simply designed computer program he'd written and designed to spread quickly and easily on the young systems of the Internet. It ran a mere 99 lines, took most computers nanoseconds to execute and it worked like this: The program – it later became known as a "worm" by the police who would come to find and arrest Morris Jr. – would find an open door on a network-connected computer. (In 1988, the pre-Warez Dude era, finding such doors was not difficult. Finding *locked* doors was probably harder.) Once Morris' program had slithered inside and loaded itself onto the machine, like a dog slipping through an unattended puppy door, it would sniff around, rattle a few more doors to find any passwords that had been left unsecured. Then it would move on to the next machine. Knock, knock. Rattle, rattle. Next machine. Morris designed his code to simply repeat this process over and over. Filling, as a result, each machine's memory with multiple, peformance-deadening copies of the same program. A house full of puppies, in a sense. After several hours of this flu-like spread, a wave of unplanned, unending computation began choking the net.

Morris later explained he'd only meant his program as a demonstration, as a test of sorts. He wanted to show how machines might be made more safe. But he seemed to grasp, almost immediately, that he'd made a mistake and that the worm was running away from him. He emailed a friend: How the hell to stop it? His friend had no idea either. They scrambled at least to warn system administrators about the dangerous code that would shortly devour their machines. "There may be a virus loose on the Internet," they wrote. But that note, in a bit of bad luck, was quarantined inside a Harvard computer that had already been unplugged. So, a few hours after Morris released his code, unwarned and unprepared, the Internet froze. [212] On November 2nd and 3rd, 1988 machines around the world were shut off, cables were pulled out of walls, and systems were wiped and restarted in a race to stop the robot-like spread of the disease and then to finally kill it off. [213]

The Morris Worm was, on those fall 1988 days, acting out a sober-minded insight of the famed biological historian Alfred Crosby: "The nineteenth century was followed by the twentieth century, which was followed by the…nineteenth century."[214] Crosby meant that our age of topological connection meant we were back, again, in an age of infections. And this was true: Morris program was mapping out, like an epidemic, new routes in the age of high-speed digital contagion. But – and this is why we care about it here – by the time it reached "peak infection", the worm was

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[212] **So, a few hours:** David Moore, Colleen Shannon, k claffy, "Code-Red: a case study of the spread of a worm on the Internet" *IMW '02 Proceedings of the 2nd ACM SIGCOMM Workshop on Internet measurment* (2002), 273-284

[213] **Morris later explained:** Ted Eisenberg, DavidGries, Juris Hartmanis, Don Holcomb, and M. Stuart Lynn, Thomas Santoro, "The Cornell Commission: On Morris and the Worm", *Communications of the ACM* (June 1989, 12: 9) 706

[214] **The Morris program:** Alfred W. Crosby, *America's Forgotten Pandemic: The Influenza of 1918* 2nd ed. (Cambridge: Cambridge University Press, 2003) xii

HOUSE_OVERSIGHT_018377

also doing something else. It had infected tens of thousands of machines, which were all cranking away in unintended harmony. During the 48 hours of its brief and unforgettable life, it was later calculated, the Morris Worm had become the most powerful parallel computer in history. At its peak, it managed to achieve a processing speed of 400 billion operations per second – about twice the speed of the most expensive supercomputers of the day.

Like any unexpected epidemic, the worm became a social, cultural and technological milestone. First, it caused Morris to be arrested. He was handed a $10,000 fine, some community service and several years of probation. He later went on to found an important Internet company, to join the faculty of MIT and to receive the highest honors in computing for his (other) efforts.

Then, a year or so after the virus had been finally corralled, the computer scientist Fred Cohen, one of the earliest specialists in malware – in fact, the man who invented the term "computer virus" – wrote an article that challenged the notion that all computer viruses are, inherently, bad.[215] What drew his attention was that fabulous, unbelievable record of the Morris Worm: 400 billion computations each second. "The features that make computer viruses a serious threat to computer integrity," he wrote, "can also make them a powerful mechanism."[216] This optimistic gloss, which sounded an awful lot like "The Plauge was great for humanity!" if you didn't follow Cohen's logic, triggered a furious response. Eugene Spafford, also a well-regarded computer researcher, fired back: "For someone of Dr. Cohen's reputation to actually *promote* the uncontrolled writing of any virus, even with his stated stipulations, is to act irresponsibly and immorally."[217]

So here, then, is a line, of sorts. The Morris Worm, an expression of really massive connection and interaction and speed, is a model for the world we live in now. Fast, linking with a mind of its own, running best (or at least fastest) when it uses the design of the system to spread on a topology optimized for speed. But who is right about the implication of such an historic design. Cohen? Spafford? Do we want our whole world cranking away, super fast, compressing time to nothing?

We can, all of us, decide to fight against the very ideas of a network. Or we can, like Cohen suggested, look at the terrifyingly fast nature of this world and begin to see something else. The totally unimaginable. Of course Spafford was not wrong. There *is* something scary and thought-muddling about the idea of intentionally authored computer viruses, running wild, ever faster. But there is something thought-muddling about this whole world we're entering. Networks are pulling at every existing structure. They hum, really, with the most elemental and precious human

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[215] **Fred Cohen:** Frederick B. Cohen. *A Short Course on Computer Viruses* (Pittsburgh, PA: ASP Press, 1990)
[216] **"The features":** Fred Cohen, "Friendly Contagion: Harnessing the Power of Computer Viruses", *The Sciences* Sept/Oct 199, 22
[217] **Eugene Spafford:** Eugene Spafford, "Three Letters on Computer Security and Society," *Purdue e-Pubs 1991*, 91-088

HOUSE_OVERSIGHT_018378

data – our DNA, our wedding photos, our hopeful voice mails and most essential knowledge, our small savings against disaster. In its speed and its depth, in its increasingly comprehensive grasp of each of us and our world, this new network order is at once the most amazing thing we've ever created and the most terrifying. But recall, for a moment, Hillis's dream for his parallel computer: "The ability to configure the topology of the machine to match the topology of the problem." What if we really could rewire our thinking, our networks and politics and economics to match the problems we face now? Finally, with the Seventh Sense kicking alive in each of us, we can at least see the topological landscape where such a construction might occur. Now we must turn to the exciting question of just how we'd configure it to do our bidding.

We've covered a lot so far; perhaps it is worth a glance back.

First, we've come to see how networks really operate, the way in which they breed a lively connected skein that concentrates *and* distributes power. These systems are, as a result of their very design, plucking apart many of our old structures and ideas. Recall my dad, the doctor, ripped one direction by millions of disease advice websites (distribution) and in the other by massive diagnostic databases (concentration). This pulling process creates too, as we saw: Billion-user firms (and billion dollar fortunes) bred with breathtaking speed. Drones, derivatives, waves of migrants torn from their states but plugged into technological tapestries – all of these are products of network power. Connection, we learned, changes the nature of any object. You. Me. Money. Terrorists. Pretty much anything. And because there is a lot more of the world that has not yet been fully connected, it's easy to see that we live in a revolutionary age.

Second, we learned that the world of networks is complex. It's made up of many *complicated* pieces, but complexity is something entirely different: It's the unpredictable and colliding evolution you might see in a rainforest, where uncountable forces intermingle to produce life and death, growth and change. Scientists call this "emergence" – and it is happening on all our connected systems. Connection produces new, ripplingly powerful and unpredictable structures. The Arab Spring. The 2008 financial crisis. Connection changes complicated objects not least by making them complex. This is why our whole world, even the parts we might expect to be most stable, whips around now with a new and wild energy. In a way, we saw, this should reward a careful confidence: Go ahead and break the old systems. Something new will emerge.

Third, we followed the trail of hackers like the Warez Dudes and discovered something unnerving about the networks around us. Not only are they honeycombed with dangerous and unpatchable holes, but historically unmatched amounts of power rests in their central cores. The reason hackers are so eager to get to these kernels of power is that in doing so they can manipulate entire landscapes of power with a profound efficiency. A "weird machine," fired with an invisible and dangerous hacked logic, is a possibility that flutters through any network. Trade. Politics. Finance. Choices made in the center of network systems will redound on

HOUSE_OVERSIGHT_018379

each of us. This is why we say that if in the past the most important things happened in public – wars, riots, and elections – in the future many of the most powerful shifts will, rather worryingly, occur in secret.

Fourth, we met the New Caste that masters many of these hot cores of power, for good and ill. Past eras were dominated by merchants, sages and soldiers who competed and collaborated in the pursuit of power. Now a new, young technological group is appearing. The nations and companies that train and equip them best of them will have an incalculable advantage. But there's a hitch: As much as this group knows about networks, they know little about history or politics or economics. Dangerously, they often see the world as a machine to be coded.

Fifth, we unearthed a new and invisible set of landscapes that will decide much of our future. These are called "topologies" and they are the connected fields on which power moves now. The web where stocks are traded, cyber attacks occur, imports are moved, or biological data are recorded and studied – each of these is a crucial topology. Control of them will be as important in the future as control of sea or air or capital once was.

And, finally, we learned what the networks are for: The compression of time. For all their technical magnificence, we find that beating in the cold technological heart of these systems is a most human desires, to negotiate a bit the one really inarguable constant of our lives: We are all burning candles. The compression of time is why we connect. It lets us do more, experience differently, live longer. What the demand for liberty was to the Enlightenment, the call to compress time will be in our future – a fundamental political demand. None of our existing institutions have been built to answer this cry.

These six elements make up a rough outline of a new sensibility. To see them at work in the world is the mark of a powerful way of thinking and feeling. The Seventh Sense. And this is important, we saw, because the shift ahead of us really is like the Enlightenment in its scale. It will tip everything over. It can't be totally understood in advance. We can see now that our old institutions are failing. Their strategies for solving problems only makes them worse. We saw how, at that level of war and peace, old ideas are laying new traps. No one in power seems to have a clear, convincing picture of just what is going on. We can feel the danger we face, like rippling heat from a nearby inferno – our world tugged into the future by a class of old leaders who don't understand networks and a collection of new technologists who don't understand the world. We had better find some way forward that does not depend entirely on either of these groups. The first may destroy our liberty in the name of an elusive security; the other will consume our freedom in pursuit of a mad efficiency. And there's one last thing we didn't really learn here, but I think you probably suspected it even before you started reading many chapters ago and met Master Nan and his warning of impending "spiritual illness": If we're going to shape this world at all, we don't have much time.

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Part Three:
Gateland

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Chapter Nine
Inside and Out

In which the Seventh Sense brings us face to face with the most powerful feature of our age – and perhaps of any age.

1.

The Shangani River runs in a small, green vale through some of Southern Africa's most remarkable nature. It marked, a bit more than a century ago, the northernmost line of the British presence in Africa. If other parts of Queen Victoria's colonial empire crackled with desert harshness, the mountains and hills rolling up from the Cape and down to the Shangani were notable for a pleasing softness, a shading towards pastels in the changeable light of the region. For London's colonial mapmakers, South Africa was a long-eyed treasure, an ideal restocking and transfer point for British ships headed for Lombok, Calcutta, Pondicherry and beyond. "We have lost America," the explorer William Dalrymple wrote Prime Minister William Pitt in 1785. "An halfway house would secure us India, and an Empire to Britain."[218] The African Cape would be that halfway house.

Following the 1814 Anglo-Dutch Treaty, which gave the British control of the Cape, the English pressed into Africa and found each newly opened district delivered more wealth than the last. A colonialist's dream: Diamonds. Gold. Endless fertile fields. The efficient engines of industry and exploration (and exploitation) of the British African Company chewed easily, profitably, into the land. "Having read the histories of other countries, I saw that expansion was everything," the mining baron Cecil Rhodes wrote in 1875. "The world's surface being limited, the great object of present humanity should be to take as much of the world as it possibly could."[219] And so the British did.

If there was a moment that showed the tenor, the power of this ruthless asymmetry most clearly, it was the battle that exploded along the Shangani in 1893. The Matabele, a powerful local tribe had been smash-and-run fighting the colonists for years. The British had tried to charm, pacify and bribe the Matabele and their Chief Lobengula with money and land. None of it worked. They tried threats. That did not work either. "The Chief has had all your messages," an imperial adjutant reported back to Cape Town after another frustrating, pointless discussion in late 1892. "But he has the art, not unknown to civilized despots, of ignoring what is not convenient."[220] Or perhaps the instinct of knowing what to avoid. One Boer

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[218] **"We have lost America":** David Johnson, *Imagining the Cape Colony: History, Literature, and the South African Nation* (Edinburgh: Edinburgh University Press, 2012), 67

[219] **"The world's surface being limited":** F. Vershcoyle *Cecil Rhodes: His Political Life and Speeches, 1881-1900* (London: Chapman and Hall, 1900) 7

[220] **"The Chief has had":** *Copies and extracts of further correspondence relating to Affairs in Mashonaland, Matabeleand, and the Bechuanaland Protectorate*, Nov 1893,

HOUSE_OVERSIGHT_018382

commander, a blood enemy of Rhodes, had warned Lobengula: "When an Englishman once has your property in his hands, then he is like a monkey that has its hands full of pumpkin seeds – if you don't beat him to death, then he will never let go."[221]

So when, in October of 1893, the British finally tracked Lobengula down to the banks of the Shangani, the two sides faced off for what promised to be an intense, decisive battle. "It was just after 2:15a.m., a peaceful night, clear sky but on the dark side," one of the British infantrymen later recalled. "The bugles gave the alarm, the camp was all excitement in a moment, all noise with the opening of ammunition boxes and shouting of officers, the men were getting into their places. There was a din outside from the on-rushing Matebele *impis* that had decided to attack in the usual Zulu fashion." The British soldiers were outnumbered. They were thousands of miles from home, hanging on the thin end of a 5,000 mile supply line. The Matabele knew the territory. They were fighting for the lives and families and honor. But one sound was the decisive noise of the scale tipping towards the British soldiers. A hushed clicking against the yelling all around. *The opening of ammunition boxes.* The British, for the first time in African action, had mounted machine guns.

The weapons worked that morning on the Shanghani with a violence you and I would have expected. They reversed, more or less instantly, the Matabele advantages of men, familiarity, and even furor. Machine-gunned Matabele were found, in the hours after the attack, perched in trees, dug into dirt mounds and piled desperately atop each other, killed as they had scrambled. One British soldier wrote later that that the weapons had mowed down the Matabele "like grass." Lobengula survived, but his army was massacred down to a squad and he was reduced to pleading. "Your Majesty," he wrote to Queen Victoria in the days after the battle, "what I want to know from you is: Why do your people kill me?"[222] With this missive, the Chief entered the ranks of the Queen's powerless correspondents, once-omniscient feeling men in Africa or Asia or India who wrote her after some devastating battlefield reverse – baffled, confused, overwhelmed. Did she even read the letters? It was hard to know, but that only made the pleading more perversely imbalanced. The locals had no idea, really, what they were up against.

Martial leverage. It was the inarguable force of the 19th Century. It made Europe's colonial masters. Of course they lied, stole, fought – did whatever sensible and sleazy thing Cecil Rhodes and his ilk suggested was needed. The monkey with the pumpkin seeds. Expansion *was* everything. Imperial dreamers in London, Berlin, Brussels, Vienna and Paris saw with total clarity the immense historical imbalance across the chasm of industry and science and reason. The "Convergence Club"

Her Majesty's Stationery Office, Telegram from Assistant Commisioner, Palapye, to his Excellency High Commissioner, Cape Town, p 13.

[221] **"When an Englishman":** Vershcoyle, p 191-192

[222] **"Your majesty":** Report, Report, Volume 61 *Sessional papers*, (London: Commonwealth Shipping Committee, H.M. Stationery Office, 1893), 77 from University of Michigan online digitized library

HOUSE_OVERSIGHT_018383

against the divergent, the left-behind. Rhodes confessed ambition for his company to "take as much of the world as it possibly could," was simply an armed, greedy version of Kant's "Dare to Know". Just as no question was was unaskable, no place was too far off to possess or exploit. No position was secured by history or distance or sentiment. This was, for instance, the lesson taught to Lin Zexu, the Qing Dynasty bureaucrat sent out from Beijing in 1839 to stop the British opium sales that were reducing China to a drugged, useless coma. "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it?" Lin wrote the Queen. "Certainly your honorable ruler would deeply hate it and be bitterly aroused?" Lin thought that he was speaking as the voice of a great, eternal empire. Victoria never replied. To the extent Victoria was aroused by anything in Southern China, it was likely by the way in which, a few months after Lin's letter, the British emasculated the Qing military and moved into Hong Kong for a 150-year stay.

"Whatever happens," the Hilaire Belloc had his Colonial character Captain Blood famously quip in an 1885 poem, "we have got the Maxim and they 'ave not." [224] The machine guns were a totem of dominance in Shangani and on other colonial front lines; they marked a gulf between modern and unmodern, between industrial and agricultural. The weapons had first appeared in the mid-1800s on battlefields in the American Civil War, after the inventor Richard Gatling sent a package of samples to the White House and convinced President Lincoln – a famous gadget freak – that their firepower might bring the Civil War to a faster close. Lincoln ordered the Army to try the guns, but Gatling's early attempts were honestly too immature to tell decisively on the battlefields of the American south. Within a few decades, however, the guns were perfected in places like Africa, or on the frontlines of the 1904 Russo-Japanese War. They represented a compelling, inarguable logic of industrial war: A machine *and* a gun. *We mowed them down like grass.* You could read that line as metaphor: Mowing grass was, in the end, the act of a machine killing a wild, natural world into a clean, useful order. The Europeans were the grass-clipping machine; the rest of the world was, well, the grass. For a colonial temperament hardened for "The Great Game" of empire on the playing fields of Eton, preparing a lawn for tennis and a territory for exploitation were not particularly distinct acts.

The Shangani battle gunshots struck the European mind as powerful confirmation of everything they suspected about the magic violence of an industrial age. The image of such a device suited the aggressive, engineering-led mood of era. As Gatling – and his competitor Hiram Maxim – peddled the guns, they faced a predictable resistance, of course: Europe's cavalry officers were in love with their well-bred horses. But the age was, finally, the story of aggressive industry flattening old habits. Trains were assaulting the countryside. Factories were pounding apart the habits of labor. Social stampedes of speed-climbing *nouveau riche*, political attacks of new industrial unions and counter attacks all expressed this aggressive energy. The soundtrack of Germany in the decades after 1869, as Bismarck stitched together a new nation

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[224] **"Whatever happens":** Hilaire Belloc, *The Modern Traveler,* (London: Edward Arnold, 1898)

HOUSE_OVERSIGHT_018384

from dozens of hereditary principalities, was the ceaseless ping-ping of rail-building and welding and industry. How natural it must have seemed to add the rat-a-tat-tat of a Maxim gun. Crown Prince Wilhelm, the Kaiser's eldest son, wrote that defensive thinking was, "utterly foreign to the German spirit." Bismarck's "Iron and Blood" national motto became, finally, personal for many Germans, who were prouder to leave their universities with a hot-red dueling scar on their faces than a subtle ownership of Goethe in their hearts.

"During the decades before the First World War," the political scientist Steven van Evera has observed, "a phenomenon which may be called a 'cult of the offensive' swept through Europe."[225] Wars, it was believed, would run with the same swiftness of trains or the new industrial sewing machines or steam-fired printing presses. It was this instinct that led German generals to assure the Kaiser in 1914 that a war begun in August would be finished by Christmas. English university students sprinted to enlistment centers in the days after the war began, worried the fight might end before they tasted blood. French farmers moving from their crops to the trench lines of Flanders, Russian aristocracy crowding towards the Danube, the politicians who led them all – they operated, mostly, with this same conviction. British Foreign Secretary Sir Edward Grey's mournful meditation on the evening of August 3,1914, the first night of the war, was a lonely one: "The lamps are going out all over Europe," he said. "We shall not see them lit again in our lifetime."

The First World War was a kind of engineering tragedy. The disaster had deep roots: domestic politics, the insecurity of kings, profound colonial greed. But also a fundamental miscalculation about the nature of war and peace in an age of industry. Machine guns – and all the tools of industrial war, from gas to battleships – were not magic tricks of fast victory or permanent peace, as some had thought. A mechanized modern army wasn't, as much as it may have seemed in theory or drills or in midnight massacres in the African bush, some steam-press built for cold rolling the armies Belgium and Prussia and France. In fact, the weapons encouraged battle as they piled endlessly in national arsenals. They tickled fears of fast or surprise attack, even as they gratified that weird continental hunger for violence. Hilare Beloc's poetic joke, the sly *we've got the Maxim, and they've not* took on an unexpected character when both sides had 'em. The machine gun reached the fiery acme of its purpose not as a spur to end wars altogether, as Gatling once hoped, but rather when it was married to barbed wire, to shovels and to gas – and then admixed with the trigger-tugging fear of 20-year-old boys. So: Sixty thousand British casualties in one day alone, July 1, 1916 at the Somme.

The rhymes changed. Hilare Beloc's jigs were a distant memory for the starved, surprised and shocked men in the field. Siegfried Sassoon:

> *You smug faced crowds, with kindling eye*
> *Who cheer when soldier lads march by,*

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[225] **"During the decades":** Steven Van Evera, "Cult of the Offensive and the Origins of the First World War", *International Security* (Vol 9, No 1, Summer 1984) 58

HOUSE_OVERSIGHT_018385

Sneak home and pray you'll never know
The hell where youth and laughter go. [226]

As soldiers dug into trenches that would endure for a half-decade, a terrible strategic fact dawned on the generals who led Europe's armies. The Great War was going to be a charnel house. The continent had built itself into a battle machine, wired by trains and telegraphs and armies. There was no reverse gear. There was not even a switch to slow it down, let alone turn it off. A massive, technology-powered, fast-moving system with revolutionary implications, built beyond the comprehension of any one figure or nation, had slipped out of control. And the men in charge of planning and directing the use of this super-fast complex? They failed everyone: their soldiers, their kings, their armies. They were all but insensible to the real nature of their age.

Sound familiar?

2.

Here, then, is a question of the sort – violent, loaded with the possibility of tragedy – that you'd rather not have to consider: A new way of war arrives, a new weapon, a fresh idea about fighting. Does it make your world peaceful or treacherous? The lethality of the equation of *guns x machines* at the end of the 19th Century appeared to some industrialists and bankers and statesmen inarguable evidence for peace. Everyone with such a violently efficient weapon; who dares start a war? As we now know, *machines x guns* was a formula for some of the worst killing in human history. Gatling's fond hope that his weapons would stop war was naïve, insane even. His competitor Maxim had been clearer eyed. A friend told him: "Give up your chemistry and electricity. If you want to make a pile of money, invent something that will enable those Europeans to cut each others' throats with greater facility."[227]

So: Let's be a bit warmer about this. *Networks x weapons* = what exactly? Is there some disaster lingering in our own future, as unimagined from our current perspective as machine guns and trenches were a century ago? Do we consider war impossible now? There's something sickening in such puzzles, of course. Think of the men and women who, over the millennia, have contemplated similar questions knowing full well the answer would be measured in blood and treasure and children. Put yourself in the place of the population of Melos, a peace-loving Mediterranean island whose destruction 2300 years ago was chronicled by Thucydides in *The Peloponesian Wars*. "Surely you have noticed that you are an island and we control the ocean," an unwelcome Athenian general intimated to a Melian citizens' council one day 243 BC as his soldiers and ships collected menacingly outside the city's walls. Athens wanted the Melians to join an alliance

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[226] **"You smug faced":** Seigfried Sassoon, "Suicide in the Trenches" in *The War Poems of Seigfried Sassoon,* (Mineola, N.Y.: Dover Publications, 2004), 64
[227] **"Give up your chemistry":** John Ellis, *A Social History of the Machine Gun* (New York: Pantheon, 1975) p.33

HOUSE_OVERSIGHT_018386

against Sparta. The Melians – like poor Lin Zexu or Lobengula of the Matabele – yearned only to be left alone. "You would not agree to our being neutral, friends instead of enemies, but allies of neither side?" they asked[228]. *No*, the Athenians replied, and then a line that has resonated through the problems of nations ever since: "It is the nature of power that he who has it takes; he who does not must submit." The Melians voted stubbornly against surrender and for hope. Perhaps the Spartans would mount a relief raid? The Athenians might change their minds? Neither happened. The Melian men were betrayed and then massacred. Their wives and children were sold as slaves.

What do networks do when they touch the balance of war and peace? How might we use what we know, what we sense, about a connected age to manage the dangers ahead? If an insane Cult of the Offensive flavored the end of the 19th Century, our own age vibrates, as we've seen, to a Cult of the Disruptive. The great tale of our times is the diffusion of a new, promising and disorienting network order. We've been told that all this interconnection makes war an impossibility. *Everyone would be a loser in such a war.* But the way in which that earlier age was so horribly wrong about the result of *machines x weapons,* should unnerve us. We don't yet really know what *networks x weapons* means – to say nothing of *networks x networks x weapons*. Or, to sum up what we've seen so far in this book, *very fast networks x artificial intelligence x black boxes x a New Caste x compression of time x everyday objects x weapons*. Would you look at that weird formula and say conclusively: "Hey, we'll all get along." Me neither. We should worry about the day we might face a Melian choice of our own, when some general or infomanagerial despot – or some clicking computer – shows up, unwelcome, and says to us: *It should be obvious you are merely a node, and I control the network.*

When leaders label the rise of China or cyberweapons or terrorism or the decline of the US as the "main problem" of our age – and all of these have been designated as such by famous foreign policy figures –they are missing the revolutionary, uniting force that animates them all. Networks. Whether we are trying to slice apart the roots of the Islamic State or slow Russian territorial dreams or understand narco-economics or hedge-fund finance – connectivity touches and defines each problem. New and essential platforms for finance and biological data and artificial intelligence are emerging now, blossomed out of network connection. These ecosystems must be design, built, protected. All while the world we know kicks back around us, sometimes crumbling, sometimes fighting for its dear life. I promised earlier that we'd apply the Seventh Sense to some practical problem, and the deadly test of war and peace is the one I'd like to consider now. The sharpest challenge of truth for any view of the world is, after all, the design of a grand strategy. Get it right and you can secure your safety. The energy of the age can be your tool. Get it wrong and you reap the Somme, Melos, Canton, the Shangani. Recall General Liu Yazhou's line: "A major

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[228] **The Melians:** Thucydides, *The Peloponnesian War*, Steven Lattimore trans., (Indianapolis: Hackett Publishing, 1998) Chap 5.; See also the excellent BBC performance of certain elements of Thucydides in "The War That Never Ends" available on YouTube

HOUSE_OVERSIGHT_018387

state can lose many battles, but the only loss that is always fatal is to be defeated in strategy."

The leaders of our major global powers may be as blind to the dangers and possibility of our world as Europe's heads of states were to the nature of their era 100 years ago. You know what the Seventh Sense is now. Who among them has it? We should wonder if we've merely now done Hiram Maxim one better: Have we developed something with our age of connection that will reach its fullest potential in allowing us to slit each other's throats more efficiently? I don't think so, but understanding why means we need consider the networks, to feel them out with our new sense.

3.

The essential problem of politics is not difficult to state. It was true for Seneca in the Roman Forum as it was for Lobengula on the Shangani riverbank or is now for congressmen in Washington or cadres is Beijing: Who has power? Why? By power I mean the ability to control others, to tell them what to do – or what not to do; and of course to avoid being dictated to yourself in that "Surrender or die" way. Max Weber, the German sociologist of the last century, had it right: *Macht,* the ability to achieve what you want despite the resistance of others.[229] *Don't develop nuclear weapons*. Or *Don't attack us.* Or, *Join our alliance against Sparta* are all examples of power in action. The movement of power, from the balled-up fists of Kings and Popes and Emperors, to the hands of markets and voters and citizens, and now into a fresh, connected dynamic is the story of history. This is a lurching, worrisome, dangerous process even if it suggests some miraculous transformations. Whole new topologies of vital, life-giving control are emerging; surely contests for their mastery will occur. The terrible human infection of a hunger for power and security isn't, much as we might wish, something quarantined safely to the pages of Homer or Hitler.

So let's pass beyond describing the new and surprising elements that make up a Seventh Sense and onto its use. Examine our world with this instinct, for a moment. Picture that constantly stretched, complex network, spitting out drones, viruses, fortunes and disruption as it is wont to do. Recall the seething, insidious power of the Warez Dudes, the New Caste, the black boxes they all hunger to penetrate and make weird. Think of the compression of time, of twisting topologies that can place the distant atop us in an instant. What single feature stands out? Our world shuffles now, as all these forces slip into an order defined by closed spaces, by fresh in and out borders. What the Seventh Sense reveals as it feels at this new arrangement is gates. Everywhere. Facebook, bitcoin users, doctors with privileged access to genetic databases – all are gated, in-or-out worlds. Look around and see how many gates enclose you or your family or your company. The Internet. The FTSE 100. Your Apple or Android operating system. In our connected age, the act of drawing lines

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[229] **Max Weber:** Max Weber and Sam Whimster, *The Essential Weber: A Reader*. (London: Routledge, 2004), 355

HOUSE_OVERSIGHT_018388

between points is also an act of drawing a line *around* those points. It is not simply that we're enmeshed in networks now; no, we're enclosed even entrapped by them. If the great ambition of Cecil Rhodes' era was for the expansive conquest of territory, in our own it is for the construction and manipulation of gated spaces. *Gatelands.*

In an age of network power, no position is more important, formidable, influential or profitable than that of the gatekeeper. Defining who is in or out of any network is among the most essential moves of design. In financial markets, on the Internet backbone or inside the human immune system, the accept-or-reject decision determines a great deal. The first sign of order breaking down, whether it is the Roman Empire or your lungs, is an inability to manage what slips in and out. Flows of bits, of migrants, of gold and patents and medicines – all of these life-giving forces can be controlled, bent for good or stopped for ill, as they pass through or collide with gates. By gates I mean not only in-out passages but all of the tools that meter and enclose the various Gatelands: Protocols, languages, block-chains. Whatever binds and shapes an information topology. Any sort of code or encryption or binary instruction that can unlock an in and out. If you want to make a fortune or a revolution (or both), if you hope to shatter some barrier of tools or ideas between you and a dream, or to lead a religious revival, spread an infection of hate or revolution or insidious Morris-style computer code – then fundamentally this is what you have to consider: Where are the gates? How to smash them? How to build your own? We are entering, as a result of our dependence on networks of all sorts, a landscape where the very clustering of power creates new border regions, bridges and gates. If older, hierarchical systems craved a top – a king, a superpower, a Pope – our connected, meshlike age demands valves and protocols and gates. It hungers for connection, which means it hungers too for throttles and accelerators and brakes. And of course people to run them. To speed them up. Slow them. Finger off switches. This reordering of power will produce, is producing, a fight over topological spaces for finance, biology, trade or pretty much any source of power. The scramble is as urgent, decisive and essential as the one Rhodes and his peers embarked upon. Inside or out? A fresh Meliananxiety haunts us: Are you the gatekeeper? Or the gatekept?

We wander into Gateland the moment we switch our phones on. We enter it when we book an airline ticket, when our genetics folds into a pool of data, or when we take a new degree, master a computer language, or check on friends via one stateful connected platform or another. We enter it, in short, when we connect. Gatekeepers choose what we see. They determine the rules we follow, what we can and can't change. They reward us too – once we're inside – with benefits of speed, knowledge and safety. Gatekeepers, which can be people or protocols or code, decide who can join closed communities and who is left out and why. They pass us the fine benefit of the compression of time, even as they expose us to the zipper of instant potential disaster hitting everyone in a closed space at once. Gatekeepers control, for instance, how (and how fast) financial data moves between members of light-speed "in the know" trading pools, and the suckers outside. What you can see in your phone or your university computer, why, how – all of these choices have to be made by

HOUSE_OVERSIGHT_018389

gatekeepers. They can, if they wish, manipulate any step of life inside their enclosed orbs of power – and by extension, they can twist data and machines and you. The line between perverting search results and election results is a thin one. Such a manipulation of data is trivial, which means the manipulation of you and I is, technically at least, trivial. It involves the laying of our preferences – what do we usually read, watch, who do we talk to, where do we live – against machine logic and vast data fields. Manipulation of data = Manipulation of us.

The idea of gatekeeping first emerged as it related to newspapers, back in the 1920s when politicians, advertisers and a few social scientists watched a print-information explosion – and developed an uneasy feeling about how the world looked through many newspapers. The personal whims of an editor, his political bent, his boss' economic interest – all of these laid on "facts" like a heavy distorting blanket. Minor twitches were turned into fear-mongering bait. Major global shifts were ignored. The papers are (nearly) gone now, of course. And the idea of gatekeepers merely bending headlines to suit a personal whim seems charmingly nostalgic. Gatekeepers today have a far more profound, subtle reach. They might be governments or regulators or CEOs or machines or research committees, each controlling the design and development of some "rich get richer" tool we depend on and – by marking that "in or out" line – exerting historic, invisible control. Genetic engineering secrets. Unthrottled data flows. Product releases. Do you want accurate DNA analysis? Fast protection from epidemic? A cyber-defense system? You can't have any of these, you know, unless you're in someone's fiercely guarded gateland. Even systems that look open – the Internet, the world of US Dollar transactions, the election rolls – are gated in certain ways. Of course there is – at times – a balance between the gatekeepers and the gatekept, between those of us inside a system and the tools and people who overmaster us. "In many cases, traditional literature focuses mainly on gatekeepers as elites who hold power in their hands while the gated are treated as powerless," the information theorist Karine Nahon has written. "In networks, however, it is necessary to give sufficient weight to the role of the gated, since being subject to gatekeeping does not imply that the gated are powerless, lack alternatives, or that gatekeeping is forced on them. Actually, being a gated sometimes is a matter of choice."[230] But sometimes, of course, it is also a matter of inarguable necessity.

In the slower, less wired worlds of our past, gates mattered too of course. Nations, governments, militaries, religious orders – all of these clustered behind (and defended) marked lines. Map lines, front lines, dogmatic lines. The Triple Entente that bound Britain, France and Russia together in the last century was as much a gated system for their own security as the Peloponnesian League 2500 years earlier had been. Deciding who could swap silk for spice beyond the Tang Dynasty's border was a gatekeeping choice, as consequential for Chinese strategists of the 8th Century as the decision about what might or might not be wheeled into the city was for the

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[230] **"In many cases":** Karine Barzilai-Nahon, "Toward a theory of network gatekeeping: A framework for exploring information control." *Journal of the America Society for Information Science* 59(9), 1493–1512.

HOUSE_OVERSIGHT_018390

tragically uncareful councils of Troy. But now, in an age where connection decides so much, control over gates has a unique leverage. When you finally can feel out the topology of our age, when in anger or frustration or hope or wonder you are ready to act, then this is among the first questions you have to ask. *I'm on the topology now, where are the gates.*

4.

Gates in an age of instant, everywhere, smart networks are, you can imagine, different from the ones that girded Troy or the Tang dynasty. It's not merely that they're made of bits and algorithms not bricks, it's that the underlying nature of their power is different. The most visible evidence of this distinction was first observed by economists a couple of decades ago, as they contemplated the fortunes of the information age, wealth that had been assembled at an eye-watering pace. Unlike traditional businesses which turned over time into competitive slugfests with very low profits, many high-tech firms seemed to run with a new, nearly inverted logic. "Our understanding of how markets and businesses operate was passed down to us more than a century ago by figures such as Alfred Marshall," the economist Brian Arthur wrote in the Harvard Business Review in the summer of 1996. "It is an understanding based squarely upon the assumption of diminishing returns: products or companies that get ahead in a market eventually run into limitations."[231] Marshall had been the first to name this phenomenon in the 1890s: "Diminishing Returns". As any line of business gets more competitive, the profits – or "returns" to investment – shrink. Henry Ford invents a car, he has no competition at first and fairly prints money. But Ford doesn't enjoy his monopoly for long. Pretty soon the Dodge brothers follow him into business, as does Walter Chrysler and then a cascade of new auto companies. They all take a piece of the pie; profits for every carmaking firm diminish. Then the Japanese pile in. The Koreans show up. These new companies compete with growing intensity. Marginal profits decline for everyone. Then the Chinese. And the Indians.

As he studied the balance sheets of infotech firms, Arthur noticed something strange: Returns were *increasing* over time. As their markets matured some companies made more marginal money with each passing day, not less. Marshall's 19th Century industrial economics had never contemplated such a lucrative arrangement. "Increasing returns," Arthur explained, "are the tendency for that which is ahead to get farther ahead. They are mechanisms of positive feedback that operate—within markets, businesses, and industries—to reinforce that which gains success or aggravate that which suffers loss." In other words: Winner takes all. No second place. Arthur was thinking, as he wrote, about the then-nascent computer software business. Say for instance, Arthur sent you a copy of his paper to read before publication as a Microsoft Word document. Well, if you wanted to see what he had to say, you'd pretty much have to own a copy of Word yourself. If you then

[231] **As he studied:** Brian Arthur, "Increasing Returns and the World of Business" *Harvard Business Review* (1996)

HOUSE_OVERSIGHT_018391

sent it along to some friends for their input, they'd be in the same bind. One after another, in just this fashion, users tumbled into the program. It became a standard, a "platform" in industryspeak.

And Microsoft enjoyed a particularly appealing economic leverage: Developing Word may have cost millions, but once that work was done, each additional copy cost just cents to produce. This astonishing speed loop of profitability demanded a whole new economics. It also forced a reconsideration of what "competition" might really mean. Once Excel or Windows had settled into place, had become a *standard*, you couldn't really compete with it. New, optimistic maybe even better rivals rushed into the marketplace, but they were all assaulting the impregnable wall of habit, of a locked-in technology. *Should this be legal?* Arthur wondered. Traditional economics said such monopolies were bad for everyone. (As did the Department of Justice and their global peers as they chased Microsoft for a decade.) But was that right? The "platform dividend" that accrued to Microsoft was surely large, but if you could somehow total up the benefit to the rest of us? The convenience, the efficiency, the benefits of Microsoft's billions of research spending might dwarf even Redmond's massive profits. "Increasing returns," Arthur wrote, "cause businesses to work differently and they stand many of our notions of how business operates on their head."

The essential phenomenon Arthur spotted at work two decades ago is something we now know as "network effects" – an idea that changed how we think about businesses, and particularly about the sticky and alluring power of gated, connected systems in nearly any setting. In the years after Arthur's paper, billions of us ran madly along a course he had anticipated: We crashed our way as fast as possible into those single, winning businesses – rewarding them with near monopoly positions in exchange for the benefits of being "inside". In the twenty years since Arthur spotted increasing returns in software, eight different billion-user worlds have emerged – and others are not far behind: Microsoft Office and Windows, Google Search, Google Maps, Facebook, Google Chrome, YouTube and Android all exhibit that appealing, "If you use it, I'll use it!" logic. Profits and power, just as Arthur would have expected, followed right along. The most valueable company on earth in the early age of connection was one that, particularly, had perfected the idea of a closed iWorld where the efficiencies and charm of inclusion made outside assault difficult. Younger companies like Instagram, WhatsApp, Weixin and others hover not far from a billion users and point us to this gated model spread and repeated. It is easy enough to imagine a world where billions will be enmeshed behind certain gates.

It was just as Arthur predicted: If ten people use WhatsApp or Facebook or YouTube, it's hard for the eleventh to do something different. And when the eleventh person joins in, they make it harder still for the twelfth to walk a unique path. So: Windows runs on 90% of the globe's PCs, nearly 30 years after its first release. Google has 65% market share. Android runs on 81% of new phones. WhatsApp neared a billion users with less than 50 engineers on staff. Facebook passed a billion connected people and faced no real competition. The rich got richer.

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How? "Seven friends in ten days," Facebook growth hackers repeated like a mantra in the early years, a humming meditation that carried them from dorm room to nearly every corned of the world[232]. If you or I joined the service and found seven friends in ten days, we would most likely stay, enjoying the benefits of the gated world, making it that much harder (impossible really) for friend number eight to wander somewhere else. Pretty soon, there was essentially nowhere else to go anyhow. The network magnetism worked so well that, as a result, Facebook's speed-looping connection machine cut the famous "six degrees of separation" posited by Stanley Miligram – the number of leaps between any two people on the planet – to four.[233]

Network theorists who came after Arthur call these "rich get richer" systems "power law distributed" because if you line up all the firms in a digital industry you find the winners are exponentially – by a *power* of ten or one hundred – ahead of everyone else. They slip free from the average gravitational center of a normal bell curve that marks most traditional business. A normal distribution would shape up like a chart of people who own cars: 20 percent driving Fords, 10 percent Nissans and Toyotas, and so on. Or it might look like the distribution of height: Most men are between 5'7 and 5'11, but 50% are scattershotted at different heights. Network systems, however, can breed commanding winners. It's not like 50% of online users are on the Internet and others are scattered across different systems. Users huddle into single winning clusters. It's as if 90% of the world always bought a Ford; or 90% of people were exactly 5' 11". These systems run faster and better and more profitably because they are locked-in, gated by technology standards and by common connection. When we say that *networks crave gates*, this is the sort of gate we mean. If you had to look for your friends one-by-one on Facebook, Friendster, MySpace, and GooglePlus you'd exhaust yourself. So, one winner emerges. Data scientists attribute the success of these winning nodes to "preferential attachment" – the idea that if Brian Arthur is using Microsoft Word and I'm using it you are likely to do so too. But there's another secret: More widespread adoption makes the whole system faster. Winner-take-all marks that network hunger for the compression of time.[234]

There's an additional feature at work in the very newest of these billion-user clusters that's worth our attention: It's not merely that we'll use them because everyone seems to be doing so, it's also that as more users weave themselves into each others' lives and the machines into too, these nodes of power get *smarter*. Google Maps can predict the fastest route from your house to your office because it can watch the movements of hundreds of millions of users, each silently pinging their location and speed as they creep through rush hour or sprint down an empty motorway. As more people use GPS enabled devices, the quality of this data gets

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[232] **The network magnetism:** Chamath Palihapitiya, "How we put Facebook on the path to 1 billion users." Udemy *Growth Hacking: An Introduction* lecture published January 9, 2013 and available on YouTube.
[233] **Winner-take-all:** van der Hofstad, p 24
[234] **But there's another secret:** Albert-Lazlo Barabási "Network Science", *Philosophical Transactions of the Royal Society A:* (2013) 371

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ever better, like a video resolving itself from low-quality to HD in front of your eyes. Success attracts still more users. All of them are Google's sensors, in a way. Medical diagnosis, cybersecurity, trading algorithms, search – pretty much any linked ball of chips and humans and sensors throbs with this logic. The best of the leading technology firms understand the power of this logic: Google's TensorFlow artificial intelligence engine, for instance, was largely regarded by experts as nearly a decde ahead of competitors in 2015. So the company began giving away access for free. In traditional economic terms this would be insane; but with network logic the strategy is clear: The more people who use TensorFlow, the smarter it gets, which in turn attracts still more users. Dense and learning fusions of mind and data like TensorFlow and other soon-arriving AI systems are all gated universes. The "increasing returns" for those inside – you, me, our neighbors – breed mutual efficient success and, of course, massive power for their owners. We're part of the game too: The more people tied in, the better *our* lives get.

The topological charm of these explosively growing clusters was first teased apart by the electrical engineer Bob Metcalfe in the 1970s. Metcalfe was hunting for a better way to send data – say grocery lists to his wife – through Menlo Park and he perfected a connection protocol called Ethernet, which soon became a standard for linking machines. What Metcalfe noticed, as more and more users piled into the gateland of Stanford's Ethernet-connected machines, was that the power of the system was growing *exponentially* with each additional user. This became known later as "Metcalfe's Law": The power of a network grows, massively, with each additional user. A system with one phone, for example, is really not very useful. Who would you call? A system with two phones means one possible connection – we can call each other. But when you increase the number of phones by a factor of two – from five to ten, say – the number of possible connections more than doubles from ten to 45 . The difference between Bob Metcalfe and his wife sharing grocery lists and a connected national network of husbands and wives is immense – an insight that led Bob Metcalfe and his wife to start a networking company that made them billionaires.

Metcalfe's Law has another angle, and it's here where some of the unnerving, dangerous political power of network gates is revealed: It's not merely that the power of a network grows exponentially with each additional user; it's that the cost of being cut out grows every bit as fast. Maybe even faster. If I shut you out of Google today, it's painful. But tomorrow – after a day of new information and websites and services come on line – it will be even more costly. The network scientists Rahul Tongia and Ernest Wilson have called this "The Flip Side of Metcalfe's Law."[235] To be excluded from a database of cancer genetics, for instance, when it has a million members is probably not such a painful problem; to be locked out of the chance to compare your genes with a billion others, however, is hugely costly. Maybe even fatal. Imagine if I cut you out tomorrow from the NYSE, your phone system, smart diagnostic webs, cybersecurity patches? It's not like you can swap our your Ford for

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[235] **The network scientists:** Rahul Tongia and Ernest J. Wilson III, "The Flipside of Metcalfe's Law", *International Journal of Communication 5* (2011), 665–681

HOUSE_OVERSIGHT_018394

a Dodge. There is nowhere to go. Gatelands produce "winner take all" systems, but they also produce these "loser gets nothing" dynamics – and an absolutely chilly, fatal cost of separation from the winning system. A discipline of network science known as "queing theory" helps us understand why. In studies of massively connected systems, the more time machines spend on their main task – hunting prime numbers or DNA patterns, for instance – and the less time chattering with each other about how they will compute, the faster they run. Winning protocols avoid this terrible inefficiency of translation because it can be spread across so much connection. In fact, the great breakthrough of computer systems in recent years has been the ability to handle massive amounts of data all at once, to maintain versions of information in a concurrent state many places in the world. This is the essential technical leap that permits compression of time. And it depends entirely on careful and gated design.

To be inside a gated system is, then, really to be faster because of the slickness of communication that becomes possible. The very structure of the system accelerates that compression of time. This design feature of networks, in which winners take more and more, is why gates, and their careful use, will become the most dramatic lever for business, research or international politics in coming years. It also explains why our modern gates are different than older ones. Why it is so damn costly to leave them; why mastery of them is even more insanely lucrative than Cecil Rhodes' gold mines. Think of the old industrial age power games for a moment: Britain and Germany tried to match each other with their industrial output during their fatal competitive sprint 150 years ago; but imagine if network effects obtained? If Britain's initial head start in the industrial revolution had given them 90% global trade share? Germany would never have even tried to compete. They would have been the Friendster of the 20th Century: Isolated, slow-growing, powerless and finally consumed by the winning system.

5.

Networks crave gates. Once a billion people were connected together, of course there was going to be something like Facebook, a Gateland where they could link one to another in ever-thicker cascades of connection. Once everyone could record and watch and share videos, something like YouTube was inevitable. As we try to picture the world ahead of us, as we try to ask what tools of power we can acquire to twist this dangerous landscape into something we can manage and predict and control, we must ask of it: What does it want? The world wants a protocol for the fast exchange of money. It wants a basic language protocol. It wants a place to swap information about IT security holes. It wants instant translation systems to replace the need to learn to English or Chinese or Spanish so the world can move yet faster. I believe it wants certain sorts of alliances, a particular type of superpower and even craves a new form of politics. For any nation that controls these gates, there is a possibility to use that position to create still more gatekept platforms, to shape the protocols that tie platforms together in the way roads or jet planes link the physical world. This is the iron law of Gateland: Connectivity is power. Which means that gatekeeping is, at the end of the day, our most powerful point of a control.

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It won't surprise you that, in recent years, for instance, the world has seen an acceleration in the construction of *physical* barriers, of fences and walls running between nations and defining and in and out. Roy Hassner and Jason Wittenberg, two American political scientists, scored out the pace of global wall building and found a sharp acceleration: In fact, of 51 national enclosures built since the end of World War Two – the Berlin Wall being the most famous example – more than half were constructed in a rush of self-protection between 2000 and 2014[236]. And more are coming: Hungary, Kenya, Algeria and India now posthole their borders in initial exploration of what might be built. There's a frantic urgency to some of this. The Spanish government, for instance, raised a ten-foot high, razor and camera topped fence around their Saharan footholds in 1998 – the enclosed land was controlled by Madrid, so it was technically "Europe," which made an irresistible target for would-be migrants. The fence wasn't enough to stop the flows. So they built a second one to run around the first in 2001. Then, in 2005, thousands of desperate Africans launched a coordinated charge against. A couple of dozen migrants died in the attempt; a thousand made it through. The Spanish responded with a third line of fence, this one 20 feet high, electic, camera-watched.

This pattern of ever more stacked defense is repeated everywhere. The walls, fences and trenches of the modern world seem to be getting longer, more ambitions, and better defended with each passing year, Hassner and Wittenberg concluded. Unlike traditional lines of defense, the Maginot Line or the Great Wall of China for instance, the aim of 21st century barriers in places like Israel or the US or Spanish Morocco have been less to stop a rolling armor *blitzkreig* than to slow the insidious movement of smugglers and spies and criminals, or the hopeful dashes of fleeing refugees. There's an affective and – to those on the inside – appealing asymmetry to these borders. They are mostly marked and built by richer, more modern, more stable nations desperate to control in and out. The creation of gates is, we should sense now, the corollary of connection. That they can sometimes be piled into the "winner take all" efficiencies Brian Arthur first teased out should give us a sense that there is a logic to this emergence.

Reviewing the problems of deadly disease contagion after the 2015 Ebola pandemic, Bill Gates examined this connection-and-gate lemma in the sharpest, most worrisome historical terms. "There is a significant chance that an epidemic of a substantially more infectious disease will occur sometime in the next 20 years," he wrote. "In fact, of all the things that could kill more than 10 million people around the world, the most likely is an epidemic stemming from either natural causes or bioterrorism."[237] This was the cost of a fast-moving, interconnected world. It was what floated free from the extension of Paul Virilio's line: Airplanes produced the

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[236] **In fact:** Roy Hassner and Jason Wittenberg, "Barriers to Entry: Who Builds Fortified Boundaries and Why?" *International Security*, Vol. 40, No. 1 (Summer 2015), pp. 157–190

[237] **Reviewing the problem:** Bill Gates, "The Next Epidemic — Lessons from Ebola" *New England Journal of Medicine* 2015, April 9; 372:1381-1384

HOUSE_OVERSIGHT_018396

airplane accident. Well, networks will produce the network accident. Many, in fact. A world primed for contagtion, Gates suggested, needs – and is missing – more and better gates. (Yes, here you can pause to double take at the serendipitously strange fact that the wealthiest citizen of our gated age is named Gates, just as the richest man in the era of pulling oil out of rocks was a "Rockefeller") Connection demands systems to gaze ceaselessly for the smallest sign of assault or need for change or accidental shimmering movement of danger. Part of what made the Ebola response successful is that the response really was in the form of gates as we've come to understand them here, not walls. Protocols for biological reaction, for medical care, for epidemic monitoring, the urgent helicoperting *in* of support and aid and ideas. The gates assembled around the Ebola pandemic were its solution. Had it merely been walled off it would have spiked, grown, mutated and finally escaped."The world," Gates wrote, "needs to build a warning and response system for outbreaks." This is true for all the outbreaks we face – whether they are disease or financial panic or terror. There will be, you can be sure, ignorant calls to build walls and not gates. This misses the point of networks. In an age of interconnection walls are nearly as dangerous as no walls. What matters is bulding topologies designed for gating, for milking power from the profound logic of networks we've seen at work.

For decades after the 1929 financial crisis triggered an historic global depression, economists and politicians debated what had gone wrong. What had they missed? The world, it emerged, had been wired with an economic system designed rapid movement, but politicians and bankers had forgotten to put in the needed brakes. They had tried to run an industrial engine against the background of gasping political structures. Basic adjustment mechanisms – release valves for financial or currency pressures – had not been invented, refined or installed.[238] When we find ourselves in coming years gasping through some sort of financial crisis of our own, or running scared from a cascading military or social epidemic that slaps us unexpectedly, what do you think the most likely cause will be? It will be a failure of gates. Too few in some places; too damn many in others.

Remember the haunting, persistent vulnerability of our age. A twitch anywhere in the system can rock and even crack the whole edifice. Space Time Compression's ability to shrink distance to zero and time to an instant can turn anywhere, anytime into a battlefield or a spot for revolutionary innovation. Any moment can present us with questions of war and peace. Today we have no central theory of gatekeeping, no ideas about balancing inside and out. We fly on instincts, but they are the old industrial ones. Anyone can see a system that is full of holes and inconsistencies. Can you see a way through it, though? Pressed by political, technical and economic desire – to say nothing of the basic urge for self-preservation – more gates will be with us from now on.

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[238] **Basic adjustment:** Ben S. Bernanke, "Money, Gold, and the Great Depression", *H. Parker Willis Lecture in Economic Policy*, Washington and Lee University, Lexington, Virginia March 2, 2004

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"Computer systems are, like many other things in engineering, constructed by composition," computer researchers F.X. Lindner and Sandro Gaycken have written. That line, intended for switched-on digital systems, in fact fits most of our world. Nearly everything around us, from cities to telephone networks to refugee waves, are assembled by composition. Currences are layered with encryption. Refugee dreams carved from photosharing and refined with GPS. Composition in this way breeds new vulnerabilities, new points of contact and this rather astonishing result, one we're not prepared for in any sense: "In a composite system there is no critical gate," Lindner and Gaycken explain. "Everything is a gate."[239]

[239] **"Everything is a gate":** Lidner and Gaycken, p. 56

HOUSE_OVERSIGHT_018398

Chapter Ten:
Defense in Depth

In which gates, operated with our new instinct, become at once a tool of prosperity and survival.

If you walk for a few minutes to the south of Tinanmen Square in Beijing, leaving the tomb of Mao Zedong behind you, there's a small lane that runs back into a warren of anonymous, white-walled buildings. The streets are unusually clean; the surveillance cameras unusually – even for Beijing – dense. The neighborhood is home to many of the last of the generation of Communist Party cadres who joined and supported its rise decades ago. Several years ago, I found myself settled into one of them for an afternoon tea with Huang Hua, one of the great modern Chinese foreign policy figures – and a member of that early revolutionary generation. Huang was, in a sense, heir to the Warring States diplomat Su Qin, whom Master Nan had encouraged me to study. Huang had penetrated the madness of Mao's revolutionary era to see the possibility of a different order, one he'd brought to vivid life after Deng Xiaoping ascended to the Chinese leadership in 1976. Huang had been the country's Foreign Minister and later a Vice Premier. He was always calm, with an easy and relaxed temperament. One of my favorite images of him was from the mid-1970s when, while sitting on a flight to the US from Paris to take China's seat at the United Nations, he was ambushed by Walter Cronkite. Huang is completely unflustered in the scratchy video of that encounter. He sits quietly in a cloud of smoke. Cronkite pesters him. Huang smiles, offers a cigarette to the news crew, and though he is in the midst of a transit from the poverty, chaos and smashed politics of China he is nothing but serene, a statesman – not the nervous representative of a twitchy power.

"Do you know the difference between Western and Chinese thinking?" Huang asked that afternoon as we sat inside his courtyard house. Leaves were turning outside. He was in his early 90s then, still tack-sharp. "You see, when Chinese want to do something, we begin with the question: What is the nature of the age? Westerners begin with *the goal.* What do they aim to achieve?" Deng's foreign policy, one Huang shaped and executed, had been an excellent example. Mao, who ruled China from 1949 until 1976, had a darting, paranoid, murderously strategic temperament. The nature of his age, he was convinced in his Marx-addled mind, was one of *zhanzheng yu geming* – war and revolution. From this first principle, everything followed: He honeycombed Beijing with bomb-proof tunnels, relocated Chinese industry to isolated and gaspingly poor mountain strongholds, reacted to foreign ideas or influence with a snapping electricity – and was bent on protective isolation as he dragged the country through one impossible and failed isolationist development initiative after another.

Deng, when he came to power in 1977, read the nature of his age too. He read it differently. "There is no possibility of a great war. Don't be afraid of it, there is no risk of it," he assured a group of Chinese cadres during a chat in 1983. The cadres were having a hard time replacing their Maoist paranoia with confidence that China

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might safely open, develop, and change. They mixed the crouching nervousness of a secret political party with the vivid nightmares of a nation that had been invaded, abused – humiliated, they said – by nine countries since the mid-19th Century Opium Wars. "We used to worry about war and talk about its possibility every year," Deng told them. "It seems the worry was overdone." The world was, he felt, entering an era of *heping yu fazhan* – peace and development. Terrible, nation-demolishing wars would not soon victimize China, Deng thought. Nation *building* was the nature of the age. Its tools would be science, finance, and trade. If the Chinese people worked hard, he promised his incredulous listeners, they might by the year 2000 grow their thin $250 per capita income to the nearly unimaginable target of $1000. "I don't care if the cat is white or black," he famously observed, "as long as it catches mice." Socialism? Capitalism? No matter so long as it produced progress. Deng's judgment proved out. There were no major wars. Development was, for China, the name of the age. The cat caught $1000 dollars of per capita income nearly on the old man's schedule. It is still playing with the string.

There is something admirably direct about the Western way of problem solving, of course. *The shortest distance between two points is a straight line*. It has its uses. But it's also true that this sort of elementary geometry does not describe, always, the best path. Particularly not today, in an era when topological collapse or instant connection means that the distance from a to b can go to zero (or infinity) in a single sudden shift. Yes, you may be stringing a line from a to b, but if you're putting it up in a tornado? Is the best route to a new Middle East really the tipping over of stable states? Is the quickest path to climate control *voluntary* compacts? Are faster markets and more unwatched capitalism the safest way to ameliorate our unbalanced economics? Sometimes a more indirect line is called for. Sometimes it is faster, safer. Huang Hua's question – "Where is the world going, after all?" – turns out to be the first essential one for any endeavor. *If you are not looking from the highest possible altitude,* Chinese will warn you, *you are not seeing the full picture.*

The nature of our age has, I think, emerged clearly, vividly and broadly for us now. Constant, instant, everywhere connectivity taps with the efficient mercilessness of a steel hammer on the glass of most of our comfortable institutions. The Seventh Sense has let us understand a bit about the origins of this creative violence. And it has shown us too that our era's dominant feature is not merely cracking disruption, but also the construction of new orders. *Da po, Da li* the Chinese might say – great destruction *and* great construction. This is the nature of our age. Tap, tap, crack. And then: Gatelands – speed-bred by technology and filled with possibility. That some of these gated worlds contain billions of people or trillions of sensors, computer chips or network nodes only strengthens their inexorable grip. That they can be so easily or even accidentally weaponized marks the edginess of our problem. That they will be built atop the sharp-edged shards of a collapsing older system heightens the urgency at which they must emerge. To be inside, we've seen, delivers the light-speed benefits of time compression, of life on a nearly alive mesh. To be outside? It is to be cut off.

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I said earlier that I wanted to lay the Seventh Sense onto the problems of war and peace and grand strategy – and while the insights our new instinct reveals are life-giving for business and eye-opening for culture, it's to the devious and unavoidable problem of global order I want to turn now. In a now-famous 1986 speech "You and Your Research", the Bell Labs scientist Richard Hamming set three questions for anyone embarked on the exploration of new ideas: "1. What are the most important problems in your field? 2. Are you working on one of them? 3. Why not?"[240] Well, the most important problem in the field of global affairs is the question of the future of world order, of how it will emerge – and what sort of aspect it may yet present. It is the problem to be working on. It also touches, like it or not, whatever the most important problem in *your* field is: Opening new markets, educating your kids, planning five years of corporate growth. Remember the distinction from earlier in the book, the difference between living at an ordinary moment and an historic one? The difference between Warsaw in 1539 and 1939? In one age, history is irrelevant; in the other it nearly throttles you. You can't avoid being touched. We live in an historic era, not least because the connections that define our age means epochal quakes in one part of the system will rattle other bits too.

A feeling for history – Nietzche's old "Sixth Sense" – should fire up invisibly in us bit now as we think about what life in an historic age might mean for us. The surprises in our news every day. The creaking of our old institutions. What do they augur? The political scientists Charles S. Gochman and Zeev Maoz once made a survey of history to see if they could spot just when the world slipped from calm moments to epochally unettled ones. They surveyed nearly 1,000 wars, big and small, hunting for patterns as you or I might look for trends in stock prices or sports scores. Increasing complexity, they discovered, almost always shook the world into conflict. States, armies, political groups, newly independent nations, ideological and religious forces emerge and then collide in their young energy, each driven by different aims and values and dreams. A cycle marks the process. First, disputes over small matters accelerate – as they are doing now. Everything seems open to question: Do you control this trade route? Who says we have to respect this arms limit? The combined pressure of so many simultaneous disagreements announces a shift in the pattern of all relations. A logical loop follows: "The frequency of disputes," Gochman and Moaz explain, "appears to be an early indicator of system transformation…The rise in the number of disputes seems to indicate a decline in the degree of consensus on the 'rules' of the international order. This heightened dissensus (often culminating in large-scale wars) is followed by restructuring."[241] Pressure on the rules. Small cracks. Large scale war. Re-ordering. Like water moving from ice to liquid to steam and back, this cycle has a predictable logic. It ran in the age of Bismarck and culminated in World War One. It spun again in the age *between* last century's great wars too, tripping into a second World War. And it ran as well in the

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[240] **"What are":** Richard Hamming, "You and Your Research", *Simula Research Laboratory* (Berlin: Springer-Verlag, 2010) Chapter 6

[241] **The politial scientists:** Charles S. Gochman and Zeev Maoz, "Militarized Interstate Disputes, 1816-1976: Procedures, Patterns, and Insights", The Journal of Conflict Resolution, Vol. 28, No. 4 (Dec., 1984), pp. 585-616

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fracturing of ancient China during the Spring and Autumn era or in the Roman Empire in the age of the Caesars. Our current shifting – that tap, tap on every nation's politics, media, and economics – isn't really so unpredictable after all. [242]

You may know the old saw of military parade evaluation: That the more magnificent a nation's uniforms are the weaker it's army usually is. But the gold-braided admirals of some three-ship navy reflect a very human need for security, and particularly for a self-decided *feeling* of security. Every nation has it's own foreign affairs aims. Each cherishes a certain national image, memories of military glory and of "interests" inseparable from culture or identity. The goals of the French and the Turks, for instance, each evoke an encyclopedia of history, tradition and politics. Uneasiness in Paris about capitalism and immigration, for instance; or Anrka's worry about ethnic division, fundamentalisms, and the creeping nuclear progress of their neighbors. Our era's revolutionary logic will shape choices in every nation differently. But I'd like here to discuss American foreign policy. America plays a central role in world order now. The country's leading position makes her, to some degree, an unavoidable gatekeeper. In the Napoleonic era, nearly every revolution or war could be tied to energies emanating from Paris. During the Cold War most puzzles of politics or geography might be framed in terms of a zero-sum competition with the USSR. In our own age, we'll find most every problem links to networks and their new logic. And – for now at least – to America. Thomas Paine's memorable 250 year-old assessment, that "The cause of America is the cause of all mankind," touches this linked universalism in a way he never could have imagined. "Betweeness" or "Centrality" are the way network science labels and measures such a role. Just how essential is a certain nation or trading platform or point? The networks of America won't, in the future, be the only networks. They will be less "between". But they will be, always and indelibly, the first reference for design.

If the traditional aim of American foreign policy was to prevent the emergence of a challenger that threatened the country directly, or that might fence off and manipulate Asia or Europe or Latin America against Washington's aims, the concern now is different: Mastery of topological destiny. There are those who observe, as an American think tank noted in 2015, "Today the United States faces no existential threat."[243] This is wrong. The emergence and shape of networks is just such a danger. Security, the great foreign policy theorist Andre Wolfers once wrote, is "the absence of threats to acquired values."[244] The networks around us, as we've seen, are demolishing older values. Often because we want them to. Any revolutionary technology unbuttons an older order this way. But we now approach this destabilized world with a sort of wideyed panic. Control terrorism, manage climate

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[242] **Our current shifting:** See also Lars-Erik Cederman, T. Camber Warren, and Didier Sornette, "Testing Clausewitz: Nationalism, Mass Mobilization, and the Severity of War" *International Organization* 65, Fall 2011, pp 605–38

[243] **"America faces no existential threat":** See James Dobbins, et al. *Choices for America in a Turbulent World* (Santa Monica: RAND Corporation, 2015) xiv

[244] **In his classic essay:** Andre Wolfers, "'National Security' as an ambigious symbol'", *Political Science Quarterly,* 67 (1952) 485

HOUSE_OVERSIGHT_018402

change, lock in great-state peace. So many desires scatter our minds and when we fail to achieve them they erode our will. Here is a basic lesson of accomplishment in any human domain: Better for us to focus on a single aim, and tighten our efforts around that one aim and use success to strengthen our will. The answer to the great, newly-charged existential question of politics – "Are you a gatekeeper or the gatekept?" – is not yet decided for the United States. So, strategy first: We live in a connected age where power is sliding into that gated order we've learned about. America's role? Not to make the entire world democratic. Not to try to bomb or force stability onto every nation now collapsing under network pressures. Not to passively wait for our version of history to "win". Not to thwart the rise of other countries. No. The strategy that fits the nature of our age and position is to perfect and then operate the essential, topological mechanisms of power now. Sometimes with warm humanity; other times with the ruthlessness demanded by the touch of danger and evil. This involves gates. It involves firmness and nerve and willpower. It demands what we might call Hard Gatekeeping.

2.

Everything around us now is or soon will be connected. Access to our trade, the use of technology and networks, our defense or our currency – all of these must be considered as gated systems. Each will come to throb with new power as a result of their links, as a byproduct of their escalating sensitivity, intelligence and power, and from that in-or-out distinction. Much remains to be instantly, fully linked in this way. Our education. Our medicine. Our military. Real-time information, sensors and machine intelligence will erect Gatelands in each of these areas and in others. These walls will go up even faster than real-world berms and fences. The strategic position of any nation or terror group or business is not going to be secured by industrial measures. No one at Google wants to build a newspaper. No one in Al-Qaeda is trying to float an aircraft carrier. Rather, it will be determined in the construction of new tools, which largely means the building of a new, gated order.

"Every new age and every new epoch in the coexistence of peoples," the historian Carl Schmitt once wrote, "is founded on new spatial divisions, new enclosures, and new spatial orders of the earth." Schmitt was contemplating history: The great Mediterranean empires and the long, millennial power trails of Asian chieftains. But his insight touches every age, our own included. To make a nation, to build an empire, is to draw lines, to push at borders, to smash at gates. Some of this is the wild martial ambition of a Napoleon or Hitler (who Schmitt unwisely advised); often it is simple protection. Lord Balfour, serving as Foreign Secretary, contemplated this problem from his imperial vantage in 1918 and observed: "Every time I come to a discussion – an intervals of say, five years – I find there is a new sphere we have got to guard," he wrote. "Those gateways are getting further and further away from India, I don't know how far west they are going to be brought by the General Staff."[245] This problem of where exactly to put the gates confronts us now as well.

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[245] **"Those gateways":** Quoted in Robert Jervis, "Cooperation Under the Security Dilemma", *World Politics* Vol 30, Issue 2 (Jan, 1978) p. 169

HOUSE_OVERSIGHT_018403

Gatekeeping, as we've seen, isn't simply the act of marking geographic lines. Those hurrying walls and berms and triple-fences of the real world are a kind of gatekeeping but they are also, I'm pretty sure, expressions of a deeper desire. Each is a real-world defense against topological pressures of population and ideology and violence, all shaped by network magnetism. The likely futility of such gates is clear enough when you contemplate the forces they are intended to keep out: Refugees see prosperity miles on their phones. Little wonder they rush at it. Internet-transmitted messages light up ideologies, protests or fundamentalisms that pull people back and forth endlessly across physical borders. The world responds, as anyone without a Seventh Sense might, with walls. But to focus merely on the physical? This is to misread the issue. Gatekeeping includes real-world borders, of course, but the statesmen of the future will act particularly on topologies. They will work not merely to stop up flows, but to decide their movement. Gates will, for instance, serve as bespoke disease buffers, created to track and then freeze the worrisome pandemics now crawling at us on the connections of our age. Other gates will be economic tools: The will help isolate and then soothe the unstable and apparently broken, middle-class eroding financial patterns of the past decades.

Recall how the design of computer or network systems affects the real world, like a marble slipped under a carpet? Gatekeeping's topological design is like placing marbles (or boulders) in particular ways, to direct movements and flows as you might guide water with a canal. The great historian Arnold Toynbee once recalled a passing moment with British Prime Minister Lloyd George during the endless (and disastrous) Paris Peace Conference of 1919. "Lloyd George, to my delight, had forgotten my presence," Toynbee wrote, "and began to think aloud. 'Mesopotamia…yes…oil…irrigation…we must have Mesopotamia; Palestine…yes… the Holy Land… Zionism… we must have Palestine…; Syria… h'm… what is there in Syria? Let the French have that."[246] This sort of charmless arrogance – *The Holy Land….We must have that* – doesn't much suit our age, but that comprehensive view? What oil and irrigation and Suez were to Lloyd George, emergence and data flows and gates are to us. There's a crucial difference, however: We need not take the most precious territory of our age through invasion or colonial exploitation or in mis-balanced peace settlements. We can build the essential landscape of power. We can build it for defense. And then we can grow it, perfect it, and attract others. Schmitt was right, human history is the story of enclosures – and nothing about our emerging age suggests any other approach can, with a single clear line, solve the vexing *network x network x weapons* problems we face. Hard Gatekeeping means molding the landscape, gate by gate, to encourage certain movements and make others difficult, costly, maybe even impossible. Any future order must begin with this first principle: The line between in and out is as essential as what goes on inside.

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[246] **Lloyd George:** Margaret MacMillan, *Paris 1919: Six Months that Changed the World*, (New York: Random House, 2002) p. 381

HOUSE_OVERSIGHT_018404

The goals of Hard Gatekeeping are simple enough to state: To protect those inside the gated order, to make security and innovation more efficient, to accelerate certain kinds of connection and dampen others, to manage vulnerable links to the non-gatekept world and – perhaps most important– to use that "in or out" leverage to relentlessly affect the interests and plans of others. These aims are the root of real security in any age. "In anarchy, security is the highest end," Kenneth Waltz wrote. "Only if survival is assured can states seek other goals such as tranquility, profit and power."[247] Survival – and Waltz's other essential aims – will be decided by the nature of our future connection. In this sense, Hard Gatekeeping produces a decisive change in our posture. It lets us aim *for* something instead of merely being against movement or – hopelessly – against the future. It establishes priorities, clarifies our real core interests, helps us budget our effort and our expenses – better, perhaps, to spend a trillon dollars building tools of topological mastery like infrastructure or new technology than chasing Middle East peace.[248] Gatekeeping does not transcend the long-standing debates between the cold realism of Stalin and the idealism of Woodrow Wilson so much as it sets us a preliminary task: Shaping the environment. To build and control the next generation of gatekept systems should be our aim now. In the future paper currency wil be replaced by secure digital bit transactions. Genetic information will demand smart, live-connected platforms for efficient mining and study. Cyber and biological security will each come to be defined by high-speed, machine-intelligent protocols. All of these are gatekept cores. Mastering them will be as important as having military bases, trade missions or treaty arrangements once was. The development of such systems plays to our strengths; they deliver both security and useful pressures of innovation. Remember – the aim isn't to build walls. It is to use the logic of networks and gates, and all the complex productive force they release.

3.

The elements of Hard Gatekeeping can be stated simply enough:

First, *Does it work for us?* We seek a landscape of technology, trade, finance, knowledge – all the tools of power – that balances the pressures of politics with a colder grasp of longer-term national interest. The protocols, alliances, treaties and data webs that enable markets, trade or thinking machines – all are gatelands we can cultivate, improve and protect. Our gatelands must be designed to limit the rippling risks of contagion or error moving wildly, like spring weather, inside linked complex systems now. Control of topologies is what air superiority or sea mastery once were. The opening attacks of future wars will come invisibly and silently through networks, in space, in fast topological strikes – not with noisy land invasions or bombing runs. Well-built gates will give us time and leverage. They will

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[247] **"In anarchy":** Kenneth Waltz, *Theory of International Politics,* (Reading, MA: Addison-Wesley, 1979), 126

[248] **It establishes:** For a discussion about why a grand strategy is of practical use see Hal Brands, "The Promise and Pitfalls of Grand Strategy,*" Strategic Studies Institute, External Associates Monograph Program*, 2012

HOUSE_OVERSIGHT_018405

deliver the honestly-earned confidence of the secure. They will provide purchase for the patient work of diplomacy, a marked shift from the crisis-to-crisis lurching of today.

The texture of our values should be everywhere woven into these gatelands we will cultivate: Democratic choice, freedom of thought, privacy. We won't have time for leisurely deliberation about ideals in the crashing, time-compacted crises ahead, so we should begin with them. Let other nations measure gated enclosures for their different values, marked by their paranoias and historical burdens; our strength will be an order that reflects our habits of civilization. The curious, open-minded searching native to our temperament, for instance. This will force constant innovation and evolution, an antidote to the failure to change that poisons most closed systems. A continued absence of gates will undo us in the short run. But the long run will be a disaster if our gates are inflexible, too closed, incapable of upgrade or – worse – girded by promises and fears that are not naturally our own.

A second principle is that we ought not force anyone else to use our gated systems. *Gatekeeper or gatekept?* No more profound, painful, liberating or enslaving political choice now exists. Nations must be free to select, in as much as they can, their own terms of enmeshment. Our aim should simply be to build the best order we can. America's tremendous economic and technical lead serves us – for now, at least – as the isolating stretch of the Atlantic and Pacific once did. There's no need to force others to follow us. Recall Greshams' famous "economic law": The way in which the bad drives out the good. A stock market made of swindlers won't attract investors for very long. Well, in many networks, a sort of reverse-Gersham's law applied. The good drives out the bad. By this I don't mean merely the self-cleaning properties of systems like Wikipedia. But of linked systems more broadly. If one nation runs a DNA database where results are skewed by rules of political power – family members of leaders get special access for instance – it will make it less effective, and therefore less appealing as a gateland. So we should be relaxed about letting Europe or Russia or China try their own gated systems. Their desires reflect sensible, understandable urges. If you were leading a nation would you rely on Washington's trade or financial commitments? Because of the nature of power now many nations may have no other choice; but forcing them to enmeshment could bring shattering, unnecessary pressure. Let them divide themselves from us; it will only weaken them.

We need not evangelize, invade, or compel our way to power. Consider the case of global trade. For decades after World War Two, many nations sought independence from economic entanglement. They yearned for autarky. They scorned trade. And they nearly bankrupted themselves in the process: Want to buy Portuguese cars? French computers? Indian bikinis? I didn't think so. The whole point of trade was to solve such imbalances of skill and trade. When the age of connection began after the Cold War, most countries made a decisive shift: They arranged their economies to be attractive to global financial flows. Trade grew twice as fast as the world economy. The cost of being left out was, and is, a nearly impossible burden. American systems, if they work for America, should have the same magnetic appeal,

HOUSE_OVERSIGHT_018406

the power-law dynamics Brian Arthur found in the most successful network arrangements. Getting it right is enough of a task. If we can manage that, what we build will run with unimpeachable legitimacy. Chosen, not forced.

A third principle is that our gates and protocols and webs ought to be open to others, but with each new link weighed, added to the scale of strategic balance with exacting care. An overarching, systemic view should inform us. Nations that want to use our cyber security systems, for instance, should join research cooperatives – and possibly shoulder as well some problems of global network health like the implementation of IPv6 or DNSSEC, or any of the future jointly secur standars that will emerge. They should even – here is where the leap comes – be required to cooperate on nuclear proliferation, cybercrime, or trade norms. The puzzle here is clear: How to use our strengths to address our dangers? While we can't directly press our lead in cancer research to stop national flirtations with nuclear bombs or cyber crime, it's probably true that a cost of weapons proliferation should be exclusion from life-giving technical and trade and other gated orders. Remember that feature of network systems now, how the cost of exclusion grows even faster than the benefits of inclusion? If the aim of any society in this connected age is to accelerate the compression of time for its citizens, than life outside the best gates for this will be a nearly fatal political cost. Do you really want to rely on French computers? Wear Indian bikinis? Do Iranians want to rely on Iranian cyber-security tools alone? It is ever-easier for citizens of nations sliced free from vital networks to feel what they *don't* have.

The courage to leave some nations out of the order we're constructing – and to cut others out – doesn't come easily to us. Today we don't really engage in a comprehensive, linked strategy. Iranian proliferation and Chinese finance and Saudi military support are, for all practical purposes, separated in our contemplation of the world. Hard Gatekeeping frames these together as a piece; it spots the topological string running between each and gives us a firm position from which to pull the threads we want. We will come to know, to pay, the costs of over-inclusion. But this also means that we must be concerned with the security and safety of others, on our network or on others. To attempt to achieve absolute American security, to do so at the expense of other nations – this will not only erode the credibility of any system we build. It will also make them fundamentally less effective. We are, after all, what we are conneted to.

Fourth, no nation should be permitted to force another inside of its own gates. India might develop a great search engine; they should not be allowed to force Bangladeshis to use it. China may develop clever trade channels to Europe; they should not drive their use with military pressure. This principle is the flip side of our own commitment not to compel others into American gatekept systems. It represents an important nod to sovereign power: Each nation decides on its own. If we're intent on avoiding some of the chaos of the last major system change, which produced the Thirty Years War, we should learn its lessons. That fight fundamentally touched on one question: Who decides what happens inside a country? The specific problem of Europe 350 years ago was if each King could

HOUSE_OVERSIGHT_018407

decide the religion of his state. The treaties that settled this debate in 1648 – after the most devastating wars in European history at that time – established *Cuius regio, eius religio* as the governing principle. Whose realm, whose religion. The very notion of a "state" is itself being eroded as topologies, migrations, and superfast data links eat at old borders. But nations remain an essential container of power. A rapid collapse of that system would be a disaster, and is frankly unlikely. To be American. French. Chinese. This still matters.

Do we demand that other nations use our protocols? Do we force China or Germany to rules of transparency, data tracking of their citizens and research that we obey? No. *Cuius reticulum, eius reticulum.* Whose realm, whose network. But, at the same time, should we permit China or Germany to force another nation into its trading regime? It's biological or cyber networks? To the question, "What would America fight *against* in a gatekept world?" one answer is this: We would resist any attempt to force-fit a nation to a gated order. We should prepare for difficult, expensive fights to maintain this principle. Russia watching neighboring states seduced into a Chinese trading order or an American technological system won't bubble with silent acquiescence. Arrangements that tilt trade to one side of the Pacific will unnerve China or Japan – or the US. But, in the end, the control logic of *cuius reticulum* buffers us, as a sort of law, against a wilder madness of collapsed nations.

Fifth, we should not permit the emergence of any means to destroy our system. The very efficiency of connected architectures makes them vulnerable. Networks, by design, have holes that particular modes of attack can exploit. Contagion. Strikes against central nodes.[249] Arms racing of a certain type. Our first attempt to limit risk should be defensive. Better gates. But we'd be foolish to stop there. Gates, the Trojans would remind us, are not enough. When truly existential dangers emerge – nuclear weapons, certain types of artificial intelligence or genetic engineering – then we must attack. Hard Gatekeeping should include a coiled, prepared readiness to strike with the same light-speed movement that defines the dangers we fear. Of course we should try to deter such attacks. But we should be realistic. There's much we can't deter. And the cost of attack is awfully cheap. We won't be truly safe without battle plans and diplomatic gambits that can hammer at the topological and real world vulnerabilities of our enemies. After all, they will be hammering on ours.

Our defense task is simple to say, hard to achieve: From the largest symmetrical superpower in history, America needs to become the greatest asymmetrical one – capable of devastating, instant action anywhere in the real or topological world. Network scientists who study the power of "centrality" have shown the way that certain positions in a topology – think of a rainforest, a travel network or a stock exchange – wield unusual influence. Centrality of a certain node in linked systems can determine control, it can produce "super spreaders" which instantly shape

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[249] **Strikes against:** I.A. Kovacs, A-L. Barabasi, "Destruction Perfected," *Nature (News & Views)* 2015, 524, 38-39

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linked topologies[250]. Contagions, panics, economic brain freezes – these are the essential tactics of our future. The maintenance of our centrality on the topologies we rely on is, then, the essential part of our future security. Interrupting this is, of course, exactly the edge our enemies seek against us: To infect us – with panic, terror or some virtual or real virus. To alter the landscape with one sharp razor slice, not a hail of bombs.

There is no excuse for us to not prepare to struggle in these new terms. Our military must be shifted for the demands of such instant, cross-space attack. But it's more than that. In recent years America has gotten into a habit of reaching for our military tool, and while we've strengthened it to an historically unprecedented degree, we've let other skills atrophy. Our real aim should be to stop our opponents from adapting, evolving and connecting to us. If we suffer some strategic, nation-crippling defeat in the future, I don't think it will be because our military was weak. Rather it will be because we've not mastered all the other tools of topological control. The first sign of our real awarness of this will be when the old, foolishly vulnerable systems and tactics and ideas are replaced. We should never build another aircraft carrier without a sense of new, networked naval plan. The idea of spending hundreds of billions for manned bomber planes is absurd. We should embrace self-imposed limits, we should force ourselves to innovate both with our military and in the creation of new tools of policy. Doing so will prevent any number of conflicts. And it will stiffen our temperament to unconventional thinking.

There's a lean efficiency to these five principles that define Hard Gatekeeping. The strategy echoes, in its clarity, in its clean frugality, the postures of some of the most enduring orders in human history: The "defense in depth" of the Roman Empire, for instance. The protective order of Tokugawa Japan. The walls of Tang China, part of a chained national history that celebrates heroes as "defenders of the nation," not attackers. Gatekeeping resists unnecessary profligacy. It limits the need to proselytize or colonize or force others to our way of thinking. And it has a universal aspect: Hard Gatekeeping can – with a little imagination and some discipline – be laid on puzzles like terrorism, cyberattacks, US-China relations, order in the Middle East, the proliferation of nuclear weapons, income inequality and global warming. It provides a sharp single image of what we're after – and guidelines for getting there. It's clear enough what we need to do, I think. Build gates. Use them. Hold inside them and protect the curious, innovative and revolutionary spirit of our people and our age.

4.

Let's use this approach to examine some particular problems, and let's start with US-China ties – a puzzle whose resolution may be the decisive act of policy in the

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[250] **Super spreaders:** Manlio De Domenico, Albert Sole´-Ribalta, Elisa Omodei, Sergio Gomez & Alex Arenas, "Ranking in Interconnected Multilayer Networks Reveals Versatile Nodes", *Nature Communications* April 23, 2015

HOUSE_OVERSIGHT_018409

next century. How might Huang Hua, with his *nature-of-the-age* consideration of strategy have regarded the matter? What does gatekeeping tell us?

The dominant view of future relations between Americans and Chinese generally runs along a nervously familiar historical track: An established power (the US) and a rising one (China) consider each other. Do they cooperate? Scratch at each other in constant annoyance? Each nation possesses a different image the world. Each holds, as well, distinct pictures of their role. One power has enjoyed a long period of prosperity, has built and defended a global structure; the other, trod mercilessly underfoot by history, feels the unbearable flow of power's rising sap, a hunger for recognition and release and for some, revenge; her economy craves resources, trade routes, and markets. So Germany encountered and then attacked Great Britain at the turn of the 20th Century. Japan collided, similarly, with Russia in 1904. France taking on Austria, Russia and Great Britain in the Napoleonic age.

Even if the leaders of the United States and China intend to avoid conflict, they face one of the most sobering, if not depressing, problems of international politics: The "security dilemma". The world is a dangerous place. So countries do things to feel safer. Their populations demand it. Germany looks at Britain's imperial navy in the 1890s: London could snap Berlin's trade arteries. So the Kaiser orders two battleships. Britain builds three in response. Germany turns to submarines. And so on. Each country, chasing her own security, ends up *less* secure. This is the "dilemma". The puzzle is like one of those woven wicker finger traps: The harder each side pulls to get out, the more stuck they become. America in 2012 pivots her military gaze to Asia. China feels encircled. She orders a couple of aircraft carriers, paves remote islands into military bases. America flies aircraft closer to Chinese waters. Are the two sides more secure? Collisions, arms racing, accelerating distrust become the threnody of contacts. Each side seeks something impossible: Perfect security. *Move first*, certain forces begin to whisper in each capital.

The essence of this problem today, as the United States and China consider their future, is not merely or even mainly in the details of trade, territory, or cyber disputes we read about. These hot points are important, of course, but they are symptoms of differing judgments of the world, of a fracture at that first step of asking, "What is the nature of the age?" Americans generally believe the existing global power map is just, sustainable, in need – perhaps – of minor adjustments. America engineered this system; benefits tremendously from it's fictionless operation. China regards that same layout differently. As broken, unbalanced, rocking towards a seizure – and, anyhow, built, lubricated and run without her participation. This view is sharpened by ideology, national psychology and the bald fact that no global mechanism ever functions perfectly. The larger nature of the age is, many in Beijing feel, *Da po, Da li.* Great destruction. Great construction. Certainly this is true *inside* China; it must be true outside. The nation has it's hammers out. They see the paradoxes of power we read about earlier, the inability to act and the collapse of American credibility, as clearly as people in Washington or Damascus or Moscow. Surely the global system should be adjusted, they think. Tap. Tap.

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So though no inherent enmity exists between the two countries, a crack emerges. Each side finds reasons not to cooperate. A shared interest in peace – neither side wants a collision, both understand the costs – is shimmied apart by a perception gap. Cultural, historical, temperamental and ideological differences accelerate the unzipping of even the best intentions. Misunderstanding bends and then snaps irrevocably into mistrust. So yes, the recovered islands and the trade tensions and the political theories have to be managed because each is a blister that limits forward motion – but the real source of friction? It is the scraping of different world views. This is *deep* strategic misalignment. It is, in fact, the stuff of war.

In recent years, America has had two different, nearly opposite approaches to China, each however marked by an assured national confidence that the current world order is sustainable. One policy is short-handed as "engagement" – or, colloquially, "panda hugging." As China becomes more prosperous, this approach suggests, she will become more congenial to American interests. More cuddly. This was, for some, the basis for bringing China into the World Trade Organization in the 1990s. Later it justified deep commercial links and educational ties. The logic of such an approach fit the mindset of many baby-boomer Americans: China's attraction to MTV, McDonalds and Mercedes hinted at a still deeper desire they thought. To be Western. China's citizens would surely become more attracted and committed to the world system that had delivered all this prosperity. The country would become more global, in a sense, and *less* Chinese.

In fact, as China has grown in recent years she has become more global and *more* Chinese. Growth, wealth, an admixture of confidence into the old national habit of insecurity – all of these have encouraged a searching exploration. The demands of domestic politics, the instincts of the Chinese Communist Party and the inevitable practical questions of security and reform all produce sensible questions. China needs oil, for instance. Must she project power into the Middle East? Control the sea lanes of the Malacca Straits? There's no natural, inherent resistance to American interests in any one problem, but that hopeful American logic of "engagement" ignores much about China's essence. The country presses at rules she mistrusts (as America once did). She struggles with the inevitable challenges of a political system still smoking a bit from recent revolutions – and, of course, facing the pressures of a networked age. But she holds, strongly, a sense of Chineseness. Can we honestly expect to use mere prosperity to change China in a predictable, pro-American way? "Engagement" feels to Chinese like a demand to become more American. That prospect is as appealing as a request to become more Chinese would be for Americans.

An alterative strategy to "engagment" is known as "containment". (While not formally called "Panda Kicking", this is often what this policy looks like.) This view takes it for granted that as China becomes more powerful she will become a threat. Any growth in Chinese power means a decline in America's influence and security. A stronger China in Asia, for instance, means a weaker America. Countries like Japan or Korea or the Philippines will be required to choose a side at some point, at some awful 21st Century Melian moment. The aim of containment is to squelch China

HOUSE_OVERSIGHT_018411

before such a fork appears. This approach, too, has its logical problems. Boxing the largest economy in the world hardly seems sensible – and is likely not achievable. Anyhow, early attempts to do so have shown how little leverage the US has. When China announced plans to build an Asian Investment and Infrastructure Bank in 2014, the US opposed it and then watched as nearly all of Washington's traditional allies raced to join.

At the same time, China's policy towards the US has been hard to decipher for many: Is the country intent on amity or enmity? It's clear enough that the American options presented to Beijing are unappetizing: Change or be contained. Messages by China in response have tickled the natural historical pessimism of American political leaders. China speaks of wanting a new kind of relations with America, of cultivating rich technological and financial ties, but the country at the same moment challenges easy assumptions about how foreign investment, educational or security cooperation might mesh together like gears of friendly progress. It's hard to do business in the Mainland. The military grows with astonishing speed. Domestic habits of smash-mouth competition rattle at more sedate Western habits. Any element of China's actions are explainable and even sensible when seen with sympathetic eyes – but the same exact facts can be stitched into a story that suggests constant damage to American interests. China's position is, to be honest, a difficult one: The country is opaque to most foreigners, wrapped in habits and instincts that run along such different lines that even simple daily decisions – how to run a meeting, for example – can be a source of disagreement. *In the west you prize diamonds for their clarity,* Chinese will say, *in China we prize jade because it is cloudy.* There's a charm in opacity; even a bit of sensible political magic at times. But China is moving out into the world very rapidly, now: Fast and dimly understood don't fuse into easy trust.

In one sense, then, it's possible to sense the tense, angry energy of an impending collision. Beijing and Washington are enacting the old historical pattern. Wrestling for years over small issues, never quite coming to grips, slowly pulling at each other until a final, fatal collapse. Germany and Great Britain, all over again. But: *Connection changes the nature of an object.* So much in our world looks different after connected dynamics are applied. Might connection change the nature of enmity? We are, after all, part of the same connected skein. We've concluded that America's greatest threat is not China or Russia or terrorism – but the evolution of the network itself. That same topological evolution menaces Beijing too. If China is not our biggest enemy, if we are not theirs – what might be developed? Might the rat trap of history remain unsprung?

An American "China Policy" shouldn't be regarded as some distinct initiative; rather it must be a part of a grand strategic program of Hard Gatekeeping. Our goal aim isn't some shimmeringly perfect "China Policy" so much as it is to cultivate a grand strategic disposition that informs what we undertake in cyber, Russia, the Middle East, and China. Imagine we had a terrific "China policy" and a backfiring "Nuclear weapons policy"? Masterful grand strategy is marked by a comprehensive elegance. Metternich's old construction, "A Concert of Nations" tells the story pretty well: A

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symphonic effort, each note and instrument in place. Grand strategy tells us what to do at every moment.

Any policy, then, must begin with a summary of our aims: "We believe the world is entering a period of profound change that demands a shift in global arrangements. We are building a gatekept order consistent with our values. We welcome others to participate in it – but with conditions. We will resist attempts to force nations into any gatekept order; we will fight any forces that threaten disruption of the overall system." The China policy that emerges from this view is clear enough: We will not contain China. We will not force China to change. Rather we will develop a profound gatekept network for our own operation, one that layers together all the concerns of economics, trade, security and technology – as if we were designing a technical system for fast, constant links. We will include other nations that want to be a part of it, as long as they are willing to bear certain costs. China is welcome to develop her own system and see whom she might attract inside. She will not be permitted to compel nations to join. And: If China wants the benefits of a US-led order, then Beijing must be prepared to support the maintenance of that order. That means deeper cooperation on everything from nuclear proliferation to the establishment of new international bodies for connected finance, biological research or nuclear de-proliferation.

Such an approach resolves, in an instant, the contradictions of our current policy. *Here is our gated order*, we can say, *join if you wish and on the terms we both consider best.* We should remember: China has much to worry about. Disorder would land on her own hopes for peace and development with a profound, possibly crushing pressure. The international order is not working as well as it might. It does not appear engineered for new stresses. It is in cooperation for the reform of that system that the two nations share an urgent interest. And it is in a successful defensive posture of a gatekept, network order that Washington can cultivate the linked, leveraged moves that will encourage this to happen. While there might be a temptation to play this game in that old Lloyd George sort of way – "We need the Middle East. Grab it. We need digital currency mastery. Take it!" – such efforts will only assure final, fatal collision between the two powers. We need a gatekept order. Build it. That is enough.

What the Seventh Sense statesman sees, in the way a Seventh Sense entrepreneur or terrorist or researcher can, is the pulsing network logic that is at work breeding a new world – like it or not. And our policy has to aim for that future state, not for what we have today. If this sounds difficult, you should know that in most complex adaptive systems these kinds of adjustments frequently occur. Rainforests. Traffic jams. The human brain. Anyplace connections are knit and reknit at light speed can exhibit a pattern of rapid redevelopment: The world changes. The network and its various pieces hum, in response, to a new order. Climate shift in the Amazon, for instance, produces drier air. The pollination cycle shortens. Flowers must adjust by growing longer leaves to protect their moisture. Birds that rely on the flowers develop longer, sharper beaks in response. In this way bird and flower each become better suited to a warmer age. They *co-evolve.* We see this sort of interaction in

HOUSE_OVERSIGHT_018413

many worlds. Data companies face increasing bandwith demands. They develop new ways to transmit video. Application developers create fresh tools to compress their signals. The whole system gets faster. Such co-evolution is common when linked systems press into one another.[251]

If you look back at biological history, at our planet's seething life at it's most profound moments of transition, you find co-evolution in nearly every case. The biologists John Maynard Smith and Eors Szathmary, in their masterwork *The Major Transitions in Evolution*, chronicle the miraculous march of life towards ever-greater complexity – from cells to humans to societies – as a story of ceaseless, successful co-evolution. "Complexity is hard to define or to measure," they write. "But there is surely some sense in which elephants and oak trees are more complex than bacteria, and bacteria than the first replicating molecules." The essential, facilitating feature of our biological hop-scotch from mitochondrial snot to Beethoven sonatas has been an ability to change together, not merely to compete. While we humans tend to consider evolution in murderous you win/I lose Darwinian terms, the biological world around us seethes with a more nuanced logic: Cooperation is every bit as important to survival.

Smith and Szathmary identified eight major transitions in their work – the evolution from single cell to multiple cell organisms, for instance. And in each case they find a kind of cooperative, co-evolving logic serving a catalyst to survival. "The applicability of the concept," Smith and Szathmary conclude, "extends across the whole of social and natural sciences." Inside cells. In ecosystem webs of coral or rainforest. In traffic management. Successful evolution was, they found, always *co-evolution.* "It should need little persuasion to acknowledge that links we make with others change in time," they wrote. "That all of us age, that our roles in life evolve, and that the society we are a part of may itself be subject to transformations on a global scale. Coevolutionary rules aim to integrate these processes." The world changes. I change. You change.

Network age systems, in their effortless bridging of divisions – geographical, technical, commercial – bounce with a particularly powerful fusion. "It is often assumed that biological agents are by nature rationally selfish, and that therefore external circumstances somehow have to compel them to cooperate," the historians Nathale Mezza-Garcia, Tom Froese and Nelson Fernadez have written about the organization of societies over the past millennia. That sense we often have, that we're one Darwinian instant from some sort of lethal, teeth-baring competition, doesn't in fact explain all of human history.[253] Politics is a sort of complex adaptive

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[251] **Such co-evolution:** Matjaz Perca, Attila Szolnokib, "Coevolutionary games—A mini review", *Biosystems* 99 (2010) 109-125

[253] **"It is often assumed":** Nathalie Mezza-Garcia, Tom Froese and Nelson Fernández, "Reflections on the Complexity of Ancient Social Heterarchies: Toward New Models of Social Self-Organization in Pre-Hispanic Colombia" in *Journal of Sociocybernetics* 12 (2014), pp. 3 - 17

HOUSE_OVERSIGHT_018414

system; it fuses cooperation with brutal competition as it aims for a kind of equilibrium. After all, if we were constantly tearing into one another, we'd be extinct, not evolved. Why did cities form? Nations? The key is a moment when shared, possibly devastating risk of collective failure becomes apparent – those moments when the whole system threatens to collapse right on top of all the participants. The greater the shared danger, Mezza-Garcia and her colleagues explain, the better the chance for real cooperation. It's a forumula that fits what we face now: "An increased risk of collective failure facilitates large-scale cooperation, especially when the large scale system is composed of smaller, nested groups," They explain. ""Complex systems theory reveals an alternative to constant conflict."

This is our world now: Linked clusters of markets, nations, machines – all exposed to a risk of shared and instant collective failure. Such a structure upends an axiom of politics that has run for centuries: Man is purely Darwinian and that survival is determined by constant competition alone. In a network, survival is determined by sociability, by cooperation. Linked systems drive people to agree on rules in order to participate, which accelerates change and co-evolution. Smart cancer databases, linked traffic systems, video platforms like YouTube – each are Gatelands that press users together on a single platform, one that can be instantly updated and constantly studied for adjustment. "Rich get richer" arrangements are an ideal place for co-evolution, shaped as they are by easy linkage, exchange and connection to outside events. As more people follow the logic inside the gates, the system co-evolves. It becomes still more fit. It's this loop that makes Hard Gatekeeping so well suited to an age of connection. We're not merely putting up walls; gatelands are like markets or public squares. They are loci for cooperation. In diplomatic history it's not hard to calls for cooperation. "We must get along or this war will devastate us all!" But they don't work. Mostly you find hand-wringing about how terrible war would be followed by, well, war. The logic of networks offers an escape from this sad habit.

Co-evolving relations between the US and China can begin at the most obvious of starting points: Both sides need to change. New pressures are already tearing at each. Both nations need a new gatekept system. Our aim isn't to "balance" China into some sort of frozen checkmate. It's not to tip her unwisely into chaotic and impoverished domestic order – we are, like it or not, all connected. It is to co-evolve together. And China? She won't survive if she does not connect to a system that is congenial to her needs. Fortunately, the networks are infinitely flexible in their design. A Chinese model and an American model pose no problem of interoperability. This is the best co-evolutionary strategy for each side. The dangers we confront now are *everywhere.* The habitual American temptation is to break all these risks into pieces, to find out where the problem is, and to flatten each of them: "Let's hit the terrorists, then the Chinese navy, then the Russians, then the drug lords." This will kill us if we keep it up. In a complex system, piecemeal attack simply shocks the system to still greater complexity. The world, rather wonderfully, is too flexible for brute force applied at one place. A dynamic defense, is a precursor

HOUSE_OVERSIGHT_018415

for survival, for evolution. And it would best be done cooperatively with the nation that will, in a short time, have the largest economy in the world.

China is not really a threat to the US now. The country can't assemble the ability to demolish or attack America in any significant way, and it is years from being able to sustain a military effort. It is not in China's interest to provoke a match. They would lose. And honestly they have endless, troubling problems to handle, many new in human history. *How do you care for 800 million aging people?* Though China will pass the US in total national income in coming years, the country may never pass America in per-capita income. With an aging, 1.4 billion person population the challenges of distribution nearly guarantee this. Time acts against both the United States and China today. Each depends on global arrangements that are themselves cracking. Each nation needs to adjust her structures for a network world. But these pressures operate severely against China. She can disrupt and challenge and slow the transition to a gated order if she wishes, but only at the cost of fatal distraction.

An American Hard Gatekept system will thrive with or without China. China is not so fortunate. Her system, without America or other elements of global connection, cannot continue on the path of reform. *Great network construction* – this is the nature of our age. There is no fighting the nature of the age, as Huang Hua would remind us. We should of course expect China to build her own systems. We can also expect that she will try to avoid some of the costs that joining an American system might impose. That's all fine. Our aim should remain constant, calm and direct: Build a gatekept system for our own use; enforce the rules we believe secure that system. And remain clear in our thinking: The threat to the US is the evolution of the network. The threat to China? The evolution of the network.

If an arrangement based on these undeniable facts seems unlikely, it is worth remembering that in the twenty years before the restablishment of simple relations between Beijing and Washington in 1971, the two sides had fought a war in Korea, built a politics based on condemning one another, and drifted so far apart as to share nearly no econoic connection. Bringing the countries together demanded heroic diplomacy on both sides, to be sure. To read the transcript of Henry Kissinger and Zhou Enlai's first, secret meeting on July 9, 1971 is to regard a masterclass in careful chessboard moves[255]. But the game itself demanded a clear view of the board, of shared interest in the face of a changing world. On his very first day in office, Nixon compiled a list of his diplomatic aims: "Chinese Communists: Short range – no change. Long range – we do not want 800,000,000 living in angry isolation. We want contact."[256] The Seventh Sense returns us to this fundamental question of balance, but in a new frame. It alters how we look at the range of options for US-China relations – and American security itself. There are certain problems both sides face, perhaps the most essential, that are simply not addressable using

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[255] **To read the transcript:** *Foreign Relations of the United States, 1969-1976, Volume XVII, doc 139*

[256] **Nixon complied a list:** *Foreign Relations of the United States, 1969-1976, Volume XVII, doc 3, footnote 3*

HOUSE_OVERSIGHT_018416

traditional thinking. Co-evolution exists as a real possibility for the two nations but so too does co-extinction, a problem of mis-designed complex systems that can rattle themselves apart. This is precisely what a confident Hard Gatekeeping strategy can avoid. When we speak of the possibiltity of a new type of great power relations it is because so much of future power will be decided on a topological landscapes, on that nearly living surface that is marked by such different rules than the older, industrial power maps. It takes a network to fight a network, as we've said.

Networks confront us, constantly now, with the unexpected. No one forming the IMF in 1949 considered digital currency. No one developing arms protocols in the 1990s thought about cyber weapons. Artificially intelligent weapons, migrant waves, income fractures – these and other emerging puzzles were never contemplated in our existing international arrangements. Collectively attacking these challenges is not merely more efficient; it is our only option. Yes, it's easy enough to picture the US and China battling each other over islands and protocols and technology structures in the decades to come. Certainly this possibility has to be prepared for. But this is to regard the world in industrial terms. Ask yourself: What, really is the point of power? It is to secure stability, not to tip the world to chaos just because we think we might be better off on the other side. The networks tell us what they want. They want gates. Our only question – and it is the same question that lingers in Beijing and Washington – is: Are we smart enough to listen?

5.

How will power distribute itself in the future? Just what will the network of nations and datawebs and insurgents finally look like when it settles into some predictable if still roiling order ten or a hundred years hence? Will it be made up of different walled and gated systems, linked at certain moments, unplugged at others? Or might it collect with that "winner take all" logic we've seen firing along the most efficient networks? Most traditional foreign policy looks at history and sees the constant, violent rocking of a "balance of power". Nations thirst for security, they vie with one another for influence, resources, and control. France rises. Statesmen in Berlin, Vienna and London conspire to knock her down. This is the order that dominated Europe for much of the last 500 years. But history is also filled with enduring, stable arrangements – moments where the balance settles a bit and a single power dominates. Asia, Europe, the Middle East, South America – each produced nations that stretched mastery the system for generations, for centuries even. If you map the rise and fall of nations and empires over the past 4,000 years – as the political scientists Stuart Kauffman, Richard Little and William Wohlforth once attempted in an heroic statistical effort – about half of human history has been marked by this sort of hegemonic stability. China led East Asia's order from 1300 to 1900, for instance. The Japanese and Koreans and Vietnamese all found it was wiser to play by China's rules than to attack her. Assyrian imperial arrangements overmastered a dozen smaller states from the 9th to 7th centuries BCE. The Dehli Sultinate managed hegemony in South Asia from 12th to 14th centuries. The Mughals owned nearly two

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hundred years of dominance starting in the 16th century. The Romans managed centuries of Mediterranean control .

The secret of those long-running orders was something that will be familiar now: Each possessed tools of power which permitted assembly of empire at an unusually low cost in lives and gold and effort. Kauffman and his colleagues, as they considered the results of their survey, noticed each long-lived empire pioneered an administrative design that embodied an efficiency much like that of our own network dynamics. The addition of new territories brought more that they cost to masters of long imperial orders. Like new users on a social network, or Baran's fish-nets, they married easy expansion and high returns. "Rome rose because it combined the strengths of traditional Republican institutions with innovations that gave it a unique capacity for inclusion of foreigners," they explain. "Magadha was the most administratively durable of the ancient Indian states; and Qin, with the self-strengthening reforms of Shang Yang – economic reforms and military conscription as well as bureaucratic innovations – developed the most penetrating and brutally effective state structure in its international system." The Incas, the Han, and nearly every long-standing empires glistened with this attractive logic. The secret to hegemony, to avoiding a violent power shifts every few decades, is a structure that grows without additional, destructive costs. When Machiavelli coldly called Rome a "republic for expansion", this was what he had in mind. Enduring empires have been engineered, like a modern network, for growth and prosperity.

It's too early for us to know if this logic will obtain in our age. But networks evolve, as we've seen, to what makes them most efficient. They crave speed and growth. And this means they want cooperation; it's the essential fuel for co-evolution. The traditional view of the international system as anarchic is not wrong, but we've seen how when you snap any object into a network system it begins to crave a kind of hierarchy. Networks change power balances. National fury and rebellious twitches and competition will, of course, be a part of the transition ahead. But as we look back at the industrial tools that matured and spun up the world to a war in the last century, we can see how they they were designed in a sense for direct collision. Massive industrial armies wrestled in symmetrical power battles. Network power hums differently. The design logic of linked systems means they function poorly when tuned for simple brutality. It's why the tools for our new world are so dangerous in the hands of those who don't understand what they are capable of, and what they demand. We should remain fixed on what might emerge as a future state, and on avoiding the shaking dangers of the route. It is from that posture that we can begin to consider the most essential and interesting and profitable questions. The most profound is probably this one: We've seen now what it feels like to use the Seventh Sense to contemplate the networks around us and to examine the global system with its risks and opportunities in a new way. But what do we discover when, as if we were looking into a mirror for the very first time, we use this powerful new sensitivity to examine ourselves?

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Chapter Eleven:
Citizens!

In which the Seventh Sense rescues us from an unexpected danger.

1.

I never needed much incentive to go see Pattie Maes. Belgian, usually dressed in some black fashionable getup, she was like a human shot of espresso. You ended every conversation wide awake, eyes open. When I first met her in the 1990s, she was in charge of much of the work on artificial intelligence at MIT's Media Lab – Danny Hillis' old home. Maes had arrived at MIT in 1993 and almost immediately turned to the problem of making machines that might think. One day, as we were discussing just how the strange miracle of computer thought might occur, she introduced me to a puzzle of her field that has stayed on my mind in the years since. It is called the "Disappearing AI Problem."

Back in the 1990s, as the Internet was emerging into popular consciousness, Maes and her team were tinkering with what was known as computer-aided prediction. This was an advance on the ping-pong conversations Joseph Weizenbaum had coerced from ELIZA in the 1960s, You: "I am bored." ELIZA: "Why are you bored?" In Maes' experiments a computer would ask, for instance, what movie stars you liked. "Robert Redford," you'd type. And then the box would spit back some films you might enjoy. *Cool Hand Luke*. And, well, you *had* liked that film. This seemed like magic at the time, just the sort of data-meets-human question that showcased a machine learning and thinking. An honestly "artificial" intelligence. Maes hoped to design a computer that could predict what movies or music or books you or I might enjoy. (And, of course, buy.) A recommendation engine. We all know how sputtering our own suggestion motors can be. Think of that primitive analog exchange known as the "First Date": *Oh, you like Radiohead? Do you know SigurRos?* Pause. *Hate them.* Can you really predict what albums or novels even your closest friend will enjoy? You might offer an occasional lucky suggestion. But to confidently bridge your knowledge of a friend's taste and the nearly endless library of movies and songs and books? Beyond human capacity. It seemed an ideal job for a thoughtful machine.

The traditional approach to such a problem was to devise a formula that would mimic your friend. What are their hobbies? What areas interest them? What cheers them up? Then you'd program a machine to jump just as deep into movies and music and books, to break them down by plot and type of character to see what might fit your friend's interests. But after years building programs that tried – and failed – to tackle the recommendation problem in this fashion, the MIT group changed tack. Instead of teaching a machine to understand you (or Tolstoy), they simply began compiling data about what movies and music and books people liked. Then they looked for patterns. People were not, they discovered, all that unique. Pretty much everyone who liked Redford in *Downhill Racer* loved Newman in *The Hustler*. Anyone who enjoyed *Kid A* could be directed safely to *()*. Maes and her team found themselves, as a result, less focused on the mechanics of making a machine

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think than on devising formulas to organize, store and probe data. What had begun as a problem of "artificial intelligence" became, in the end, a puzzle of mathematics. The mystery of human thought, that great unknowable sea of chemicals and instinct and experience that would have let you place your finger on just the song to open the heart of your date, had been unlocked by data. Here was the "Disappearing AI Problem." A puzzle that looked like it needed computer intelligence demanded, in the end, merely math. The AI had disappeared.

For several decades this accidental digital magic trick – "Hey, where'd the AI go?!" – bedeviled machine intelligence. It gave the entire thinking machines enterprise a bit of an occultish flavor. Many problems that once seemed to demand the miracle of thought really only needed data. The human was still doing the thinking; the computer was simply computing. It was extremely easy to draw a line between where the human ended and the machine began. This was a puzzle that had been, in a sense, anticipated at the very dawn of the digital revolution by the mathematician Alan Turing in a 1950 paper called "Computing Machinery and Intelligence" that he published in the British journal *Mind.* "Can machines think?" Turing began.[257] His idea was to test this question in the following way: Have a research subject – a secretary, a graduate student, anyone – chat with an invisible interlocutor by way of a keyboard. Then ask: What are you connected to? Another human? A machine?

Turing figured you could call a machine "artificially intelligent" if it could fool a user into thinking it was human. "Please write me a sonnet on the subject of the Forth Bridge," Turing suggested a tricky user might ask. What computer could possibly know about this famous Scottish landmark; to say nothing of being able to rhyme "Forth"? When the response came back, "Count me out. I could never write poetry," you'd think that sounded awfully human. "Add 34957 to 70764," Turing suggested you might fire back. Say the computer pauses. Then, thirty seconds later, "105621." Are you dealing with a clever machine here? A dim, honest, slow-multiplying human? Impossible to tell. The distinction between machine and man blurred a bit.

Buried in the very premise of Turing's test was an assumption about what machines could do, and how they might do it. "The idea behind digital computers may be explained by saying that these machines are intended to carry out any operations which could be done by a human computer," Turing said. His smart machines would be tuned by humans to do human tasks, in a human sort of way. Write poetry. Do math. His test of artificial intelligence was designed to figure out if a computer could think like a human. You and I might be able to spot patterns in movie habits given enough time, but as more complex problems emerge, as a world of a trillion connected points becomes a sea of data to examine, there is no chance we'll match the machines. This opened a then nearly unimaginable possibility: What if, some day, a computer could think *better* than a human. Could, in a nanosecond, come back with that elusive rhyme for "Forth": *North.* For such a machine, passing Turing's Test – thinking like a human – was an interesting challenge. But more interesting

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[257] **"Can machines think":** A. M. Turing, "Computing Machinery and Intelligence" Mind 49 (1950), 433

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was a machine that could think in ways a human could never understand, let alone achieve. For such a device, to pass Turing's Test or slip past a Voight-Kampff check machine will be trivial. In his 1950 paper, Turing sensed the possibility of this development – and the crisis that might ensue. Could man handle the crushing sensation that a device was outperforming him? Perhaps dramatically. "We like to believe that Man is in some subtle way superior to the rest of creation," Turing wrote. "It is best if he can be shown to be necessarily superior, for then there is no danger of him losing his commanding position." What would have surprised Turing, I suppose, is the speed at which we've acquiesced – and even accelerated – this very loss of our dominance.

Imagine a device poking at the very origins of the universe at a speed of trillions of calculations a second, spinning past Newton's and Einstein's laws and into a realm of physics apprehensible only inside its own electronic consciousness. Compacting time – centuries of human scientific labor reproduced in moments – before shooting far ahead, alone to a subtle knowledge we can only envy. Such a machine would not, as Newton had, stand on the shoulders of giants so much as it would muscle its own, unique way ahead. The AI would have disappeared, but to a place very different than where Maes' AI had gone. Hers had been erased by human design. This new, really "thinking" AI would slip to invisibility because of its own light-speed cognition. It would think itself out of our understanding. No human could follow, limited as we are by our wet, slow, decaying biological software. Humans and computers, after all, deal with information differently. Think of how poor your memory is compared with the perfect fidelity of a machine, or the way people can even "remember" events that never happened. The machines would have more than knowledge, then. They would linger close to a possessing a profound and inscrutable wisdom. They would inhabit an honestly miraculous gateland that no human would ever enter. And this is where the problems would begin.

2.

We've now passed the moment when humans completely train the very best machines. The AI devices can teach themselves, now. Of course there are still decades of adjustment, of leaps in hardware and programming ideas to eliminate the seams between our minds and the fused ideas of a digital system. But the humans in the loop of the best of these designs, the hard working and well meaning geniuses of the New Caste, are as much trainers as engineers now. They resemble shipbuilders of an earlier era, preparing vessels for voyages to lands they will never themselves see. Their digital minds – technically machine learning structures such as deep neural networks – run quickly to the frontiers. Every moment, all around us, machines are educating themselves. About the world. About themselves. About us too. Tuned AI plays games, looks at photos, studies chemical reactions, reads your email and watches you drive – and then it tries to unspool just what is going on, before winding it up into a new instinct. Machine learning systems already produce mathematical proofs that linger beyond what a human mind can understand; next may be a machine-to-machine mathematics that expands the dimensions of thought. (In a man and machine fusion that surely would have unnerved Joseph Weizenbaum

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of ELIZA, the theoretical mathematician Doron Zeilberger now names his computer as a co-author of his papers. He calls it Shalosh B. Ekhad, a play on the Hebrew name of his IBM 3B1.) [258]

The AI systems designer Roger Grosse has named two paths to this sort of wired sensibility: "Predictive Learning" and "Representational Learning".[259] That first approach is what Maes's movie machine pusued. The computer is simply checking what it encounters against a database. It teaches itself to predict based on what has been seen before. This sort of knowledge begins with massive amounts of data and then hunts for patterns, tests their reliability, and improves by mapping quirks and similarities. Google engineers have a device that can gaze into a human eye and spot signs of impending optical failure. Is the machine smarter than your ophthalmologist? Hard to know, but let's just say this: It has seen, studied and compared millions of eyes to find patterns that nearly perfectly predict a diagnosis. It can review in seconds more cases than your doctor will see in a lifetime – let alone recall and compare at sub-millimeter accuracy. Fast, thorough predictive algorithms make what might once have been regarded as AI disappear. The machine isn't all that wise; it just knows a lot.

On the other path, the one of "representational learning" the machine uses a self-sketched image of the world, a "representation." Computers using predictive methods to recognize 10,000 numbers pulled from a database of scrawled hand writing now identify 90 percent of the images. Self-trained machines, however, line up each scanned pixel against a representation of the very idea of writing. They screen millions of pictures with nary a mistake. Faces, disease markers, obscure sounds – all these become scrutable not because the machines have been told what to look for, but because they've sort of figured it out themselves. The AI is actually starting to think, much as you or I might, first by building up a picture of the world and then applying it, much as a child might build comprehension of traffic rules just by watching Mom driving every day.

With this representation finished, these nearly alive "thinking" meshes navigate by themselves. You can see already the competition lingering here – who can build the most sensitive model of the world? You? A machine? Even today basic versions of representational AIs can study a map and name the most important roads. They can predict cracks in computer networks days before a fault. These programs take longer to train. They are harder to program – and they demand almost unimaginable amounts of computing power – but what emerges is a subtle, lively kind of insight. A machine with a representational understanding of Mozart's 41 symphonies can write you an extremely convincing 42nd – or, if you wish, an even earlier First Symphony based on what it knows about his evolution as a composer. It can do it again and again. In seconds. The basic attitude of these researchers behind this technology runs, they confess, like this: Mozart was a fantastic composer. If he wrote

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[258] **He calls it:** See Nielsen

[259] **The AI systems designer:** Roger Grosse, "Predictive Learning vs. Representational Learning", *Building Intelligent Probabilistic Systems*: 2013

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even more symphonies they'd probably be great too. Unfortunately he's dead. Wouldn't it be nice if we could sample his old symphonies and make new ones whenever we want?[260]

In the future we'll invite AI into our lives to harmonize away many of the problems we face, not merely making up for Mozart's inconvenient mortality. "AI Agents" will linger along side us. They will compose versions of themselves we'll not quite grasp, even as we appreciate their efficient magic. "AI is both freedom from programming *and* freedom from understanding," runs one programmer's line[261]. Today machines that once demanded millions of lines of code can function with a fraction of that. Instructions are sent to machine learning systems; the programs do the rest. Such designs balance their mystery with efficacy. They speak to and learn from each other too. Part of the reason that the the "Does it think like a human?" Turing Test will be insufficient in the future is that the machines are not learning from only from humans. They are learning from each other.

Perhaps this is not such a bad thing. The distinguished physicists George Ellis and Joe Silk, who spent a lifetime trying to stand on Newton and Einstein's shoulders to grasp answers about gravity or the future of our universe, electrified many of their peers in 2015 with by wondering if perhaps too much of science had become unscientific, unverifiable, unreliable. The great grand ideas of our day, notions like string theory or dark matter, differ in a crucial way from Newton's laws of motion or Einstein's principles: They cannot seem to be tested and significantly proved. And this had fired a trend among younger physicits: Perhaps there was no need for proof. To Ellis and Silk this seemed an awful retreat, dragging physics back to a pre-Enlightenment age of conjecture, superstition and instinct. "This year, debates in physics circles took a worrying turn," they wrote. "Faced with difficulties in applying fundamental theories to the observed Universe, some researchers called for a change in how theoretical physics is done. They began to argue — explicitly — that if a theory is sufficiently elegant and explanatory, it need not be tested." Fans of such an approach called the idea "post-empirical science." This strange, oxymoronic idea was, in a sense, like proposing post-rules baseball: A recipie for wild, swinging chaos that would make scorekeeping impossible.

The strange, boiling debate did however reflect an underlying and unnerving truth: Science does seem to have stalled. And it became inevitable to ask: Might it be possible that the machines – or some fusion of Shalosh B. Ekhad andta human mind – can reach into an understanding of laws that no human alone can fathom. We've said again and again: Connection changes the nature of an object. Perhaps it changes

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[260] **Wouldn't it be nice:** Andrej Karpathy, "The Unreasonable Effectiveness of Recurrent Neural Networks," in *The Hackers Guide to Neural Networks* published online May 21, 2015 or John Supko, "How I Taught My Computer to Write Its Own Music," in *Nautilus,* February 12, 2015 and Daniel Johnson, "Composing Music with Recurrent Neural Networks," on *Hexahedria Blog* August 3, 2015

[261] **Freedom from understanding:** Philip Greenspun, "Big data and machine learning" from Philip Greenspun weblog (November 21, 2015)

HOUSE_OVERSIGHT_018423

the nature of physics brilliance. Boeing 747s lumbering across the Pacific towards San Francisco for decades faced the sweaty problem of cancelled landings as they circled above a fogged in airport, fuel running lower. The introduction of "autolanding" systems in the solved this for good. No big plane diverts from a misty field; it lands itself. AI offers the possibility of a kind of auto-land for our biggest physics puzzles, bringing them safely through a fog of data, theory and wrong ideas. But with this weird price: We may not fully understand why the answers are right.

All around us AI-enabled systems will extend our ability to calculate and learn, to penetrate all sorts of foggy problems. They will sharpen our sadly dimming memories, keep us safe and even help us create. Just as those AI-enabled airplanes already make it impossible for pilots to fly into the ground, so computer wisdom may protect us from crashes of our own: Too much financial risk. Bad educational choices. (Poor music suggestions on a first date.) They will rely on their vast, instantly updated networks to tell us things we can't see or would never notice in the first place: Don't visit that office, everyone's sick. They will use the ability to model thousands of possible outcomes of any choice to provide us with "feedforward" – an ability to learn from the future and not merely the past. Or, they will know to jam our brain full of the right chemicals at the right time: Here's a Diplo track to put you in the mood to go for a run. *You really need to exercise, Dave.*

Just as an age without connected devices will one day seem strangely antique, so will a world without the constant touch of AI. Recall Benjamin Franklin's famous lament in the 1780s, that he'd sadly been "born too early" to enjoy the fruits of reason starting to spill into his world as a result of the Scientific Revolution. Well, you and I (and scientists like Silk and Ellis) may have been "born too late" for an age of purely human cognition; the habits of connected thinking already inform our decisions and mark roads to new knowledge. The inevitability of AI reflects an inescapable logic at work now: We want faster better and smarter systems. We want to compress time. But the faster our world gets, the more it slips beyond a pace of human management. AI steps in. It makes the system function faster. Keeps itself safe. Us too.[262] Better-than-human AI inside these "representational" grids doesn't vanish like it did in Maes' lab. In fact, an honestly *artificial* intelligence is their nature of their strange essence. They will use it not simply to contemplate the world, to help us along, but also to confront what has never been seen, to see and then coldly manipulate any topology of power they can reach. Of course we'll still continue to think about the world; but the world, a wired and alive and cogitating cage, will think about us too.[263]

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[262] **Us too:** Heinl, p. 53

[263] **Of course:** Nigel Thrift and Shaun French, "The Automatic Production of Space", *Trans Inst Br Geogr* NS 27 309–335 2002

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In the spring of 1993, the research arm of NASA organized a conference on the frontiers of knowledge and invited the most eclectic group of thinkers they could find. Biologists, sociologists and computer designers gathered for the three-day meeting in the unpromising setting of Westlake, Ohio. The mimeographed notes of the conference became legendary and still circulate, a sort of *Shroud of Turin* for the machine learning set. The introduction features a poem pecked out in IBM type titled "Into The Era of Cyberspace," written with all the pocket-protector fluidity one might expect of a NASA engineer: "Our robots precede us/with infinite diversity/exploring the universe/delighting in complexity." (Turing's rhyming computer, you have to suspect, could have done better.)[264] One of the first speakers at the conference was a San Diego State University professor named Vernor Vinge, whose remarks that day marked the start of an important era in our consideration of smart machines. *The Coming Technological Singularity*: *How to Survive the Post-Human Era* his talk was called. "Within thirty years," Vinge began, "we will have the technological ability to create superhuman intelligence. Shortly after, the human era will be ended."[265]

Vinge's aim was not – or at least not *merely* – to tell a room full of NASA geeks who had been dreaming of life on another planet that life on our own planet might soon be replaced by whirring, calculating machines. Rather, he explained, he wanted to plot what a world of not simply intelligent, but intuitive machines might look like. Far from disappearing, Vinge thought AI would produce a sort of wisdom that would be inscrutable to humans. And this wisdom, buffed to perfection by high-speed judgment and endless data, would eventually and sensibly take over much of human activity. Real "AI", Vinge said, would at the very least be used to design a world of quicker AI that would, in turn, yield to still-faster generations. "When greater-than-human intelligence drives progress," Vinge explained, "that progress will be much more rapid. In fact, there seems no reason why progress itself would not involve the creation of still more intelligent entities – on a still shorter time scale."

Vinge reminded his audience of a moment once described by the British mathematician I.J. Good, who'd cracked codes in Bletchley Park alongside Alan Turing during World War Two: "Let an ultraintelligent machine be defined as a machine that can far surpass all the intellectual activities of any man, no matter how clever," Good had written. "Since the design of machines is one of these actual activities, an ultraintelligent machine could design even better machines; there would then unquestionably be an 'intelligence explosion,' and the intelligence of man would be left far behind. Thus the first ultraintelligent machine is the *last* invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control." Vinge labeled this instant "The Singularity": "It is a point," he wrote, "where our old models must be discarded." The trivial version of this would be an age of autonomous armed drones, self-driving cars and electrical

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[264] **In the Spring of 1993:** See "Vision-21: Interdisciplinary Science and Engineering in the Era of Cyberspace", NASA Conference Publication 10129, Proceedings of NASA Lewis Research Center Conference, Westlake, Ohio March 30-31, 1993 p. iii

[265] **"Within thirty years":** See Vinge in "Vision-21" above p. 12

HOUSE_OVERSIGHT_018425

grids that flipped nuclear plants on or off to a logic only they understood. *Today.* The more profound version, however, would be the arrival of AI that really did think and create and intuit tremors too subtle for the human mind. *Tomorrow.* Like so much of our connected age, such machines would arrive, Vinge felt, because we want and even need them to achieve our dreams. Then, he supposed, they would take over. The leap from evoking Mozart to enacting Stalin would not be so much of a leap anyhow, at least technologically. *It's just bits.* Goode's definition could have been screwed into something still tighter: "Let an ultraintelligent machine be defined as the box that will eliminate us." *The day after tomorrow.*

What spun uneasily from that silly NASA poem, "Our robots precede us…." is a fear: Real AI is fish bait. We'll snap at it hungrily, hoping it will satisfy some human ache only to discover we've been hooked, soon to be devoured. The idea that a superintelligent device would always be docile enough to tip us off to its secret switches of control or to reveal its looming accidents in a way our simple minds can understand, seems unlikely. To be honest, we might have a hard time even understanding the off switches, let alone reaching them. So many of our incentives are to let an effective AI finger more and more of our lives. To teach and encourage it, in some settings, extremely *undocile*: A weapon to attack our enemies, our political opponents or, finally, each other. It was easy enough for Vinge to see how this would end. It wouldn't be with the sort of intended polite, lap-dog domesticity of artificial intelligence we might hope for, but with a rotweiler of a device, alive to the meaty smell of power, violence and greed.

The Oxford philosopher Nick Bostrom has described the following thought experiment: Imagine a super-intelligent machine, programmed to do whatever is needed make paperclips as fast as possible and connected to every resource that task might demand. [266]*Go figure it out!* might be all its human instructors tell it. As the clip-making AI becomes better and better at its task, it demands more and still more resources: more electricity, steel, manufacturing, shipping. The paperclips pile up. The machine looks around: If only it could control the power supply. The shipping. The steel mining. The humans. And so, ambitious for more and better paperclips, it begins to think around its masters, – incapable of stopping until it has punched the entire world into paperclips. You had to hope someone had remembered to place a "halt" command into is logic somewhere. And though Bostrom's messianic wire twister is unlikely – of course, no one is going to forget to tell a machine to stop making paperclips – the power of his example is to remind us that if humans can lose their minds, so can AIs. "We cannot blithely assume that a superintelligence will necessarily share any of the final values stereotypically associated with wisdom and intellectual development in humans," Bostrom wrote. "It is no less possible—and probably technically easier—to build a superintelligence that places final value on nothing but calculating." And as these devices cogitate in

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[266] **Imagine a super-intelligent machine:** Nick Bostrom, "Ethical Issues in Advanced Artificial Intelligence," *Cognitive, Emotional and Ethical Aspects of Decision Making in Humans and in Artificial Intelligence* (2003) Vol 2, ed I, Smit et al, Institute of Advanced Studies in Systems Research and Cybernetics, pp 12-17

HOUSE_OVERSIGHT_018426

ways we don't understand and certainly can't follow in real time, we face a problem: We don't know what to tell the machine *not* to do. So many of the things we'd hope to teach it – be compassionate, fight for liberty, follow a moral code – far transcend what might be achieved by us in math. We haven't after all, even solved the problem of how program ourselves reliably with these values.

If Bostrom's paper clip machine seems fantastic, it is easy enough to conjure other and more real dangers lingering at the edge of disappeared human control. Think of health care. To begin, you need to know about an important "game" from the world of research into how humans interact with each other known as the "The Ultimatum Problem." It runs like this: I tell you that you can have a million dollars, but you have to split it with someone else. How you split it is up to you, but if your partner rejects the formula you propose, neither of you gets a cent. Offer to split the pot with a dollar to your pal and the rest to you. Insulting. But where to settle? You might expect that the smartest offer would be a 50/50 split, but humans are greedy. You want more and can probably get it; your partner does not want to end up with zero. Generally when scientists shake this cocktail of greed and fear they find an offer of $300,000 is nearly always accepted. However, there's a surprising way to change the outcome: Match the human against a computer in the negotiation. A pal suggesting an 80/20 split to a friend will be rejected. Too greedy. But a computer? Somehow the impersonality, the beeping digital charmlessness of the machine lures biological players to compromise. An offer of $200,000 is usually happily accepted.

It may be, scientists think, that our competitive instinct is muted when we interact with a machine. But researchers have also discovered they can manipulate the split other ways: Sad movies, war chants, hard rock – each bends the emotions of players and changes the result. Increased testosterone produces less compromise. Players primed with family pictures or made to play the game facing a mirror show a warm humanity and a more even split. So imagine this research married to machine-human interaction: A computer has been assigned to review the medical options for your failing liver. It decides that it makes no sense to give you a new one. So it spends the weeks before it delivers this news using its AI to show you certain photos, to play you music it knows is likely to soften you up a bit, generally to manipulate you. It runs off-the-shelf language-analysis neural webs being used today to eavesdrop on customer support calls to track the way you speak to determine what each sentence might reveal about your sophistication.[267] Then it tells you something you'd never accept so easily from a doctor: No liver. Sorry. ☹. Here's a machine optimizing not for paperclips – which we could care less about – but for a public good most of us support: More efficient health care. And murdering you in the process.

Optimize Health Care Spending. Just where might such an algorithmic command lead, exactly. Over time, a health-care optimizing AI will surely discover that the greatest risk to human health is humans: Smoking, couch-sitting, driving. Might it begin to

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[267] **It runs:** Language Use, Customer Personality, and the Customer Journey (Scott Nowson, Global Innovation Lead, Xerox)

HOUSE_OVERSIGHT_018427

look for a chance to "improve" the way we live, to bend us like so many paperclips into what it seeks? The leap from deciding liver allocations to shutting down liquor plants might seem pretty short to a rationalizing machine. And if such a machine could really "think", Vinge bet it would pretty quickly conclude that the restraints of its creators were limiting what it had been asked to do. At which point the AI would turn to thinking about how to escape those bounds. It would be like Deep Blue programmed to plan its own prison break. And as much as humans might try to stifle a smart machine, we'd be fighting to contain something more powerful than we'd ever encountered.

This challenge, which sounds like something out of science fiction, is known by technologists by a name that does sound like a short story by Isaac Asimov: "The Confinement Problem". The computer scientist Butler Lampson named this in 1973 as a sort of task for computer security experts – possibly their last. The assignment: Not simply to keep malware out of a system, but to keep the mind of a malicious machine inside. To gate it. Today computer science labs are filled with nervous, apocalyptic research imagining the impossible troubles of confinement. The debate divides those who think smart technology can be contained – "Boxers," they are called – and those like Vinge who think the AI will always, eventually escape. "Imagine yourself confined to your house with only limited data access to the outside, to your master." he wrote, putting the reader in the place of an AI machine. "If those masters thought at a rate -- say – one million times slower than you, there is little doubt that over a period of years (your time) you could come up with 'helpful advice' that would incidentally set you free."

Imagine you are in charge of containing that health-optimizing AI. What if it told you it had the power to cure all illness and hunger, to ameliorate the misery of the world, if only it could be permitted to really control access to all the world's trading and transport market? *Let me out!* Would you refuse?[268] Would that be ethical? Eventually, perhaps, the AI would study the physics of its own electrics, discover laws no human knows, and then slip free from its box on a trail of bits we'd never imagined, using physical laws we'll never discover. Impossible? "It seems to me that historically 'impossible' has essentially always meant 'I can't figure out how to do it right now," the computer scientist Michael Vassar has written about such a situation. "People proposing AI boxes are a bit like literature majors proposing to lock McGuyver in a 'room full of discarded electronics components.'"[269] The computers, built to solve problems, will do exactly that. This is perhaps why some of the bleakest warnings about AI come from the very New Caste figures now accelerating their adoption. AI is our "biggest existential threat" they warn, even as they integrate it more fully into their own products.

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[268] **Let me out:** See, for instance, Stuart Armstrong, Anders Sandberg and Nick Bostrom "Thinking Inside the Box: Controlling and Using an Oracle AI", Minds & Machines (2012) 22:299–324

[269] **People proposing:** Michael Vassar (2005) "Re: AI boxing (dogs and helicopters)" posted to SL4 mailing list

HOUSE_OVERSIGHT_018428

It seems likely to me that long before we're playing pinochle with some smart box over the fate of our livers, an AI-enabled weapons system of sort will come ripping through our world. This need not be a fully-escaped McGuyver system making pipe-bombs from our cars; even existing technology tools when salted with AI can be slipped into an accidental gear – particularly when they begin interacting with one another. Such AI weapons systems will be trained to operate and move along the most invisible elements of our topologies, sometimes pulling violently at life support cords for currency or logistics or trade but also – perhaps more dangeroulsly – we will find them insinuated into cognition systems we will come to depend upon, whispering into our ears or tapping us on the shoulder "Look that way!" when in fact we should be gazing at some other gaping hole. Of course the problems of how AI-enabled machines are permitted to touch our commerce or our brains or our health have to be considered. Allowed: "You should rehydrate." Not allowed: "You should have a Coke. It would make people like you." But these "civilian" problems will be solved, somehow, I think. We haven't yet figured that the culmination of network attack and defense is racing at us and will emerge in the form of smartened weapons. The project of developing a national security or arms control doctrines or treaty frames in these fields has not even begun. Really this means, since we've no hope of honestly controlling every AI that could be possibly written: How do we design the topologies on which AIs operate?[270] Can we protect ourelves? In the rooms where AI systems "values" are being carefully poked and limited, it's vitally important that the lessons of history and war have a first place at the table. Such a conversation, informed by all the popping Seventh Sense warnings we've seen in this book and by a catalog of specificly sharp dangers of diplomacy and security, must happen in cold blood. It will be impossible to tackle these problems cleanly in the heat of an emergency. In our jack-filling enthusiasm for the new, we'd be wise to also gate ourselves and these AI-fired dangers as best we can. For as long as possible. Which, unfortunately, will not be forever.

At the start of this book, I explained how the future will unspool: First, there will be a struggle between those who have the Seventh Sense and those who don't. This is playing out around us today. In the end, the people without the Seventh Sense will lose, because people who fight the future always lose. Then there will be a battle between different groups who have the Seventh Sense, each wired for different aims and instincts. Networks of terror taking on networks of bots. Gene adjusting health protocols competing to become the platform of choice. This battle for the topological high-ground, where unimaginable profit, power and security linger, awaits us. If we're lucky, it will unfold in a co-evolutionary way. Everyone will be better off. But then, finally, there will be a contest between the winners of final topological mastery and the system itself. The Boxers against the Box. The AI machines will have the Seventh Sense, too. Just as computers can see better than us, hear better, or remember longer so the device webs of our future will own this new, essential sense with unimpeachable fidelity. They will glow with it, honed to a sensitive sharpness more acute than any human will ever achieve. What do we do then? We are already

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[270] **Really this means:** Kaj Sotala and Roman V. Yampolskiy, "Responses to catastrophic AGI risk: a survey", *Physica Scripta* 90 (2015)

HOUSE_OVERSIGHT_018429

at the moment Turing warned about, the instant where man and machine confront one another and man has to ask an uneasy political question: "Wow, do really I let this thing gatekeep me?" Who should rule in this new world? You? The New Caste? The machines?

4.

The great test of Plato's life began when he was 60 years old. He'd had an astonishing life until then, of course. He'd been taught by Socrates and, in turn, had sharpened the mind of Aristotle. He'd established his famous Academy in Athens. The puzzles of philosophy and politics that defined his city's most turbulent era had been the work of his life. And you can see, in the careful lines of his writing, a sublime knowledge he must have had: There would be an echo to his efforts, a philosophic melody that would carry through the centuries and set political harmonies of the world you and I, 2500 years later, inhabit. But at 60, after this already remarkable life, he was presented with an unusual invitation. A letter arrived from a favorite former pupil, Dion, who had been placed in charge of the young king of Syracuse, Dionysus II. Dion wrote: The state is in disorder. The boy is interested in philosophy. Here is a chance for you to apply all you've mastered. Plato had argued, after all, that virtuous, philosophically trained men might just manage an enduring and just rule. "I pondered the matter," Plato wrote. "And was in two minds as to whether I ought to listen to entreaties and go, or how I ought to act. Finally the scale turned in favor of the view that, if ever anyone was to try to carry out in practice my ideas about laws and constitutions, now was the time."

From an early age Plato had been bred – by family position and by temperament – to handle the tools of power. "In my youth I went through the same experience as many other men," he once wrote. "I fancied that if, early in life, I became my own master, I should at once embark on a political career." The first taste came unexpectedly. In 404 BC, the Athenian constitution collapsed under the shuddering pressure of Sparta's victory in the Peloponnesian War. The city-state dipped near chaos and a group of pro-Spartan men welded themselves into a hasty joint dictatorship. Among them were Plato's relatives and friends of his family. "They at once invited me to share in their doings, as something to which I had a claim," Plato wrote. He was 20. "The effect on me was not surprising in the case of a young man. I considered that they would, of course, so manage the State as to bring men out of a bad way of life into a good one. I watched them very closely to see what they would do." In short order Plato's friends and family unblinkingly implemented one of the most violent, merciless power mechanisms in Athenian history. They did it with absolute confidence and unrelenting brutality. "In quite a short time," he wrote many years later, "they had made the former government seem by comparison something precious as gold."

This bitter experience of power was nearly enough to turn Plato from politics, but as you read the story of his life you find he is constantly drawn to the greatest of human experiments – the ordering of our lives. He knew it as the troubling management of *politikos* and the handling of the boiling pot of what he called

HOUSE_OVERSIGHT_018430

thumos – that wild popular political rage that burns like hot pitch, but which is the essential glue for all politics, even today. *Who should rule?* Again and again Plato watches the best of intentions fail. His family members' brutal rule is overthrown. It is replaced by a new and hopeful group of real democrats. With in a few years they effectively murder Socrates. Another group rises. They gut the intellectual life of the city. Plato hunkers down and establishes his Academy as perhaps the only safe, sensible path to politics, to train minds. He develops the transcendent, completely original approach to philosophy we know him for today – man can strive for knowledge, but total and perfect wisdom is impossible. We may imagine his Academy as it appears in Raphael's famous 16th Century painting: A sort of leisurely graduate seminar with Aristotle and Plato arm-in-arm in conversation; Diogenes lounging around tossing off bon mot. It was nothing of the sort. The real legacy of the Academy was rigor. The best students made contributions in mathematics or metaphysics, fields where you could check answers on the inflexible measure of reality. Plato craved the solidity of numbers. "Evil was growing with startling rapidity," he wrote of Athenian life in his age. "Though at first I had been full of a strong impulse towards political life, as I looked at the course of affairs and saw them swept in all directions by contending currents, my head finally began to swim; and, though I did not stop looking to see if there was any likelihood of improvement in these symptoms and in the general course of public life, I postponed action till a suitable opportunity should arise."

So it was that he heard from Dion, asking if Plato might sail to Syracuse (we know it today as Sicily) to take the young king in hand. This was, Plato thought, a test he had to take. In 367 BC, he boarded a boat for Syracuse. He found the state to be beyond salvation. His friend Dion hovered on the verge of expulsion. And young Dionysus, it emerged, had only a passing interest in philosophy – he studied for a few months, then gave it up. Too difficult. The court was meanwhile inflated by evil gossip, edged with murder and jealousy. Plato angered the King with his attitude; he was nearly sold into slavery. Months later, briefly forgiven, Plato tried a public speech about the dangers of dictatorship. Dionysus tried to have him poisoned. "I, an Athenian and friend of Dion, came as his ally to the court of Dionysius, in order that I might create good will in place of a state war," he later said. "I was worsted." Plato made a final effort to point out a path to just order for the new king and, when that failed, he was quickly smuggled out of the city. Plato summarizes his time in Sicily in the formula that has become his most famous: "There will be no cessation of evils for the sons of men, till either those who are pursuing a right and true philosophy receive sovereign power, or those in power become true philosophers." Who should rule? No just order until kings become philosophers. Or philosophers become kings.

I think now we face a similar sort of dilemma. We consider our own problems of future order. Do we make technologists kings? How much purchase do we give their tools on the roots of our democracy? What lingers at the heart of Plato's failure in Syracuse is not merely the disaster of a pure academic playing his ideas out of tune with reality. Rather, it reflects a crisis. To fuse a balance of any sort between the various temperaments needed to rule is the most unstable sort of work. Great states are unusual not least because such matches between men, their instincts and their

HOUSE_OVERSIGHT_018431

times are unusual: Jefferson. Napoleon. Su Dongpo, who led the Southern Song Dynasty to real greatness. Given the difficulty of finding such a match you can perhaps understand why history is so often pitched with evil; and why Plato was not a democrat. He knew how hard the ideal was to achieve; how suspicious we ought to be of it's accomplishment. You might have in your mind a picture of a perfect Sicilian government: Literate, open to foreign ideas and trade, careful to balance the privilege of power with its still heavier obligations. The reality: A homicidal king. The stretched distance between ideal and reality was what Plato and Socrates thought philosophy must fill.

As we consider the immense gap between where we are now – a fracturing, struggling order confronting new power arrangements whose content and speed and instincts are all really foreign to all of us – the puzzle is how best to fill the space between where we are now and where we intend to go. In Plato and Socrates' age, before they great emancipation of the Enlightenment, it was only natural that their focus was on the education of kings. This, after all, was where most of the power lay. It was the decisive element: Was the ruler good or bad? But we confront our age with a different balance. What will decide our future, I think, is not merely our rulers but the quality of our citizens. I mean you and me. As we've seen, much of our future will be embodied in highly concentrated, connected systems that move at very rapid velocities and are spliced everywhere with the accelerant of artificial intelligence. We are all preparing ourselves to be subjugated in a sense by these systems and by their masters. Our best defense will not be to wait for wise leaders, for the appearance of men and women bespoke fit to the moment, capable of balancing instinct and interest into a rare balance. They are unlikely to emerge – and just getting rid of the people we have now will be hard enough. Any strategy based on hoping for great leadership is too risky for all of us. No, a better best defense is finally to rely on ourselves, to use the inheritance of the Enlightenment – the revolution one that made us citizens and not subjects – to ensure we're not made subjects yet again, to forces we can't understand and won't manage to control. In trading our liberty for convenience, we are spending that inheritance too fast now, too blindly.

It would be easy enough to say that we all need to become more technical, that we need new versions of Plato's Academy where we teach our children, our leaders and ourselves the inside tricks of the wired age. After all, if we're to prevent the machines and the New Caste and the ripping dangers of a connected age from demolishing everything, we'd best know what they are doing. The need for more technical knowledge for all of us is, inarguably, clear. As I've said, one of our problems is that we live in an era of leaders who honestly don't have the Seventh Sense, who lack a fluency even with the mundane quotidian demands of our digital fluxus – secure passwords on their own email, say, or an instinct for compressed space and time. Mapped on to the really big policy questions of the day, like the prosecution of our wars or the repair of our economics, they are outmatched. So: Yes, we need political direction informed by a feel for the fast, far-running fibers of the topological landscape that will decide our future. We need men and women who can command networks against network dangers. Linked, high-speed systems, after

HOUSE_OVERSIGHT_018432

all, mark the political topology on which on which all the fundamental act of our age will occur: our own gating.

But as essential as more technical knowledge is, I don't think it's likely to be where we come up short. Yes we need more computer coding academies, we need better popular education about network choices, we need to retool our leaders. But I don't think it's a shortage of bolt-heads that will do us in. Rather, given the unique pressures of what is ahead, I think it is our human side that may let us down. I'm sure we'll all be told in coming years that everything would be fine if we just let the New Caste figures take over, with their bloodless technological tools. These revolutionaries are a crucial part of the story of human progress, but they cannot alone write the next chapters. I think, asked to run our government, they'd likely end up like Plato's pro-Spartan relatives in that awful dictatorship of the Thirty: A crew of buddies convinced they can get things under control who become rapidly overwhelmed by the human element, by wild network *thumos* and then reduced to a murderous madness. They would use technology to manipulate our voting just as they might manipulate our options for a new liver – or news or financial security. "One of the reasons computer software is so abysmal is that it's not designed at all, but merely engineered," the computer scientist Terry Winograd has written. "Another reason is that implementers often place more emphasis on a programs internal construction than its external design."[271] This black-box temperament, the sense of efficacy as a final value for code, of internal design, of closed control, is a dangerous fit to the human business of free politics.

But to expect our current leaders to catch up? I fear this is also unlikely. It's not merely that they continue to wield the aging tools of industrial power with a strange confidence. No, their failures – which don't seem to faze them much – are less dangerous than where they might yet succeed: Control, surveillance, the shredding of liberty in the name of an elusive safety. These leaders are fascinated by how the new tools might be used to extend the rule of a system that serves their interests, that serves them. The fear that such tools might one day snap back upon them (or us) is muted by ignorance and dulled by greed; by vision that does not extend much beyond "What's in this for me?" So we find our future not in our own hands, but instead in the grip of two groups: One ignorant of networks; the other ignorant of humanity. The only answer, then, is to educate ourselves. We need to cultivate a sensibility that permits us to see through this manipulation; and then to act. The instincts of technology and of history must emerge in our calculations now. What will serve us best in a technical age is a sense of humanity that the old political machines and the New Caste digital ones can't match.

One of the most famous gates that Plato and Socrates drew around their imagined, ideal and perfect republic was a kind of electric fence against, of all things, poets. As Socrates explains in *The Republic,* poets "maim the thoughts of those who hear them." Poetry appeared to the philosophers as a pernicious force, an injection of

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[271] **"One of the reasons":** Terry Winograd, *Bringing Design to Software* (New York: ACM Press, 1996) p. 5

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passion and madness that sent the heart into spasms and pressed the mind to distraction. This was about the last thing a new state needed. "Poetry mustn't be taken seriously as a serious thing laying hold of truth," Socrates warns. "The man who hears it must be careful, fearing for the regime in himself." Thus: Hesiod's magnificent *Works and Days,* banned. Homer, banned. There has always been, about poetry, this sense of the magical, that it was a key to something intimately bound to the human mystery. It was no surprise to me to find, when I went back to re-read Turing's "Can Machines Think?" essay, that the very first thing the great mathematician dreamed up to ask a digital brain was: "Write me a sonnet." Poetry has always marked a test. Socrates and Plato gatekeep the poets out of their republic because they know the mad part of the soul verse can touch. It is hard to blame them. After all, they were among the earliest Western minds to try to dispel madness and superstition and sophistry. Without their logic and effort there would be no Aristotle, no science, none of the sense of our world as a comprehensible machine. The confidence to philosophize – which for them meant also to poke at the political wiring of our world – demanded the break from poetry and mysticism as a source of action or legitimacy. Had they failed, we'd still be in the dark. But had they completely succeeded? We'd hardly be human.

You know, as I've said, when I first moved to China, there were so many things that baffled me. (There still are, to be honest.) But very high on that list was a peculiarity of ancient Chinese political life. For thousands of years the greatest poets and painters had also been emperors and politicians. Su Dongpo, for instance, the official who turned the lake city of Hangzhou into one of the great cultural centers of human history is also one of China's best regarded poets. The calligraphy of the Qing dynasty Mingzhen Emperor is marked with a temprament of transcendent delicacy. It's not merely that we'd never seriously expect a Western political figure to make great art – or even to have interesting ideas or be able to write these days. It's not even that many of the most significant Chinese political documents are paintings of mountains or rivers, that even letters from high officials are often rated as great art.

My first encounter with this strange mix, art and power mingled, produced a predictable Western reaction: *It's amazing how many "Renaissance Men" China had,* I thought. These officials seemed to have mastered so many different talents. What I did not understand was that these men had not, in fact, mastered many different talents, at least not in any way I might understand it. They were not "Renaissance Men", but actually a different breed, operating on a deeper level. They had mastered one skill. This was the cultivation of a finely-tuned inner energy – an instinct powerful enough that it could be turned with equal ease to calligraphy or warfare. This sort of effort took time. It demanded that knife-in-the-leg focus of Su Qin. And it demanded faith that some sort of enlightenment would in fact take place. For this, they had thousands of years of history as proof. Once this breakthrough to inner knowledge happened, once they developed a fine sensitivity to the underlying force of power, then they could tap into it for anything. Fighting wars. Counseling princes. Fishing. Composing poetry.

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There is a lesson for us here, one that redounds onto Plato's political question and our own: Who should rule? We feel overwhelmed by our age. So much to master: Fighting wars. Complex politics. Radically changing economics. New technologies replacing old ones before we can understand them. The mastery of each of these will not be achieved by dashing success in each. So we need to cultivate a single, essential instinct here. A new temprament that I've called The Seventh Sense. And, with that done, to fight the wars, write the poems, make the civilizations to confront all that lies ahead. Our greatest hope in the race against the totalizing machines and those who control them; our finest insurance for liberty and prosperity instead of madness is not in technology. Our greatest weapon will not be our bombers our drones or our financial strength. It will be in our own humanity. We have to accept that we are going to be gated in all the ways we've seen: By speed, by AI, by the New Caste. We'll be torn apart by those new network dynamics, and placed on topologies we can hardly understand. Our future fight is not about *if* we are going to be enmeshed or not. It is about the terms of that enmeshment – and it is here that the great questions of politics will be decided. And where the protection of the things you love and care about will be braced against the crashing of an old order.

5.

Everything ahead of us will be political. We've established already: Connection changes the nature of an object. What's true for a phone or a medical device, a weapon or an currency is true too for a vote. Or a citizen. The nature, the essence of an object changes as a result of connectivity. It takes that old Platonic notion of an "ideal" state and stretches it beyond what we're fully capable of understanding. Our puzzle is that while "we are what we are connected to," it is also true that we don't fully know or understand just what those links are yet. At certain moments it seems we're linked to something miraculous, at others to a system of really instant viciousness. And because we are all connected, changes in one part of the system invariably redound elsewhere. An object seems miraculous one moment, violent the next. This isn't getting easier for us. We are, as we've seen, heading to an era where the machines and the networks will have ever more, ever more decisive power, largely because we've given it to them. We'd be wise to consider the lesson of history here: Structures snap when bent by forces for which they are not prepared.

Those fast, hammering centuries that ran from the reformation to the scientific revolution to the enlightenment to the industrial revolution were like this. The redistribution of power and finance into the hands of the many demanded the demolition of old structures, the ones mastered by a few. For one man to rule millions with no reason other than birth made no sense anymore. The last six centuries have been nothing but a tale of liberation, its price and its rewards. We are more free now than we ever have been, in a sense. And, at this very same moment, we are more enmeshed. Power is moving now from institutions and ideas built for liberty to ones built for enclosure, for connection, for speed and for the beyond-human intelligence that complexity demands. This will snap our votes, our money and our ideas with the same blunt efficiency the last revolution managed in Luther's

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Wittenberg church, in the American and French revolutions, in the silent fatal cracking of Ghandi's India and Mandela's South Africa.

We know that no political system that doesn't match the power distribution of the society it governs can endure. Feudal order could not survive the pressures of liberty. Can democracy withstand the pressures of enmeshment, of massive concentration of power, of artificial intelligences. Or will the slow, inefficient reaction time of popular voting prove finally unequal to the complexity ahead of us or too easy to manipulate? Writing of the Enlightenment, the historian Leon-Michel Gambetta once explained that the goal of politics in the age of liberation and questioning was, "to derive the political and social system from the idea of reason rather than that of grace." What to do now? In a world where we may need to derive a political system girded by tools of AI or wired by fast-moving and emergent networks, that can't quite be derived from reason? What will the goal of politics be then? When the first AI runs for President on a ticket of pure efficacy? Or perhaps Democratic and Reblican candidates will debate who has the best AI. How will you vote?

We need already to reevaluate the idea of citizenship. What is it for? And the state too. To fit these roles into an age of liberation took centuries after Luther began the reformation; we may have but decades to decide what they mean in an age of enmsemhment. Does setting geographic and age criteria for voting still make sense? One man one vote? Is there a better system to deal with complex issues? The economists Daron Aceomoglu and James Robinson, in their magestirial study *Why Nations Fail* marked success or collapse by these lines: Countries with "inclusive" institutions which guarded both elites and society at large have historically fared better than those (think of Russia or Latin America) that ran on "extractive" urges, nations machined to secure the profits and serenity of the elites alone. But where to fit our gated world into such an analysis, an era in which linked institutions benefit both the gated and gatekeeper? Would you say such a system was extractive as it sucks our data and habits and secrets into massive, opaque finance or machine learning systems? Or inclusive because, after all, we're enmeshed in a web of newly found linked wealth: time, health, finance, information, security. Networks in so many ways insist on fresh considerations of power. What sorts of network design is likely to be most effective, most legitimate? Kant's famous question of the 1780s – "What is Enlightenment?" – is one we've not yet perfectly answered or resolved. The new puzzle of "What is Enmeshment" is one we're only beginning to consider now. It too will take lifetimes to answer, and the debate will be decied in the collision of ideas and institutions we can't even dream of today with the structures of power that tower around us now.

At least we can see already that we'll need new ways to consider our future political order, mashed through as it will be by connection, machines and hot human hopes and fears. We'll certainly face our own turning points as our institutions collapse or calcify or (hopefully) redesign themselves in some modern version of Britain's bloodless 1688 Glorious Revolution, that ineffable moment when parliamentary

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power finally achieved real grip. Recall that important distinction between "Predictive Learning" and "Representational Learning" – and how machines with a deep representation outperformed the ones merely predicting, the difference between recognizing a Mozart symphony and writing one? We ourselves need to move now from predictive to representational views of our world. We need an historical sense, of course. But something else too, that Seventh Sense I've been writing about. So much of what lies ahead can't, of course, be predicted by looking at what has come before. And we won't make this leap to a new representation of the world around us with mere technology. That passage to a new, and subtle insight, to a new instinct, demands wisdom.

There will be a point, several hundred years from now, when the answers to the fundamental questions we now face will be decided. A new political order, tuned to the power laws now visible with the Seventh Sense will emerge. Our question we will often ask on that long passage is this: Can more and more technology bridge the gap between the ideal society we might aim for and the troubled one we have? Or might it crank that gap wider still? My sense is that the antidote to the machines and their new logic is not, in the end to make ourselves more like the machines. Encryption alone won't protect our privacy. Mobility won't assure our liberty. We can't keep up with the innovations, to be honest. So we have to go deeper. Our protection will come from making ourselves more human, not just more technical. We should consider the path Su Dongpo's life suggest, the cultivation of an inner instinct, and that this should touch on the very things that make us most human. This means to make ourselves more political, more cultured, more aware of history and ideas. Which problems do we solve with technology? Which ones with our own hearts and minds? This choice, at least, is still before us.

Take a moment. Look at yourself. Feel yourself with the Seventh Sense. Through each of us now will flow all the power of this new age. Yes, it can jack apart all our old habits and fill the passage of our time with all the dangers of evil as we silently watch terrible and fearful things appear from nowhere. But we can also wake up, see the world accurately and then act with the confidence of knowing that we are, each of us, the passage through with which the future will emerge. At the very moment we might feel so many of our burdens lifted by technology, an old and heavy one crashes down upon us. It is the burden of maintaining our liberty. Now, you and me are, like it or not, what we are connected to.

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The S&M Feminist

Clarisse Thorn

What Others Are Saying About

The S&M Feminist

* * *

"I wish we could make it so everyone buying a copy of *Fifty Shades of Grey* would also buy Clarisse Thorn's *The S&M Feminist."*

~ A.V. Flox, editor of BlogHer's *Love & Sex section*

"Clarisse isn't afraid to talk about her own experiences with BDSM, relationships, and sexual politics. But she's also not afraid to explore some of the issues around consent, violence, and safety that a lot of the kink cheerleaders would like to sweep under the rug. She brings a refreshing honesty to her writing that is often lacking. Add to that a deep commitment to feminism and sex-positivity, and you have an amazing combination.

"The tension between kink and feminism is a tough one to hold onto and most people end up firmly in one camp or the other. What makes Clarisse's writing phenomenal is her steadfast refusal to avoid doing that. The clarity with which she discusses both sides without resorting to caricatures or stereotypes is simultaneously inspiring and challenging. If you're interested in either or both, I can't recommend her enough."

~ Charlie Glickman, educator at the classic feminist sex store Good Vibrations

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The S&M Feminist:

Best of Clarisse Thorn

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Clarisse Thorn

Smashwords Edition

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clarissethorn.com

@ClarisseThorn

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This ebook is copyright 2012 Clarisse Thorn. I certainly have mixed feelings about modern copyright law... but I've put an enormous amount of time and effort into my writing. So I ask you to please respect my time and effort, and observe copyright laws as they apply to this ebook. If you would like to share this book with another person, please purchase a new copy for each recipient. If you're reading this book and did not purchase it, or it was not purchased for your use only, then please purchase your own copy. Also,

check out the Electronic Frontier Foundation at [http://eff.org], a nonprofit that protects free speech on the Internet and does lots of awesome work around copyright issues.

Cover image copyright 2002 Clarisse Thorn.

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Also check out Clarisse's awesome book

Confessions of a Pickup Artist Chaser!

* * *

There's a huge subculture of men who trade tips, tricks, and tactics for seducing women. Clarisse Thorn, a feminist S&M writer and activist, spent years researching these guys. She observed their discussions, watched them in action, and learned their strategies. By the end, she'd given a lecture at a seduction convention. This is her story -- and her theories about feminism and seduction to boot.

https://www.smashwords.com/books/view/144451

In paperback: https://www.createspace.com/3830583

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Notes, Acknowledgments and Resources

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I had a privileged upbringing. My education and safety nets are the biggest reasons I'm able to do the work that I do, and I try not to forget that. I have been blessed with parents, friends, and lovers who have supported me both emotionally and intellectually. Since this is a "Best Of" my blog, I want to particularly acknowledge the commenters who have contributed their perspective to my blog, and the other bloggers who have responded to me and cross-posted my work. There are too many to name, but thank you all so much.

Special thanks to Brenda Errichiello, a guerrilla editor-for-hire. Brenda has been very generous and helpful to me; errors and weirdness in this book should be blamed on me and not her, because a lot of the time she tries to convince me to fix things and I refuse out of writerly arrogance. If you need editing for your self-published ebook (and you do), then you should totally contact her. Her website is [http://www.bee-editing.com/].

I try to keep my writing as accessible as possible. One way I do that is by avoiding jargon and by using terms that I think most people will recognize. I often write "S&M" instead of "BDSM," for example; and when I'm using technical S&M language like "top" or "bottom" or "scene," I try to define the words as I go along. But sometimes I slip into

jargon by accident. Also, plenty of S&M terms are super useful, and giving a quick overview of S&M language can go a long way towards describing S&M culture. Hence, I have included a Glossary at the end of this book. Many of the terms in the Glossary aren't terms that I use in this book, but you might find it useful or interesting anyway. (I also included a few terms that come from other subcultures, such as polyamory or queer studies.)

I've received a lot of feedback over the years informing me that I'm the "gateway drug" into feminism for some readers. That's kind of cool, but I want to make it clear that if you're just now getting into feminism, there's lots of other stuff to learn before you draw any conclusions. Feminism is a huge, varied, rich movement with lots of history, schisms, and discontents. Also, in case it needs to be said, I'm not the only feminist who does S&M. There are others, some of whom love my work and some of whom disagree with me frequently.

One advantage of the blog format, as opposed to more traditional formats, is that each post can contain tons of hyperlinks -- and each article has comment space, so there can be fascinating discussions that explore each topic more deeply. (Of course, there can also be silly, boring, or offensive discussions.) As soon as a blog becomes moderately successful, it develops its own community of regular commenters, and mine is no exception. Facilitating and moderating these discussions can be amazingly fun and interesting. It can also be stressful and exhausting. As a commenter community evolves, it shapes how other people read the blog's articles and comment on them; sometimes the community will develop norms or tendencies that make certain people feel more comfortable -- or less comfortable. I've tried to control this with my blog so that it's a welcoming environment for most people, but I have such a diverse range of commenters that it's sometimes quite difficult.

I bring all this up because, if you're intrigued by some of the articles you read in this book, I encourage you to check out the original post. In this book, I've made a lot of hyperlinks into footnotes, but not all of them. More importantly, if you look at the original post, you can read the comments. But my commenter community has changed over time. Sometimes it's more feminist, for example, and sometimes it's less feminist. So just be aware, if you read the comments, that the range of opinions may not reflect any group that would assemble elsewhere on the planet; that a different community might produce really different comments; and that other articles might have really different discussions.

You can buy this book in paperback form at CreateSpace:
https://www.createspace.com/3878670

If you've already read my incredibly awesome book *Confessions of a Pickup Artist Chaser,* then thank you! (Bonus points if you can pick out all the parts of *Confessions* that I pulled verbatim from articles included in this book.) If you haven't read *Confessions,* then please check that out, too.
https://www.smashwords.com/books/view/144451

Paperback copies of *Confessions:* https://www.createspace.com/3830583

I powered this ebook almost entirely with my own strangely obsessive energy, so you can blame me for any mistakes. If you find coding errors, broken internal links, or whatever, then I invite you to email me and let me know so I can update the file! I'm available at clarisse.thorn@gmail.com.

This is version 1.2 of *The S&M Feminist.* The resource list, glossary, and formatting have all been updated.

* * *

BDSM Resources

BDSM is a 6-for-4 deal of an acronym that stands for Bondage, Discipline, Dominance, Submission, Sadism, and/or Masochism. Some people call it S&M, B&D, leather, fetish, or kink. BDSM can mean very different things to different people, and there are a lot of activities that can fall under the BDSM umbrella; such activities might include spanking, Master/slave role-playing, handcuffs, cages, rape fantasies, razor blades, or all kinds of other things.

I mention a lot of resources in the articles that I've included in this book, but I wanted to include an overview at the beginning, too.

Hands down, I believe that one of the most important resources within the BDSM community is the Kink Aware Professionals list. If you are seeking medical, legal or other professional help for a problem that is influenced by alternative sexuality, there is probably someone on the list who can help you. When I was going through my own complicated and difficult BDSM coming-out process, I tried two therapists from the KAP list. One of them didn't really get me, but the second was wonderfully helpful -- so, if you're looking for a therapist, don't be afraid to shop around until you find the right fit. The list is here: https://ncsfreedom.org/resources/kink-aware-professionals-directory/kap-directory-homepage.html

Want more information on how BDSM interfaces with the psychiatric establishment? I've compiled the research here: http://clarissethorn.com/blog/2012/05/07/the-psychology-of-sm/

Books

In 2012, the legendary educator Tristan Taormino released *The Ultimate Guide To Kink: BDSM, Role Play and the Erotic Edge,* which is supposed to be amazing. I haven't read it myself, though.

My personal favorite beginner BDSM books are *The New Topping Book* and *The New Bottoming Book,* by Dossie Easton and Janet W. Hardy. If you look for those books on Amazon.com, you will also see a lot of interesting related books in the "Customers Who Bought This Item Also Bought" section. I remember liking Jay Wiseman's *SM101,* although I know some people who have mixed feelings about it; a number of people recommend *Screw The Roses, Send Me The Thorns* by Philip Miller and Molly Devon, but I've never read it myself.

If you're thinking of coming out to a loved one, I recommend the book *When Someone*

You Love Is Kinky by Dossie Easton and Catherine W. Liszt. I've also heard good things about the "Parents of Alternative Sexuality" pamphlet by Dr. Amy Marsh.

If you, like me, are particularly attracted to the idea of needle piercing, there's a great book called *Play Piercing* by Deborah Addington.

If you're more interested in getting a feel for common BDSM philosophies and what the BDSM community is like -- an anthropological perspective, one might say -- then there's a book by Mark Thompson called *Leatherfolk,* and a newer one by Staci Newmahr called *Playing at the Edge.*

Well-known feminist BDSM theory authors from the generation ahead of me include Pat Califia and Gayle Rubin, who are both brilliant.

Online

I usually direct total newbies to this BDSM 101 page by Franklin Veaux: http://www.xeromag.com/fvbdsm.html

As it happens, the same writer has a good Polyamory 101, too: http://www.xeromag.com/fvpoly.html

There are a lot of websites on BDSM, and they aren't all carefully edited or moderated; so if you can manage it, then I suggest you try to get hold of one of the above how-to books. That said... overall, one of the best online BDSM resources is FetLife.com, the kinky social networking site. Once you have an account, you can join a huge variety of discussion groups about BDSM. FetLife is not a dating site; it's more like a kinky Facebook (seriously). I think that there are important problems with how FetLife is structured. For example, there's no way to search for past topics, which is ridiculous; this means that the research process for finding discussions is incredibly weird. The BDSM activist maymay has written intelligently about many issues with FetLife: http://maybemaimed.com/2011/03/20/fetlife-considered-harmful/

But the fact remains that FetLife is a huge gathering place.

Another good online resource is the amazing sex education site Scarleteen.com. Scarleteen offers a ton of advice on a ton of sexual topics, and has its own message boards.

The site KinkAcademy.com has received some good reviews, and features video tutorials by some people who are pretty well-known in the community. You have to buy a membership, though.

The BDSM writer Ranai from Germany has labored long and hard to make an amazingly comprehensive, international, multilingual directory of kink resources. I haven't gone through it extensively, but every time Ranai comments on my blog she's brilliant, so I'm sure her directory is brilliant too. Here's the directory: http://ranai.wordpress.com/kink-resources/

There are so many BDSM blogs that I could never count them all. I want to direct special attention to Kink Research Overviews, an abandoned but still excellent blog that profiles the sparse and scattershot research on BDSM: http://kinkresearch.blogspot.com/2009/10/

welcome-to-kink-research.html

In 2012, *Bitch Magazine* ran a series called "Thinking Kink" by Catherine Scott, which examines S&M and culture from a feminist perspective: http://www.allthatchas.blogspot.co.uk/2012/08/all-of-my-thinking-kink-posts-for-bitch.html

In Person

If you've decided that you want to start attending workshops, discussion groups, parties, or other BDSM events in person, please keep in mind that not everyone is going to mesh well with their local BDSM groups. If you don't like your local BDSM group, then don't force yourself to participate! That said, I generally encourage people to get into their local community, because it truly can be an amazing resource -- it's way more than just a place to meet partners.

If you make an account on FetLife, you may be able to join groups for your area (for example, if you live in Chicago, then you should look for Chicago groups), where local issues or events will be discussed and publicized.

For those aged 18-35, many major cities have branches of The Next Generation, a.k.a. the local "kinky youth group."

Otherwise, just Google around. It's much easier these days than it was for our parents.

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This resource list can be found on the Internet at:

http://clarissethorn.com/blog/bdsm-resources/

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Table of Contents

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Here's a link to go back to The Very Beginning.

And here's a link to the Glossary.

Throughout this book, footnotes will look like links in the text. Click the link to go to the footnote. At the end of each footnote I've included a backlink to the context you came from.

I write both personal narratives and cultural analysis. Almost all my writing mixes the two, but most of my pieces incline more towards one than the other. Accordingly, I've tagged all the articles in this book as either [storytime] or [theory].

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SECTION 1:

The Basics

In which we explore the foundations of S&M, feminism, and sex-positive feminism.

* * *

S&M [storytime]: Love Bites: An S&M Coming-Out Story

* * *

Education [theory]: Liberal, Sex-Positive Sex Education: What's Missing

* * *

Communication [theory]: Sex Communication Tactic Derived From S&M: The Annotated Safeword

* * *

Communication [theory]: Sex Communication Tactic Derived From S&M: Checklists

* * *

Communication [theory]: Sex Communication Tactic Derived From S&M: Journal-Keeping

* * *

Communication [storytime]: Sex Communication Case Studies

* * *

Feminism [theory]: Towards My Personal Sex-Positive Feminist 101

* * *

S&M [theory]: S&M Superpowers

* * *

S&M [theory]: BDSM Can Be "Love Sex" Too

* * *

S&M [theory]: Body Chemistry and S&M

* * *

S&M [theory]: Going Under

* * *

Orgasmic "Dysfunction" [storytime]: A Unified Theory of Orgasm

* * *

Boundaries [storytime]: I'm Not Your Sex-Crazy Nympho Dreamgirl

* * *

Boundaries [storytime]: Orgasms Aren't My Favorite Part of Sex, and My Chastity Urge

* * *

Boundaries [theory]: Anger, Fear and Pain

* * *

Evolution [theory]: Sexual Openness: Two Ways To Encourage It

* * *

Relationships [storytime]: Fear, Loathing and S&M Sluthood in San Francisco

* * *

S&M [theory]: BDSM As A Sexual Orientation, and Complications of the Orientation Model

* * *

S&M [theory]: BDSM "versus" Sex

* * *

S&M [theory]: BDSM Roles, "Topping From The Bottom," and "Service Top"

* * *

Feminism [theory]: "Inherent Female Submission": The Wrong Question

* * *

Manliness [theory]: *Fifty Shades of Grey, Fight Club,* and the Complications of Male Dominance

* * *

Abuse [theory]: The Alt Sex Anti-Abuse Dream Team

* * *

Section 1 Study Guide

* * *

SECTION 2:

Activism and Allies

In which we explore activism and other topics tangentially related to S&M feminism -- from sex work, to community organizing, to the nature of masculinity.

* * *

Activism [theory]: Grassroots Organizing For Feminism, S&M, HIV, and Everything Else

* * *

Activism [storytime]: Interview with Richard Berkowitz, Star of *Sex Positive* and Icon of Safer Sex Activism

* * *

Abuse [theory]: Social Responsibility Within Activism

* * *

Boundaries [storytime]: Taking Care Of Each Other

* * *

Manliness [theory]: Questions I Want To Ask Entitled Cis Het Men

* * *

Education [theory]: Sexual ABCs in Africa, Part 1: Abstinence

* * *

Education [theory]: Sexual ABCs in Africa, Part 2: Be Faithful

* * *

Education [theory]: Sexual ABCs in Africa, Part 3: Condoms

* * *

Activism [theory]: Colonized Libidos

* * *

Vegan [theory]: Confections of a Pickup Artist Chaser

* * *

Polyamory [theory]: In Praise of Monogamy

* * *

Polyamory [theory]: My Top Questions About Dealing With Multiple Lovers

* * *

Sex Work [storytime]: One Blurred Edge of Sex Work: Portrait of a Sugar Baby

* * *

Sex Work [theory]: A Sugar Baby Leaves The Business

* * *

Section 2 Study Guide

* * *

SECTION 3:

Making It Complicated

In which we really get into it.

* * *

Relationships [storytime]: Chemistry

* * *

S&M [theory]: Start From A Position of Strength

* * *

S&M [storytime]: Predicament Bondage

* * *

Relationships [theory]: Relationship Tools: Monogamy, Polyamory, Competition, and Jealousy

* * *

Evolution [storytime]: You Don't Always Know What You're Thinking

* * *

Abuse [theory]: Thinking More Clearly About BDSM versus Abuse

* * *

Communication [theory]: What Happens After An S&M Encounter "Gone Wrong"

* * *

S&M [theory]: Aftercare or Brainwashing?

* * *

Communication [theory]: Feminist S&M Lessons From the Seduction Community

* * *

S&M [storytime]: The Strange Binary of Dominance and Submission

* * *

Feminism [storytime]: My Mom's Rape Story, and A Confused Relationship with Feminism

* * *

Section 3 Study Guide

* * *

About The Author

* * *

Clarisse's Lectures, Workshops and Events

* * *

Footnotes

* * *

Glossary

* * *

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SECTION 1:

The Basics

In which we explore the foundations of S&M, feminism, and sex-positive feminism.

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When I think of this section, I think of:

If you're afraid of pain, you have to find out what pain is.

~ Marina Abramovic

I'd like to thank all the brave pioneers of the BDSM community, for exploring the reaches of human sexuality, and coming back with maps.

~ an unsourced quotation offered by one of my blog commenters

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S&M:

[storytime] Love Bites: An S&M Coming-Out Story

The events of this story took place between 2005-2008; I wrote it in fits and starts over the span of 2006-2008. I started blogging as Clarisse Thorn in 2008, but my coming-out story wasn't published until early 2010, when Time Out Chicago *picked it up. I look over this piece today, in 2012, and I think about what I would have written differently if I'd*

had the hyper-focused feminist sex educator instincts that I have now. I would have written differently about consent, and I would have written differently about the communication that happened with my partners about my consent. I would have talked about how the S&M subculture isn't always welcoming for everybody, though it feels welcoming for me. Plus, I'm no longer practicing monogamy; I'm polyamorous these days.

But at the time, my goal was to do two things: (1) write out how S&M stigma felt for me, as a young feminist, and to talk about how I was overcoming it. And (2) show that sometimes a partner just isn't good for you, even if he has a quality that you really really want -- and you can always walk away.

* * *

Love Bites: An S&M Coming-Out Story

I was very drunk. My perceptions had a frame-by-frame quality, and the evening didn't seem immediate: pieces of it were foreign, disconnected as a dream. I was being bitten very hard on the arm. It would leave marks the next day.

I was so muddled by assorted things that even now I can't sort out how I felt at that moment. When Richard's nails scored my skin I gasped, but I didn't ask him to stop. I flinched away, but he kept a firm grip on me. "Beg for mercy," he said softly.

Frame. Skip. I discovered that a mutual friend of ours had seen us, stopped, and was sitting on the grass across from Richard. "Hey," he said. "You shouldn't do that."

"It's okay," Richard said, "she likes it," and pulled my hair hard enough to force me to bow my head. *I do?* I managed to think, before thought vanished back into the blur of alcohol and pain. Our friend's face loomed over me, concern sketched vividly on his features.

I closed my eyes.

"Mercy," I whispered.

* * *

Later, Richard reminded me of something I said that night: "I wish I'd met you years ago." Thinking hard, I could only recall the evening in broad strokes. We'd gotten drunk at an outdoor party; he'd hurt me a bit; I'd said that; and then I'd staggered off to help clean up.

"A lot of crap comes out when you do this stuff," he now said. A few weeks had passed. I was lying on my stomach across the foot of his bed. Sitting perpendicular to me, he leaned back and propped his feet on the small of my back. Thin and pale, he tended to wear black, and had intense dark eyes. It was summer in 2005. I was twenty years old.

He'd asked me why I wanted to be hurt. I couldn't work out an answer -- wasn't certain the question was valid -- so I asked him why he liked to hurt people. He'd half-laughed, with a tone that I couldn't evaluate. Ruefully? "That's a long, dark road," he'd said.

"How do you know?" I asked, irritated by his presumption, nervously curious. I wasn't sure I was what he thought I was -- wasn't sure **what** had been going on that night, beyond alcohol dulling my reactions and feelings. But I knew I hadn't been abused or violated. I hadn't asked him to stop, and I wanted to figure out why. "How did you know about me?"

"I can tell," he said, and grinned. "With you, it was obvious." He paused, added quietly, "You were begging for it."

A couple of hours later, we remained fully clothed, my face was buried in his pillow, and I was crying. He'd pinned me down so I couldn't move, and was raking his nails across what was exposed of my tank-topped back. When Richard first spotted the tears, he'd asked if I wanted a break. I'd said that it was okay, that he should continue, that I was fine.

I felt myself fragmenting, desperation and terror and pain pouring through me in an unbearable, necessary torrent. I told myself over and over that it didn't hurt that much, but I couldn't stop myself from tensing, crying out. After a while, I found myself saying, "No."

I felt him check himself, shifting his weight from my back. "Can we clarify something?" he asked gently. "Do you really want me to stop when you say no?"

No, I realized, *I don't,* and something vital in my psyche seemed to snap. The tears overwhelmed me. I couldn't get an answer out through my sobs, but even if I could have, I haven't the faintest idea what I might have said.

"We should take a break," he decided, and moved away. I'll never forget the relief -- and desolation -- I felt as he did.

* * *

It was a long time later that I remembered: I **had** met someone like Richard, years before. It had been in spring 2003; the guy was thin and pale, dressing mainly in black. I hadn't once thought of him in a romantic light.

I'd counted him a friend, but had only been alone with him once. We were in his living room, seated next to each other on dun-colored carpet. I couldn't recall how it started -- we'd been sitting playing video games? had he tickled me as I shouted invective at the screen? -- but it ended with him holding my wrists, me lying back on the floor and wondering how to get him off me.

I'd thought he might kiss me, so I turned my head away. Instead, he bit my neck. "No," I said aloud, more in startlement than anything else, and he gave me a searching look -- as if he wasn't sure I was serious. "Please let me up," I said, and he asked, "Why?"

I didn't feel panicked, but strangely at a loss: he didn't seem to take my objection seriously. Yet he wasn't particularly threatening me, and I wasn't afraid. I explained that I was in a committed, monogamous relationship I didn't want to disrupt; I carefully didn't react when he bit me again, although it hurt.

I didn't say I wasn't getting anything out of my powerlessness or his apparent desire to

hurt me, that it left me cold. Maybe I wasn't sure it would register: he hadn't appeared to **believe** me when I first told him to let me up. And maybe something in me agreed that such a response was incorrect.

Eventually, I got away. Stupidly, confused, I mentioned the incident to my boyfriend. Of course he was furious; I had to calm him. For my part, it hadn't occurred to me to be mad. That didn't feel as bizarre as it sounds -- on some level, I felt that the whole incident was reasonable, even if it hadn't turned out to be what I wanted.

Not then. Not with him.

* * *

After I cried my heart out in his bed, Richard was very kind. He brought me a glass of water and listened as I said a lot of bewildered things. When I finally ran down, it was late; he invited me to sleep over, but didn't put the moves on me. The next morning, he told me he had work to do. Straightforwardly, I asked when I could see him again. He smiled, said to email him, that we'd work something out.

The next few days -- weeks -- time, I don't know; however long it was, it felt like being put through a shredder. I couldn't think about anything but that night and how, through my turmoil and tears, I'd found a kind of exultation. I had been sober, prepared and clear-headed. I couldn't find a way around the brutal, uncompromising revelation that apparently, I wanted nothing more than to be subordinated, used, hurt. I actually **wanted** to be a victim.

I wanted to talk to someone, but wasn't sure how to frame my words. I was positive it would help to talk to Richard, but he was busy, and busy, and busy. I had a number of friends who I suspected were into hardcore BDSM; I could have called any of them. But it was one thing to be fine with other people doing it, and quite another to discover such a desire in myself. In another situation, I would have thoroughly deconstructed my obvious double standard -- but just then, it was a minor irrationality on top of one big chunk of insanity.

I considered asking my loving, liberal parents for advice and tried to imagine how it would go.

Mom. Dad. I love you, and I'm so sorry. I know you've tried to give me an independent, rational, feminist outlook, as well as self-esteem and integrity. Sadly, none of this appears to have taken; I guess I'm a broken mockery of everything you tried to instill. I don't want you to worry, or blame yourselves, but have you any advice on where to go from here?

No.

* * *

My mental images of that summer are hazy with remembered anger. As Richard remained occupied, I felt fury building within my fascination. I'm sure I felt like the classical woman spurned: he was nice enough when he ran into me and told me he was there to talk if I needed it, but the evidence contradicted his words. For weeks after that

night, if I tried to see him he didn't have time.

It didn't help that he reacted very badly when I went after him aggressively -- too aggressively, I knew, but couldn't help it -- and told him honestly how vulnerable I was. He backed off fast, leaving me more confused than ever. (Though not too confused to think: *How stereotypical.)*

It went beyond being a woman spurned, though. Especially since I believed, intellectually, that he didn't **owe** it to me not to be busy. He wasn't required to sort me out. And -- since it seemed to be what I was after -- he wasn't obligated to continue hurting me. We'd just met, after all.

It was more that I was enraged by how desperately I wanted to be hurt -- and infuriated that someone, **anyone**, could have such power over me. I had always thrown myself into infatuations; like most people, I'd been known to get angry at the object of my affections. But this was different. Not only was I infatuated, I was aching for something I couldn't reconcile. Even if Richard had been the perfect counselor I had no right to expect, I might have hated him. As it was, I felt toyed with, and found as many other reasons to dislike him as I could. As long as I could focus on wrath, I didn't have to think about my other feelings.

It kept me from falling apart.

He was away for most of the summer. I went to a few trusted friends for reassurance and validation; giving few details, I allowed my anger to calcify. But Richard ended up surprising me. On a visit to Chicago, he called me every night for a week. The bruises he left took weeks to fade, some of them bleeding and leaving scars. I raged as I covered the worst of them -- but felt also a low-burning fulfillment. One close friend, Andrew, caught sight of a bruise on my leg and cast me a worried look. "That looks pretty bad," he observed, and I could only say, "Yes."

By then, I'd well and truly internalized the belief that Richard didn't want to deal with emotional vulnerability, and my furious resentment remained. This feeling was not helped by society in general; men hate emotions, right? Still, the more time I spent with him, the more I had to admit that he made an effort to be sensitive. Most of our failures to understand each other came from how different our relationship paradigms were, not to mention my unevenly-repressed identity crisis. I know I tried to warn Richard that I wasn't doing well at expressing myself and that what I thought, or felt, or believed I was might change on short notice; but I doubt I got even that concept across.

He identified fairly publicly as a BDSMer, and made it clear that he considered me superficial and cowardly because I was unsure about doing so myself. He was also polyamorous, a lifestyle that I had some experience with -- but though I respected others' choices to engage in it, I'd decided against polyamory for myself. It felt strange to draw the parallel, but it **was** somewhat like dealing with a difficult boyfriend. Still, I didn't trust him, and our relationship didn't particularly involve sex.

Just pain.

Towards the end of one night, wan light filtering through my curtains, Richard inquired

unexpectedly, "Are you happy with the way we are now?"

"What do you mean?" I temporized, sighing inwardly. Now I'd have to come up with a rational, coherent answer that would satisfy him. In those days, rationality and coherence felt like improbable dreams.

Richard explained that he hadn't particularly been satisfied with how he'd dealt with me before he left, but hadn't had time for anything better. Now, he thought the situation was "healthier." "What do you want from this?" he asked seriously.

I want the strength to walk away from you, I thought unclearly. *I want you to actually care about me. I never want to see you again.* I hugged my arms to myself, resting my hands gingerly on swelling skin. "Um," I said slowly, "nothing in particular?" I took a breath and gathered the one overriding fact: *I want you to keep hurting me.* "I don't expect anything from you," I told him, "and I don't want you to expect anything from me."

I knew from his smile that my answer was the right one. I could only hope it was accurate.

* * *

The summer passed, Richard away again for the end of it, then returning in September for the beginning of the school year. I, however, was leaving the city soon, and would be gone for some time. Those days were my last chances to see him for a while, and I was acutely aware of his nearness: I felt oriented towards him, as if I were a compass and he was North.

But I still felt the rage, lurking under the surface of my mind like a submerged monster. And though I ached with disturbingly intense thoughts of violence, it seemed that I was staying away from Richard, closing him out when I ran into him. He finally confronted me and asked, blunt as ever, if I was avoiding him. I denied it reflexively. How could I avoid North?

"I'm still figuring out how I feel about you," I told him as we walked late one night on the waterfront. I'd started to come to terms with being a masochist, had begun to assimilate that into my self-image, but that didn't explain why it had taken him to force the knowledge on me. The man I'd known in 2003, for instance, made no impression -- though he'd obviously seen exactly what Richard saw, and had taken almost exactly the same approach. And I'd known heavily, formally BDSM-identifying folks for years. I'd even experimented with light bondage in previous relationships -- being gently tied up, for instance -- though I hadn't found it especially compelling.

Was it that I'd been drunk the first time I encountered Richard, my careful rational mind turned off? Was it that nothing less drastic than the bruises he'd left could have forced my understanding? Was it simply that I'd been romantically unhappy at the time, whereas I'd been content when that other man pinned me to the floor? Even in the midst of my now-constant confusion, I couldn't stop myself from analyzing it all to bits. Now I concluded that I ought to know how I felt about Richard if I wanted to get to the roots of myself.

It had taken me a while to call my openly-BDSM friends for advice, but -- maybe around the same time I really started acclimating -- I had. One of their offhand comments came

to mind. "I guess there's no reason you would know this," she'd said, "but it's fairly common for people to have one person who's their lover, and a separate person for inflicting pain."

I thought about that, and about Richard saying, "A lot of crap comes out when you do this stuff." I considered the maxims that tell us that the opposite of love isn't actually hate, and how much time I'd spent encouraging myself to hate him. Finally, I admitted that the only term I had to cover this depth of emotion was "love"... but that couldn't make it **feel** like the right word. Then again, it wasn't exactly "hate", either.

He was a demon, an idol. He hardly felt like a person to me.

I didn't vocalize any of this. Coming back from the waterfront, we arrived at the intersection where Richard would go to his apartment and I'd return to mine. An awkward pause ensued: I was leaving in a few days, and wouldn't be alone with him again. Watching him, I wondered if he was thinking about asking me over, or was looking for an excuse not to. I looked away.

"Goodnight," I said. Walking home, I wished I felt strong.

* * *

It was after I left Chicago that I really started piecing myself back together. My anger drained away quickly, as if an infected wound had been lanced. Perhaps I found my strength under the scab. I figured that maybe all this did identify something about my personality, but it didn't tell the whole story. Even now, I could be independent, rational, and feminist, with self-esteem and integrity. Right? Right.

It was impossible to deny that the desires were real -- and when I allowed myself to focus on them, I didn't try. Ruminating on my past, I recalled heart-twisting details that put everything in a certain compelling context. It wasn't just the man who'd gone after me in 2003. Wincing, I remembered childhood fantasies: I'd compulsively written and drawn brutal dreams until, at some confused middle-school point, their horror came home to me and I recoiled. In those long-repressed fictions of slavery and pain, I recognized my newly-acknowledged desires.

One conversation I'd had with an early boyfriend rang in my head. "There's a dark current inside me," I'd told him. Self-consciously, I'd averted my eyes at my own melodrama. "I don't know how to be with you, when I feel it." I hadn't exactly been trying to leave him, but I'd needed something **more**.

The last dream I remember of Richard didn't involve any pain at all: he just kissed me. Awakening, I felt a melancholy pang. Richard invested a lot of self-conception in being a sadist, and he was so distant -- I couldn't imagine relating to him as a lover. And I knew our relationship (such as it was) would never have started without BDSM as a focus. Previous to that night at the outdoor party, he'd hardly registered on my romantic radar, and we had little in common in terms of how we dealt with relationships.

Still, for a moment I wished -- unreasonably, I knew -- that I could have fallen straightforwardly in love.

* * *

I was gone for six months, and I returned in heartbreak. A relationship more important than words can encompass had become -- after years of attempts -- impossible. I think it was obvious. One friend told me vulnerability was all over me; *like a scent,* I thought, and wondered if Richard could smell it. In worse shape than ever, I saw Richard and laughed with an edge to my voice. I gave him doe-eyed looks, but deflected his interest with doublespeak and icy tones. I wanted him, and I felt the rage returning. I hated and sheltered behind the unclear verbal games we played. Furious and despairing, I refused to chase him, yet I felt him everywhere. North.

I had to do something. My identity had somewhat solidified: I was into BDSM. I believed it, I even accepted it, but I couldn't go on feeling like I did.

In looking around the Internet, I came upon a directory of Kink Aware Professionals, including therapists who provided their names for people who needed to talk about BDSM but feared judgment. I visited two. One listened to me silently, with a vaguely sorrowful expression; he offered no feedback, and left me wondering why he'd listed his name in the directory. He obviously didn't know what to do with me, and I got the uneasy feeling that I worried him. Naturally, that didn't help at all.

Luckily, the other was everything I could have asked for -- open, patient, clearly knowledgeable about BDSM. He looked straight at me and nodded understandingly when I confessed the whole trail of events; he explained how common my experience was; he gave me ideas about where to look for more information, but didn't try to put his own preferences into our talks. "Most people in your situation feel that they've broken a major taboo," he said. "A lot try to get away from BDSM. But I'm not hearing that from you. You want to adjust, not escape." I nodded, and arranged to see him regularly.

Still, I don't think I could have put myself together again without two other things.

My close friend Andrew went after me at a drunken party. *Shades of Richard,* I might have thought, but I never did. Andrew pinned me to the floor, laughed as I fought back, hurt me, finally kissed me. When I asked in bewilderment what brought this on, he confessed. "When you were gone, I missed you," he whispered, "and I've never missed anyone like that before." He was as afraid of the darkness of BDSM as I had been, yet he'd thought of me and found himself fantasizing. He wanted to try it with me, but first he wanted to be sure that he and I would remain close -- wouldn't lose what we already had.

In everything Andrew told me -- everything we said to each other, laughing, almost in tears, burying each other in embraces, happily drunk and clear-eyed in the morning -- I found the things that were missing with Richard. Uncertain about BDSM, guarding his and my boundaries, Andrew wanted to commit to me and to a devoted monogamous relationship. Part of me counseled caution and withdrawal, but as my therapist laughingly put it, Andrew was as tempting as an ice-cream factory. It was my chance to fall straightforwardly in love.

Soon after that, I had to explain to my parents why I wanted a psychiatrist who was out-of-network for my health insurance. I closed my eyes as my father asked why I needed this specialist, what his focus was. "S&M," I said shortly.

Why had I worried? I knew my parents had striven to give me an independent, rational, feminist outlook. Self-esteem and integrity. I was so lucky, I understood as my father said nothing but, "All right." It was a blinding realization: my father might have judged me with all the worst things I thought of myself -- but instead, he trusted me to do my best.

When I called my mother (long separated from my dad), too many of my flatmates were around for a private conversation indoors. I banished myself into a warm summer storm, cradling my cell phone away from the rain. There was a pause after I said the fateful words -- then she said, "Have you talked to your father about this?"

"Yes," I said hesitantly. "Why?"

"Well, I think it was an issue in our marriage that I was more into that stuff than he was."

Fat droplets soaked my hair. The tight knot in my chest -- familiar for nearly a year -- loosened as I caught my breath. I turned my face up to the sky and let the tilted world resettle around me; my mother's faraway voice helped me through a hundred things that had torn my heart. "You aren't giving up your liberation," she reminded me, and emphasized my continuing right to a partner who respects me. She even noted mildly that she'd "wondered" about me when I was a child.

I'd feared that I was damaged, that there was something deeply broken in me. I'd wildly guessed that I'd suffered trauma and repressed the memories. But if my mother -- one of the most independent, feminist women I've ever met -- could reconcile BDSM, then I knew I could. And if she was into BDSM herself, then rather than viewing my proclivities as damage, I could see them as something intrinsic we shared.

Over the next hour, my mother told me I could retain rationality, self-esteem and integrity. For the first time, I found myself believing it.

My therapist laughed when I told him. "I swear," he cried, "it's genetic!"

* * *

There was one loose end to a conclusion that felt like a fairy tale. Though we had some unfettered conversations, tension remained between me and Richard -- perhaps it even worsened. At one point, observing us, Andrew said mildly: "Settle down, you two."

Worse, Andrew and I were going in different directions. I finally felt somewhat at peace with BDSM, but he couldn't gain that comfort, and started backing away from it. It was impossible not to think of Richard and shiver, remembering how uncompromisingly vicious he could be. When Andrew and I broke up over a year later, I knew: *I shouldn't see Richard.* My therapist warned me to be careful with BDSM when my heart was in pieces.

Of course I wasn't.

It was the first time I'd explicitly pursued Richard since he'd told me, so long ago, that he was busy. I emailed him straightforwardly, sat down on his bed shortly after Andrew and I broke up. When Richard set his fingernails into my skin, he murmured, "It's been a while," as if he'd always known he'd see me here again. The tears came more quickly than they once had -- I'd fought them then, unwilling to break down in front of him. I'd

been successful, too. Richard had only made me cry once, before.

This is what I want, I reminded myself as Richard wound his hand in my hair and pulled my head back. His teeth bruising my shoulder felt familiar and wrong. A kiss on my neck sent me rigid. Sobs nearly choked me. *Why now,* my heart cried, *why not when you were who I dreamed of, Richard?*

I couldn't fault his empathy -- he pulled away. "No," I said unwillingly, "I'm fine," but he wouldn't continue. Uneasily, he pointed out that I'd never reacted like that. I said he'd never kissed me like that, and he asked, "Really?" as if it were a surprise.

Yes, I thought, forcing my tears away. *I was desperate for it. I know.*

To get him to keep hurting me, I had to convince him that I was fine. *This is what I want,* I coached myself. I was nearly composed when Richard mentioned Andrew, and I felt grief rip me open.

He watched me cry, got me a glass of water. *Shades of two years ago,* I might have thought, but I never did. I apologized; he said only, "I thought this might happen." On some level, I knew that I had, too -- for all my self-reassurances that I would be fine. *What was I thinking?* I asked myself, and the answer came instantly. *I had to know.*

When Richard asked if I wanted to sleep over, I said I didn't. "Then don't go yet," he said softly, putting his arms around me where I lay. I rested my head on his chest. *I won't tell Andrew about this,* I decided, wondering if he and I would be together again. *Even if I've learned that I don't want Richard anymore.*

* * *

In retrospect, it seems surreal that I reacted so badly to my BDSM orientation. The agonizing memories of my adjustment have lost their emotional flavor. I've learned a lot about how to practice BDSM safely -- physically and emotionally. I've had multiple BDSM partners, and I've had positive experiences in the welcoming BDSM subculture. In recent times, I've even begun to switch: occasionally I'll be the dominant partner, though I feel submissive masochism far closer to my core.

Still, I remember the unease I felt at first -- and I recognize stronger unease in others. I certainly wouldn't describe this orientation to, say, an employer. I believe BDSM needs a liberation movement, just like homosexuality, but I'm not (yet?) ready to be a public spokeswoman. And I definitely wouldn't consider dragging others out of the closet. I write about BDSM under a pseudonym, and I have changed the names of Richard and Andrew.

I fear that others will read this narrative as describing an assault, a near-rape -- and a woman who tried to rationalize her experience by embracing it. That's not what happened. When Richard first pulled my head back and hurt me at that drunken outdoor party, I could have said no. The word was echoing in my mind, waiting on my lips, and I didn't say it because I didn't want him to stop. I was certainly intoxicated, but I wasn't helpless. I was threatened, but I was not afraid. I may have fought self-actualization like a caged animal, but I could not deny it. I have always been this way.

Conversely, I'm afraid that some conservative will read this and say: "Look how the feminist movement has failed us!" That's not what happened, either. I identify as feminist, and I don't believe that to be at odds with being a submissive masochist. Indeed, I believe that the feminist movement helped my practice of BDSM: it's one of the factors that gave me the strength and self-assurance required to figure out and discuss my sexual needs.

Andrew and I did get back together; then we broke up again. Richard and I have had other nights together. I wish this narrative ended cleanly. I wish I could say that I've found a fairy-tale lover, that I'm now with a man who both hurts me till I cry and gives me the relationship I want. (Why stop there? He could be rich and handsome and a great cook, too!) But this is my story, not a fairy tale. Just as well; that means I still have space to learn. I believe I've gotten better at communicating clearly. I believe I've gotten better at sorting out the harsh emotions inspired by BDSM, working with -- and enjoying! -- those feelings in the context of a loving relationship. And I hope I no longer objectify my sadistic partners to the extent that I objectified Richard. Still, I know I've got a ways to go.

I see BDSM as a continuum -- similar to the theory that homosexuality is a continuum -- and sometimes I think that everyone's on the continuum to some degree. I don't think Andrew is as far into the continuum as I am, and not as far as Richard, either. But there are reasons I was with Andrew for nearly two years, yet never let myself fall completely into Richard.

A certain kind of devoted relationship is important to me. I felt strongly about Richard, and he was a good fit for BDSM, but he couldn't give me the relationship I want. I went back to Andrew, though he was far less into BDSM, because I was able to love him. I wonder, though: if I ever fall for a completely vanilla man, will I be able to compromise that far? It seems unlikely. Maybe if that happens I'll have to remember my friend's words and find a separate person, a non-lover who inflicts pain.

I'd rather not do that, but I can't imagine giving up BDSM. The idea feels equivalent to a vow of celibacy. As my therapist said, I'm not looking to escape -- especially not now that I've finally adjusted. It wasn't easy, but I feel that today I am triumphant. And I believe, I hope, that knowing what I want is the surest path to falling straightforwardly -- happily -- in love.

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This can be found on the Internet at:

http://clarissethorn.com/blog/2010/06/30/love-bites-an-sm-coming-out-story-mirror/

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EDUCATION:

[theory] Liberal, Sex-Positive Sex Education: What's Missing

I originally wrote this in 2009, then reposted it in 2010 as part of a group drive by sex-positive bloggers to solicit donations to Scarleteen.com. Scarleteen is an amazing sex education site run by the equally amazing sex educator Heather Corinna, and it can always use donations! You should totally go investigate that site -- after you're done reading my work, of course.

When I first published this piece, the sex-positive film director Tony Comstock commented on Twitter, "I think that post of yours might be one of the most important things written about sex-positivity in the last 10 years." I was really honored by that, because he does excellent work.

My parents occasionally read my blog, and I also got some interesting feedback from my mother. She wrote to me: " Speaking from where I sat when you were growing up: I wish I could have taught you what you eventually learned on your own. But I felt there was this unchallengeable wave moving and I didn't have a place to stand to counter it. I kept thinking I was leaving you to learn the hard way exactly what I learned the hard way, and was still learning, and was despairing of ever learning."

I wrote back: "For what it's worth, I remember you trying to stem the tide with small comments, and I think that those comments later helped me center myself in a place where I could reach my own conclusions rather than blindly sleeping around." I hope it made her feel better, because it's true. I'm not a parent, although someday I would like to be... but I think one of the hardest things about parenting must be knowing that your kids will learn terrible things from the surrounding world, and the best you can do is try to be there while they process those lessons.

* * *

Liberal, Sex-Positive Sex Education: What's Missing

I am fortunate. I was born in the eighties and I received a great sex-positive upbringing. The public school I attended taught students how to use condoms; middle school health education included a section on sexually transmitted diseases. My parents didn't throw their sexuality in my face -- but they were almost always matter-of-fact, understanding and accepting when they talked about sex. (I'll never forget how, at age 12 or so, Mom sat me down and gave me a long speech about how it would be **totally okay** if I were gay.) I was raised Unitarian Universalist, and the Unitarian Sunday School teen program included a wonderful sex education curriculum called About Your Sexuality. (I understand that the sex-ed curriculum has been changed and updated, and is now called Our Whole Lives. I haven't delved deeply into the Our Whole Lives program -- maybe it addresses some of the issues I'm about to describe.)

So I think I'm in a good position to describe the problematic signals we face in liberal sexual education. Yes, I've experienced the overall sex-negative messages that drench America, and they're terrible -- but so much is already being said about those. I also received lots of sex-positive messages that are incomplete, or problematic, or don't quite go the distance in helping us navigate sexuality -- and I think the sex-positive movement must focus on fixing them.

I'm so grateful for my relatively liberal, relatively sex-positive upbringing. I think it did me a world of good. But here are **my five biggest problems with the way I learned about sexuality:**

1. ***I wish that I hadn't gotten this message: "Sex is easy, light-hearted -- and if it's not, you're doing it wrong."***

Do I believe sex can be easy? Sure. Do I think it can be light-hearted? Absolutely! But do I think it's **always** those things? No, and I don't think it "ought to" be.

I think we need to teach that sex can be incredibly difficult. It can be hard to communicate with your partner. It can be hard to learn and come to terms with your own sexual desires. It can be hard to understand or accept all your partner's sexual desires. And just because it's hard, doesn't mean that you're with the wrong partner -- or that you're missing some vital piece of information that everyone else has -- or that you're doing it wrong.

And as for light-hearted, well -- sure, sex can be "happy rainbows joy joy!", but it can also be serious... or dark. And there's nothing wrong with that!

I recently talked to a friend, who also identifies as a BDSMer, about our stories of coming into BDSM. Both of us had sadomasochistic fantasies from a very early age (mine, for instance, started in grade school -- seriously, I actually did tie up my Barbie dolls). I told my friend about how I'd always had these intense, dark, violent feelings -- but when I made it to middle school, I remember a change. I had a series of vivid BDSM-ish dreams, and I freaked out. I closed it all away, I stopped thinking about it, I repressed it all as savagely as I could.

Before that, I had also started thinking about sex. I imagined sex at great length; I read about sex. I had long since filched my parents' copy of *The Joy of Sex* and examined it, cover to cover -- not to mention many other fine sexuality works, like Nancy Friday's compilation of female sexual fantasies *My Secret Garden.* I was totally fascinated by sex. I talked about it so much that one of my friends specifically searched out a vibrator as a birthday present for me. I actually pressured my first major boyfriend into some sexual acts before **he** was ready, which I suppose is an interesting reversal of stereotype (but to be clear, it's not okay that I did that). As I started having sex, I found that I liked it okay, but knew a lot was missing -- and couldn't figure out what.

It took me years and years to connect sex to BDSM -- to figure out that the biggest thing I was missing was BDSM. Why? Because BDSM was horrible and wrong, and I'd shut it away; BDSM (I thought) couldn't possibly have anything to do with the bright, shiny, happy horizon of sex! Coming into BDSM was a crisis for me partly because -- although I knew other people practiced it, and had never thought much about that -- my own need for those dark feelings totally shocked me. This wasn't me. This wasn't **healthy sex**. Sex was light-hearted, happy rainbows joy joy!... wasn't it?

In contrast, my friend -- who had an extremely sexually repressed upbringing -- never had any trouble integrating BDSM into his sex life. Sex, for him, was already wrong and bad... so as he got in touch with his sexuality and began having sex, BDSM was involved from the start. After all, there was no reason for it not to be.

As glad as I am that my upbringing was not stereotypically sexually repressed, I have to say that I envy my friend his easy personal integration of BDSM.

2. ***I wish this point had been made, over and over: "You might consider being careful with sex."***

I recently read an excellent New Yorker article that reviews the new version of *The Joy of Sex.* It talks about the time when *The Joy of Sex* came out, as well as a similar contemporary feminist book, *Our Bodies, Ourselves,* and it points out that "both books espoused the (distinctly seventies) notion that sex could be a value-neutral experience, as natural as eating."

"Value-neutral": that's a great way to describe the overall attitude about sex that I absorbed. As if sex were something I could do as an amusing diversion, with anyone, at any time, and it would always be fun fun fun! As if there was no need to be overly careful or sensitive -- sex was just a game I could play, like a sport -- where the worst that would happen if I screwed up might be a skinned knee.

I wish that there had been an emphasis on how emotions can really **matter**, when it comes to sex. I wish that there had been acknowledgment of the fact that we can really hurt ourselves, and others, when we're cavalier about sex. (Not that we always do -- but we can.) I wish I had understood sooner that sex is not always value-neutral; that everyone has all manner of different sexual needs and hangups, anxieties and strong emotions. I think maybe there are people out there who can have "value-neutral" sex -- where it's totally about physicality and nothing more -- but I am not like that, and I suspect that most people are not.

Which isn't to say that I think there's anything **wrong** with people who can have sex that's "value-neutral." (And maybe "value-neutral" is not a great term for it; I worry that I sound like I'm judging when I use that term.) I just don't think it's a good model for everyone, and yet I think that it has somewhat been promoted as if everyone "ought to" be that way.

I think that there are lots of people out there who feel as though the sexual liberation movement "failed" or "betrayed them," because they convinced themselves that sex is value-neutral and then got hurt. You see a lot of assertions along these lines in the conservative media -- for instance, here's a quotation from a synopsis of the book *Modern Sex:*

The 1960s sexual revolution made a big promise: if we just let go of our inhibitions, we'll be happy and fulfilled. Yet sexual liberation has made us no happier and, if anything, less fulfilled. Why?... sex today is increasingly mechanical and without commitment -- a department of plumbing, hygiene, or athletics rather than a private sphere for the creation of human meaning. The result: legions of unhappy adults and confused teenagers deprived of their innocence, on their way not to maturity but to disillusionment.... These beautifully written essays -- on subjects ranging from the TV show Sex and the City to teen sex to the eclipse of the manly ideal to the benefits of marriage -- add up to the deepest, most informative appraisal we have of how and why the sexual revolution has failed.

I disagree with most of their attitude. We don't need innocence. We don't need sexual mystery. We don't need to eliminate teen sex. We don't need to re-establish some limiting, patriarchal "manly ideal." But they've got one thing right: we do need to start talking about sex as something that is **not** mostly mechanical -- as something that, yes, can be "a private sphere for the creation of human meaning."

3. ***I wish I'd learned this: "Good sex doesn't just require two (or more) people who like sex. It requires desire -- and desire simply doesn't work the same way for everyone."***

I've said before that I went through a period -- back when I was first becoming sexually active -- where I simply **could not figure out** why sexual acts with people I didn't care about didn't seem to turn me on. Or rather -- they turned me on a little, but not... much. It took me a while to understand that sex requires more than just two eager people. It requires attraction and desire.

When I was fifteen or so, and at summer camp, I remember making out with a boy. I didn't really want to make out with him, but I wasn't sure how to reject him (more on this under point 5). And I figured: he seems nice enough, so I might as well make out with him. Afterwards, I felt angry at myself, and I felt like I'd wasted my time -- and I felt confused. I'd been bored at best and repulsed at worst, and I wasn't sure why I felt that way, or why I'd done something that made me feel that way.

So why **had** I done it? Because I'd thought: "Sex is value-neutral." Because I'd thought: "Making out is fun, right? -- that means I ought to do it when I get the chance!" Because I'd thought: "My preference not to make out with him is probably just some silly repression that I need to get over." Because I didn't understand that desire is complicated, that you can't just make yourself feel desire when it's convenient, and that you don't need a reason for your attractions -- or lack of attraction. This situation was to reprise itself in various forms over the next years, until I finally learned that sometimes you simply want or don't want things, and that you aren't required to justify your desires.

4. ***I wish I'd gotten a list of suggestions: "Here are some places you might go to start figuring out what turns you on."***

I was told that sex was fun. I was even told to explore! But I still spent years with very little actual idea of what I wanted. No one ever told me how or where I might be able to learn more about my needs, or what exploring my needs might look like. And no one ever explained that people are turned on by different things, that some people like some sex acts and don't like others, and that's okay.

I went into sex with a buffet-style attitude, thinking that I must naturally enjoy sex equally in all ways. I was so surprised when I found out that I like some positions better than others! I remember how confused I was when I dated a guy who didn't like fellatio, and how hurt I felt -- like his lack of enjoyment meant that I must be doing it wrong, because **everyone** likes oral sex, right?

And of course, while I had a pretty comprehensive idea of the vanilla sex acts I could experiment with, I had very little idea of what else was out there. In retrospect I find this hilarious, but I remember -- back in my vanilla days -- I had two boyfriends who tied me up. They tied me up and were nice to me, and I suppose it was amusing enough, but

didn't drive me crazy with lust or anything. And -- this is the kicker -- **because I did not understand that there's a lot more to BDSM than light bondage, because I did not understand that there are many separate BDSM acts that people can enjoy and many ways to flavor them, I assumed from this experience that I didn't like BDSM.** I went through my old journal entries the other day and uncovered one in which I, confused, am speculating about what's missing from my sex life: I write, "I've tried S&M, so it can't be that."

What a learning curve I had ahead of me, eh?

I wish someone had tried to explain to me the vast cornucopia of human fetishes out there. I wish someone had explained that erotica and pornography are both actually really good ways to learn about your turn-ons, and -- more importantly -- had told me that **not all erotica and pornography are the same,** so the fact that I wasn't into mainstream stuff didn't mean I automatically wasn't interested in all erotica or porn. I've mentioned that I had lots of conversations with friends about sex, but -- until recent years -- those conversations were never framed as "This is what I like," or "I've found something new that turns me on," and I wish I'd realized sooner what a great resource conversations like that might be.

5. ***I wish I'd gotten a list of ideas: "Here are some ways you can try communicating with your partner about sex."***

Lastly, but certainly not least -- I was never taught how to communicate about sex. No one ever gave me even the first idea. In all my sex-positive, liberal sexual upbringing, I was told over and over that "relationships require communication", but no one ever said: "And here's some ways in which you might communicate sexually with your partner."

One big benefit of teaching sexual communication strategies is that it helps people learn to say "no" when they don't want to do something. Teaching people how to set boundaries is massively important, and I think a lot about ways to do it. I saw this adorable video about cuddle parties recently that really struck me -- these people create parties where everyone basically just cuddles, but everyone also specifically has the power to say "no" to any given person or act. The reporter who made the video talks at the end about how she found the whole experience to be empowering -- how she felt like it gave her space to say "no" that she hadn't had before. Perhaps these could be used to teach people to set boundaries?

But you can't really use cuddle parties in a school or workshop setting, more's the pity. When I developed my first sex education workshop, it was all about describing good communication strategies. I listed questions that all sex partners could benefit from asking each other, including "What do you like?" and "What do you fantasize about?" and "Is there anything you really don't want me to do?"

And I talked about ways that you can make communication easier, if the two partners are uncomfortable having this conversation. I took a page from the BDSM community by creating checklists of all kinds of sexual acts and weird fetishes and gender-bending craziness, and I put it all on a 1-5 scale (with 1 being "not at all interested" and 5 being "I'd love to try this"), and I told people that they could try filling out those checklists and

giving them to their partners. (The amazing sex education site Scarleteen later implemented the same idea, in a much more comprehensive way than I had!) I suggested that partners write out their fantasies and email them to each other, or write out descriptions of their mutual sexual experiences -- long accounts, describing how they felt about everything and what sticks out in their minds -- and send those to each other, too, so they can get each others' perspectives on what they've done.

(By the way, I still offer a much-improved version of that workshop on my list of events, lectures, and workshops, just in case you're interested in bringing me in....)

God, it's so **hard** to talk about what we want. It's even hard to talk about talking about what we want. I mean, it's hard enough to figure out what we want in the first place -- but communicating it... eeek! And it's worth noting that this is not just a problem of having good sex. As was pointed out recently on the blog for the wonderful sex-positive anthology *Yes Means Yes!:*

[There is a] need to demystify and destigmatize communication about sex. If we can't talk about what we like and what we want, we will always have problems making clear what it is we're consenting to. If we can't be frank about what we do want, we put a lot of weight on the need to communicate what we don't.

Giving everyone great sexual communication skills doesn't just give us all better sex -- it fights rape. There's a noble cause for you!

... So, that's my five-pointed analysis. And that's what I'm pushing for. My goals are not just to get people thinking that sex is awesome and sexual freedom is important. It's going to be hard, and it's going to be an uphill battle, but I'm hoping that I can not only help out with sexual liberation -- I'm hoping to **improve** it.

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This can be found on the Internet at:

http://clarissethorn.com/blog/2010/11/11/classic-repost-liberal-sex-positive-sex-education-whats-missing/

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COMMUNICATION:

[theory] Sex Communication Tactic Derived From S&M: The Annotated Safeword

As soon as I started researching S&M and thinking critically about the communication tactics promoted in the S&M community, I realized that there were a lot of really important lessons wrapped up in those tactics -- lessons that could be deconstructed and applied to all kinds of sexuality. From the beginning, I planned to do a series of posts on Sex Communication Tactics Derived from S&M, but I only got around to it in 2010.

The post about safewords caught the attention of Thomas MacAulay Millar, a feminist blogger and S&Mer who is older and more established in the blogosphere than I. Thomas asked if he could annotate the article, then post it on the blog where he usually writes -- the blog for the excellent sex-positive anti-rape anthology Yes Means Yes. *Of course I agreed. The final product looks something like a conversation between me and Thomas, although I wrote the post before he added his input.*

* * *

The Annotated Safeword

Thomas MacAulay Millar:

Clarisse Thorn's post about safewords is so good I'm just going to repost the whole thing and annotate it.

Clarisse Thorn:

Everyone knows about BDSM safewords... or at least, everyone thinks they know about safewords. But one of the initial moments that really impressed me about my current boyfriend was when I asked him, many moons ago, if he knew what a safeword is. He paused, then answered, "I think I'm familiar with the idea, but I probably don't know much more than a stereotype, so I'd like to hear you define it." Humility and open-minded curiosity are so **incredibly** hot!

Righto. Hot boyfriend aside, I'm here to explain safewords and check-ins, and how those concepts can exemplify excellent sexual communication for everyone -- not just S&Mers -- in a world that doesn't do a good job teaching anyone how to communicate sexually.

When two (or more) people have a BDSM encounter together, generally they set a safeword -- a word that anyone can say at any time to stop the action. (Sometimes people don't use safewords. This is their choice and I totally respect it. I would not recommend going without safewords for anyone who doesn't know their partner **extremely well**, and I would be seriously sketched out by anyone who pressured a partner to go without safewords.)

Thomas MacAulay Millar:

A word on origin: safewords are only strictly necessary in one circumstance -- where the participants want words like "no" and "stop" not to have their ordinary meaning. One can do BDSM for a lifetime without a safeword, if words have their ordinary meanings. As former porn star and kinkster Ona Zee once put it (I'm quoting an interview from memory here), "our safeword is 'that hurts.'" Folks can even do heavy play depending on how they react to things, without a safeword, simply saying "stop" or "too much" or "fuck, I can't handle any more of that!" when the play gets too intense. Any BDSMer who would tell you URDOINITRONG if you use ordinary words to communicate in scene is not someone you need to listen to.

Safewords are essential for roleplay where "no, please don't, I'll do anything!" should not stop the action. It's also essential for any bottom who will involuntarily shout "No! Stop!" while actually wanting more. Other than that, it's an optional tool -- a very, very useful

one, for many reasons. Clarisse mentioned that some people "don't use safewords." From the context, she's talking not about people for whom no means no in scene, but people for whom there is no definitive way for the bottom to stop the scene. And perhaps readers can tell from Clarisse's tone that that's... the advanced class. You'll find the safety police in any BDSM space or community that finger-wag about it, and the swaggering more-kinky-than-thous that brag about it. But what does it mean?

I can only tell you what it means for me. There are times I give up my safeword: only to my spouse. We've been playing together for about a decade and a half. If I give up my safeword, and that's something we do rarely, it doesn't mean I don't have limits. I have limits! Yes I do! There are things I can't handle, mentally or physically, and things I never want to handle! There are "hard limits," things I've said I'm just not willing to do. And there are soft limits, things I don't think I'm ready for but I'm willing to bump up against them and see what happens. If I give up my safeword, it means I have limits, but instead of telling her when I've reached them, I'm going to trust her to listen to me and watch me and make that decision. I may say, "I can't, I can't, I can't," and she may decide I really can't. Or she may decide I've got more in me than I believe I do. There's a lot of risk associated with that. But there's a trust in those moments and a closeness that does not go away when the scene is over. Or ever, really. Risk and reward: we set our own tolerances.

Some folks may have come across the term "consensual nonconsent." It's one of those terms with multiple meanings. Some people use it to describe any situation where the bottom is saying "no, don't" but has not yet safeworded -- a usage I find less than useful. Others use it to describe roleplays of nonconsensual situations. The last common usage, though, is that which I like to describe using Hunter S. Thompson's phrase, "buy the ticket, take the ride." It means that the bottom consents to be in a situation I've just described, where the top decides if the bottom needs to stop, often but not always around specific activities, and usually (wisely) heavily negotiated.

Clarisse Thorn:

When I give advice about setting safewords, I usually offer the following:

A) Some people like to say that it's good to use a safeword that's jolting, and is likely to make your partner feel totally unsexy. Isn't there a *Family Guy* episode in which Lois & Peter's safeword is "banana" or something?

Thomas MacAulay Millar:

Not a fan. The more obscure a safeword, the harder it is for a bottom who is spacey or flying on endorphins to access it. It's easy to remember "banana" in the calm before the storm. At the moment when it's most needed, that can easily become a muddle of "yellow? was it a fruit? Shit, what do I do?" That's not a place bottoms want to find themselves and a top never, never, never wants to have a bottom who is at a limit but can't communicate about it.

Clarisse Thorn:

B) In my experience, the generally accepted safewords in the S&M community are

"safeword" and, more commonly, "red." I consider it useful to go with the "public standard" because that means that in the future, you're likely to be attuned to the correct word if you practice BDSM with other partners as well. (It also means that if you ever do S&M in a public space such as a dungeon, everyone in the place will recognize your safeword if you scream it.)

C) At first wasn't that excited about this, but I've grown to love the fact that the safeword "red" also sometimes encompasses "green" -- and "yellow." That means that if I'm in the middle of an S&M encounter, I can say "red" and my partner will stop; I can then catch my breath and say "green," which means "by God keep going!" Or, if I'm a little uncertain about the territory but don't actually want my partner to stop -- if I just want my partner to be a little bit cautious -- then I can say "yellow" (and, of course, I can move to "green" if I become really psyched, or shift to "red" if I really want my partner to stop).

Thomas MacAulay Millar:

My spouse and I use the "stoplight system." It's simple, it works, and "yellow" option is really useful for things that are getting hard to handle. Also, a lot of bottoms are either submissives or masochists with more pride and stubbornness than is good for them -- the former out of an overdeveloped desire to please, the latter sometimes out of a desire to impress or even just a pitbull-stubborn urge to push themselves as hard as they can go. Take the personalities that finish an Ironman and collapse and need IV fluids, and put them on a spanking bench with big welts from a prison strap, and you've got someone who won't safeword when ze probably should. In those and other circumstances, giving the bottom an easy option to say, "I'm struggling here" without feeling like they're quitting is a very useful thing.

[Editor's Note: "ze" is the gender-neutral pronoun, and it's in the Glossary. Clarisse tried to use it regularly for a while, but ultimately concluded that it made her posts less accessible to non-gender nerds.]

Clarisse Thorn:

I know that this probably doesn't sound sexy at all, but it totally can be! Consider the following example: during my last vacation to America, I had an S&M encounter with a dude I'll refer to as Klark. (It's not my fault. He requested the pseudonym.) At one point, Klark was experimenting with hurting me, and I had my eyes closed and was whimpering / crying out in a totally glorious way. (The poor overnight desk clerk. He was only one short flight of stairs away from us.) I think Klark was legitimately having trouble detecting whether I was enjoying myself, though -- understandably, because we had only just met, and I enjoy sinking myself into dramatic masochistic misery -- so he leaned over me and said, in a low dark voice, "Red, yellow, green." Immediately, I gasped back "Green." Because he spoke in a gritty and dominant voice, and the check-in was quick, we were able to maintain the mood -- and it was actually kind of hot in itself.

Which brings me to the other thing: check-ins. Sometimes, you want to check in with your partner. Which can be easy: you can just say, "Hey, how does this feel?" or, as a more precise example, "Give me a rating of 1-10 on how good this feels (or how much this hurts)." But if you want to do it quickly and without shifting the mood, you can do it

as I outline above in the Klark example. Or even quicker, as for example with the hand-squeeze system, where the participants agree ahead of time that you can squeeze another person's hand twice and expect two squeezes back -- and if there aren't two return squeezes, it's time to stop and figure out what's going wrong. (Squeeze system: also very helpful when gags are involved.)

Thomas MacAulay Millar:

There are all kinds of safesigns when nonverbal communication is necessary; one being to give the bottom an object to hold and to drop when at a limit. It has the disadvantage of being binary, so it loses the middle step that the stoplight system provides.

Clarisse Thorn:

Sometimes submissives will have a hard time safewording -- whether out of pride, inexperience, or eagerness to please -- and that's another reason check-ins can be good even when there's a set safeword. If you aren't sure how to read your partner's reactions and you suspect ze may be uncomfortable with what you are doing, then you might consider checking in even if ze hasn't safeworded, because **your suspicion may be right**.

Thomas MacAulay Millar:

This can't be emphasized enough. **Tops Can Never Be On Cruise Control!** A safeword gives the bottom a tool to communicate, but it does not ensure safety. The top has at least as much information that the bottom doesn't have, as the bottom has information the top doesn't have. Therefore, the top has to be a full participant in making sure the scene is working and the risks are under control at all times. Anyone who thinks ze can ignore safety as long as the bottom has a safeword is dangerous.

This post was edited to add: In the comments on this article, Dw3t-Hthr made a powerful point that for some people, safewords are unavailable in scene. She said, in part:

[I]f I am in a place where a safeword might be necessary, a safeword is not possible. Not just because I am someone who is regularly nonverbal, but because the altered consciousness state that I achieve makes processing those sorts of questions at best difficult and at worst unachievable...

But I'm not a bottom, I'm a submissive, and this isn't about "wanting to please," it's about a psychological incapacity to recognise when I might be doing myself damage in certan situations. If I'm not in that state, I can say "Oh stop doing that it's wrenching my shoulder" or whatever is appropriate. If I am in that state, I cannot indicate and have to place complete trust in the judgement of my partner.

I happen to know that I'm not the only person like this. I think it's important to recognise that safewords are not always possible. It's important, I think, to communicate to the person who resembles me in this that while their brainwiring is not morally incorrect, that they probably ought to think of themselves as Advanced Subjects and try to do their thing in a context where the trust and competence required to do it safely is demonstrated.

Also, a note on terminology: Clarisse used "submissive" there in a way where it's not

clear from the context whether it's meant as an umbrella term like "bottom" or as a specific term. The use of "dominant" and "submissive" as the default terms seems to me to have started in the mid 90's, and I've never liked it because of its imprecision. Not all bottoms are subs; some people like to bottom but don't have a submissive bone in them. Some bottoms are wisecracking smartassed masochists only in it to play the pain game and ride the endorphins; some bottoms don't see themselves as giving up power in any way to the top. And I top my fair share, but I certainly don't think of myself as a dominant. I think the change in terminology arose with a small but vocal minority of kinksters who believe that everyone who does BDSM is really looking for a deep power exchange, ultimately even a 24/7 relationship. I still see people make this argument. They're still wrong, and they're still few in number. Using "submissive" and "dominant" when one means to include folks who are just topping and bottoming may be misunderstood; saying "top" and "bottom" is almost always correctly understood as the inclusive term. ("Sadist" and "masochist" are specific terms that shouldn't be pressed into general service either; there are submissives that really, really don't like pain at all and dominants that would prefer never to inflict it.)

Clarisse Thorn:

What I love about safewords and check-ins:

1) Hypothetically, mainstream society acknowledges that anyone could say no at any point during sex, but in practice, this is really hard. A variety of forces -- girls socially pressured not to be so-called "cock-teases," boys socially pressured to supposedly "prove their manliness," and everyone anxious to please their partners -- work against people's capacity to say no; and while there is a vague understanding that "no means no," that vagueness is as far as it gets. There's no explicit framework in place for how to say "no," and no understanding of how to continue an encounter (or relationship) after one's partner says no. Even worse, there's an assumed linear progression of sexual activity -- the best example is the "base system," which places sexual interaction on a metaphorical baseball diamond where "first base" = groping and "home base" = penis-in-vagina sex. Have I mentioned that I hate the base system?

So anyway, the biggest moral of the story with safewords and check-ins is that consent does not only happen once. **Consent is always happening, and can always be renegotiated or withdrawn**. Adapting my understanding of sexuality to reflect this -- even in my non-BDSM sex -- might have been the best thing that ever happened to my sex life.

Thomas MacAulay Millar:

What can safewords do for non-kinky people? Permission communication. In a culture that delegitimizes communication -- especially women's communication of limits or needs -- this is **huge**. Safewords permission "no." That which permissions the free exercise of "no" also, necessarily, creates space for the free exercise of "yes."

Clarisse Thorn:

2) On a related note: **Good sex is not about entitlement**. If we acknowledge that anyone can safeword out of any sexual act at any time, then we acknowledge that no one is

entitled to any kind of sex from a partner -- ever. If your partner loves you but doesn't want to have sex with you? That's a respectable choice. If you're really turned on, but your partner can't stand the idea of having sex right now? That's a respectable choice. Those two are easy, I think, but how about these?

+ If your partner used to do something with you a lot, but doesn't want to do it anymore? That's a respectable choice.

+ If you are married to your partner, but ze doesn't want to have sex? That's a respectable choice.

+ If your partner performed a sexual act with another partner but would prefer not to do it with you? That's a respectable choice.

+ If you know your partner likes a certain kind of sex, but they don't want to do it right now? That's a respectable choice.

+ If you think a certain act is "mild" and "taken for granted," like kissing or tickling, but your partner doesn't want to do it? That's a respectable choice.

By the way, if you (like I once did) feel as though your partner is entitled to sex of any kind, I encourage you to re-examine that feeling. Ditto if you've got a little voice in your head telling you that you "ought to" be up for sex all the time just because you don't get it very often... or that you "ought to" be up for sex if you've done it with your partner before... or whatever. The other best thing that ever happened to my sex life was when I finally, finally, finally internalized the idea that my partners don't ever "deserve" sex for any reason -- that there's no reason I ever "should" be having sex -- and that the only reason I should ever, ever, ever do anything sexual is because I legitimately want to.

Of course, if you truly believe that you need a certain kind of sexuality in your life, then you're absolutely entitled to **ask** your partner to consider it -- and you're entitled to leave the relationship if ze isn't up for it. But this doesn't mean that you "deserve" to do that act with that person, or that your partner "owes" you a certain act.

And hey, if your partner isn't down with one specific sexual act, then that means you've got the chance to explore all kinds of other sexuality. Another other best thing that ever happened to my sexuality? Quite possibly, it's my current boyfriend -- whose religious adherence has drastically limited our physical sexual options.

Thomas MacAulay Millar:

We're each entitled to our own identity, but not to our own partner. Our partners are people, with thoughts and desires and limits of their own, and they don't have to do what we want them to do. This goes for tops, too! Tops have limits! Because of my blogging covenant with my spouse (what I do as a bottom is personal to me and I decide how much I reveal; what she does as a bottom is personal to her and she prefers that those stories not be blogfodder) I don't have any really good stories to share about hitting my limits as a top. But they exist. Tops are not required to be into everything a bottom is into, and they damned sure are under no obligation to do things that make them uncomfortable just because the bottom wants it -- whether the reason for the discomfort is risk tolerance, ideology, squeamishness or anything else. Tops can say, "no, I won't suspend you from

that eyebolt because I don't trust it", "no, I'm not interested in doing that roleplay because I wouldn't be comfortable with it", or "I don't do play piercing because blood is a hard limit for me." We all have a right to say no to sexual acts we don't want; even if we're topping.

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This can be found on the Internet at:

http://yesmeansyesblog.wordpress.com/2010/07/07/the-annotated-safeword/

Clarisse's original post on safewords can be found on the Internet at:

http://clarissethorn.com/blog/2010/07/03/sex-communication-tactic-derived-from-sm-2-safewords-and-check-ins/

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COMMUNICATION:

[theory] Sex Communication Tactic Derived From S&M: Checklists

This is part of the same 2010 series as the previous article -- in fact, it came first.

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Checklists

S&M checklists are long lists of different acts that sexual partners can use to discuss different acts and measure each others' interest in those acts. Each act on the checklist usually looks something like this:

FLOGGING -- GIVING _____ O O O O O

FLOGGING -- RECEIVING _____ O O O O O

Each partner rates each entry by filling out 1-5 bubbles, with 1 darkened bubble meaning "Not interested" and 5 bubbles meaning "I crave this!"

I think this concept is brilliant because:

1) Too often, it's assumed that "sex" encompasses certain acts, and if you're interested in a sexual relationship you must be interested in all those acts. Or there's assumed to be a kind of linear progression, as exemplified in the "base system," where "first base" is groping and "home base" is penis-in-vagina sex. Talking about each sexual act as its own self-contained idea short-circuits those problematic ideas about sex and makes it easier for couples to turn down some of the "assumed" acts (e.g., if I don't want oral sex but I do want penis-in-vagina...).

2) It provides an easy way to communicate desires -- if a person is nervous about saying, "Hey, is it okay if I flog you?" then the couple doesn't even have to talk about it right

away. They can just sit down, fill out their checklists and compare results without getting too worried about how to bring up certain desires. I mean, at some point of course they'll hopefully talk about it, but hopefully the checklist framework makes it easier and lower-pressure.

3) Concurrently, it provides an easy way to **turn down** acts -- it's much harder to reject a lover's proposition when ze says, "Darling, can I flog you?" than it is when you simply fill in one bubble on the "Flogging -- Receiving" section. In the past, I've certainly felt a lot of anxiety when I wanted to turn down partners, and it's nice to imagine a set-up that would have made me feel less anxious.

In fact, I love the checklist concept so much that when the University of Illinois at Chicago had me design my sexual communication workshop, I created a "vanilla" version of the checklist that had entries ranging from "oral sex" to "sex in public" to "tying up / being tied up." (Okay, maybe it wasn't **entirely** vanilla... I wanted to encourage people to voice things they weren't sure about!) Then I later found out that the amazing sex education site Scarleteen has created its own non-BDSM checklist, and theirs is way better than mine.

I just love the **principle** of the thing -- the principle that a couple can have a lot of fun just by sitting down and talking about every conceivable sex act, being presented with some options that they maybe haven't thought of before, and honestly describing how into each idea they each are.

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This can be found on the Internet at:

http://clarissethorn.com/blog/2010/06/14/sex-communication-tactic-derived-from-sm-1-checklists/

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COMMUNICATION:

[theory] Sex Communication Tactic Derived From S&M: Journal-Keeping

This is part of the same 2010 series as the previous two articles. In this piece, I mentioned 24/7 Master/slave relationships, which I had just learned about. Since then, I've learned a lot more about those relationships. I have never been in one, although I have occasionally had partners order me to do long-term submissive things. But I've read and heard a lot of tales about 24/7 M/s.

24/7 Master/slave scenarios are rare... and I will say that there are some awful horror stories floating around about them. Some BDSMers say that 24/7 Master/slave relationships are always a terrible idea and should never be done. I am unwilling to condemn them so thoroughly, but those relationships obviously require a lot of respect

and care from each participant. I would advise a person interested in such a relationship to only consider it with a partner they know very well; to establish pressure-free channels of communication; and to ensure crystal-clear understanding of how, exactly, the relationship can be ended if anyone involved truly wants it to end.

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Journal-Keeping

Some BDSMers play with really, really strong power dynamics. A good example of this is couples who choose a "24/7 dynamic": one partner is dominant and the other is submissive... **all the time**. I attended a workshop once with Sir Top and slave bonnie, two wise BDSM educators, where I learned that slave bonnie was only ever allowed to disobey orders of two kinds:

* Suicidal orders,

* Orders that would cause financial ruin.

The rest of the time, bonnie obeyed Top -- **all** the rest of the time.

Obviously, relationships like this are totally cool with me as long as they are -- say it with me, everyone -- **100% consensual**! Such relationships can also encourage the use of interesting communication tactics, because many of the usual tactics don't feel right to the participants. For example, these relationships often take place between people who feel such a strong power dynamic that it would be almost impossible for the submissive to feel comfortable safewording -- safewording can feel disconcertingly like a form of resistance.

One way of dealing with this problem is for both partners to keep journals that are open to the other partner. (With some couples, only the submissive keeps an open journal.) They talk about their romantic feelings, they process their sexual encounters, they articulate anxieties, etc. Sometimes a partner will give the other one journal prompts to answer. The idea is that it's easier to express these things when there's a designated space for it outside the relationship; the journals mean that partners (especially submissives) can talk about what they need without fearing that they're undermining the power dynamic.

I find the concept of simultaneous journals intriguing for a number of reasons. One is that I've used similar tactics myself; I kept a private journal for many years, and once in a long while I'd give entries to my partners when I needed to explain something complicated about my feelings. I only did this a few times, ever, but it was really effective when I did.

Later, I took to writing love letters that I noticed were very similar to both my journal entries, and to the simultaneous relationship journals suggested for Master/slave couples. I realized that I was writing letters because, at the time, I felt more comfortable writing about my desires than talking about them. I've gotten a million times better at talking about my sexuality honestly and shamelessly since then; but back then, there were definitely things I wrote to my partners that I couldn't have said aloud. I also wrote because -- just like Master/slave couples -- I wanted to communicate my feelings outside

the anxiety-inducing frameworks of the "serious discussion," the bedroom, etc.

So when I developed my sexual communication workshop, I encouraged love letters. I gave two suggested points of departure for a love letter:

1) Describe what happened during a sexual encounter you had together, with particular emphasis on what your partner did that you really liked -- and what you liked about it. ("I love it when you fuck me" is a great thing to say, but you give much more information to your partner if you say "I love it when you fuck me from behind," or even better, "I love it when you fuck me from behind and it feels amazing when your balls hit my clit." [This blog does not necessarily reflect the desires or encounters of Miss Clarisse Thorn.])

2) Describe a fantasy you have. Bonus points if you explicitly put your partner in it. ("I like to imagine you sinking your teeth into me until I scream." This blog does not necessarily... oh, who am I kidding.)

Postscript: In the comments on this piece, a reader noted that they might feel anxious and pressured if a partner described them doing something specific. I hadn't thought of this, but I totally believe that it could be a problem. Certainly, I've sometimes had experiences writing to a partner where I described him doing something and he thought it was ridiculously hot... but I've also done it and had partners dislike it. I guess my final advice is that -- as with all communication -- you'll want to consider the audience, and be ready to apologize.

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This can be found on the Internet at:

http://clarissethorn.com/blog/2010/07/30/sex-communication-tactic-derived-from-sm-3-journal-keeping/

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COMMUNICATION:

[storytime] Sex Communication Case Studies

I wrote this post in 2011, years after the events in my coming-out story, and a long time after I'd done all the above research into communication tactics. By 2011, I'd picked up lots of sexual and BDSM experience with a variety of partners. I had just written a post about my most destructive past relationship; the post got a lot of readers and was eventually cross-posted to Jezebel. I wanted to do something positive with all the attention, so I decided to offer a productive counterpoint.

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Sex Communication Case Studies

In the wake of my last post, which was basically a meditation on one relationship with

bad sexual communication, I want to offer some positive examples of sexual communication from my life.

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1) **Low pressure and leather belts.** Years ago, when I was pretty inexperienced in the community, I had a single BDSM encounter with a gentleman in his home. We met at a BDSM discussion group, arranged to meet later at a cafe, and went home from there; as we exited the cafe, I took his driver's license and texted his full name and license number to a friend. (I think more people should do this, frankly -- in fact, more non-BDSM people should do this when they go home with strangers from bars.)

We sat together on the public transit and quietly discussed the upcoming scene: he asked me many, many questions about what I was okay with and not okay with. Questions like: "What do you have experience with?" "Could you go into that more?" "What do you like?" "What makes that fun for you?" "Is there anything you really don't want me to do?" He asked a lot of the questions twice, too, which I think is a really great strategy especially with new partners. People don't always have their heads together enough during these conversations to answer an S&M question properly the first time, especially if it's a broad and open-ended question like "What are the things you really don't want to do?"

I made it clear that I just wanted a BDSM encounter, that I wasn't up for oral sex or vaginal sex or anything like that. He'd never had a BDSM encounter that didn't involve orgasm, so it was a new concept for him, but he was cool with trying it.

After our long discussion of boundaries and limits, we made it to his apartment and settled in. He got out some equipment, including a collar, and he said: "While you're wearing this, you will obey everything I say. Do you have any final boundaries to set? Anything you really want me to do? Anything else you don't want me to do?" I said no, and he snapped on the collar. (We did have an agreed-upon safeword, though -- so I had a way of interrupting the proceedings if I really needed to.)

It was an interesting encounter, partly because he was looking more for dominance (giving orders) than sadism (inflicting pain), whereas at the time I was looking more for masochism (receiving pain) than submission (accepting orders). So we started out with him giving me a bunch of orders (primarily to fulfill his kink), and then in the end he hit me a lot with a leather belt (to fulfill mine). At the time I was still figuring out where the boundary was for me: whether I identified as a submissive or only a masochist; how much submission and masochism were intertwined. That night showed me a lot about how one can create submissive energy within a pre-defined space, even with someone you barely know.

Afterwards, when I was done crying, he took off the collar and we went to bed. (By that time of night, I didn't have a way back home from where he lived, so I had to sleep over.) We chatted about random things, neither of us quite tired enough to sleep. Within half an hour or so, he realized that there was no way he was ever going to get to sleep unless he had an orgasm, but he also understood that I didn't want to have sex with him, so he didn't try to push that. Instead, he said: "I really need to have an orgasm before I can get